(2000) 02 BOM CK 0101

Bombay High Court

Case No: Appeal No. 885 of 1995 in Arbitration Petition No. 177 of 1982 in Award Lodging No. 110 of 1992 in Arbitration Suit No. 2289 of 1984

Messrs Khatri and Khatri		APPELLANT
	Vs	
City and Industrial Development Corporation of Maharashtra Ltd.		RESPONDENT

Date of Decision: Feb. 10, 2000

Acts Referred:

- Arbitration Act, 1940 - Section 30

Citation: AIR 2000 Bom 315 : (2000) 3 ALLMR 80 : (2000) 3 BomCR 408

Hon'ble Judges: V.C. Daga, J; B.P. Saraf, J

Bench: Division Bench

Advocate: V.V. Tulzapurkar, S. Shah and H.S. Solomon, instructed by Solomon and Co, for the Appellant; S.U. Kamdar and Rao, instructed by Pumanand and Co., for the Respondent

Judgement

@JUDGMENTTAG-ORDER

V.C. Daga, J.

This appeal arises out of an order dated 23-2-1995 passed by the learned Single Judge by which the petition of the appellant u/s 30 of the Arbitration Act, 1940 was dismissed and decree was passed in terms of the award of the sole arbitrator dated 11th June 1992 by which the appellants were directed to pay to the respondent a sum of Rs. 9,02,177/-.

2. The appellant is a successful tenderer whose tenderer came to be accepted on 26-4-1982 but failed to complete construction work even within the extended time which ultimately resulted in the request for further extension of time at the instance of the appellant. The respondent declined to grant further extension and the contract came to be terminated on 19th September 1984 and respondent got the work completed through some other agency. The dispute between the appellants and the respondents was referred to the Secretary of the P.W.D. of the State of

Maharashtra for arbitration as a sole arbitrator. The claims set up by the appellant were referred to as "counter claim" and "the claims" of the respondents came to be referred to as claims in the award as well as in the impugned judgment of the learned Single Judge. The same are referred to in this judgment also accordingly.

3. The sole challenge set up by the appellant is that the learned Single Judge upheld the inconsistent findings recorded by the Arbitrator exhibiting gross non-application of mind apparent on the face of the record. As such, the submission is that the decree based on such illegal award is liable to be set aside.

4. The strength to the submission is gathered from the fact that the sole arbitrator allowed counter claim Nos. I, II, III, VIII, XIII and XV (including the dues on account of final bill) in the sum of Rs. 7,78,953/- part of which includes claim for loss of profits at 15% on cost of balance work withdrawn from the petitioner, and at the same time the Arbitrator has allowed the claim of the respondent (Claimants) (viz. Claim No. I) for extra cost incurred in getting the balance work completed through another agency which included 24.5% supervision charges whereas the Arbitrator rejected claim No. 2 for increases in the cost of material supplied by the respondents to the new agency, due to inflation and also claim No. 3 for loss of revenue due to non-recovery of service charges for the period of delay from the intending buyers of the apartments and shops. As such, according to the learned Counsel for the appellant, granting Claim No. 1 and rejecting Claim Nos. 2 and 3 have given rise to contradictory decision which shows non-application of mind on the part of the Arbitrator. According to the learned Counsel for the appellant when the Arbitrator had disallowed respondent''s Claim No. 2 for increase in the cost of materials supplied by respondents to the new agency due to inflation and the respondent''s claim No. 3 for loss of revenue due to non-recovery of service charges, for the period of delay from the intending buyers of apartments and shops, then for the same reasons the learned Arbitrator ought to have disallowed respondents'' claim No. 1 for extra cost incurred in getting the balance work completed through another agency including 24.5% supervision charges. According to the respondents, grant of claim No. I presupposes delay, at any rate, on the part of the appellant. As such the contention is that prima facie, findings recorded in the award are inconsistent.

5. The Counsel for the appellant further went on to submit that by allowing the counter claim No. III which included claim for loss of profits by the appellant, the inconsistency has crept in, as such the entire award suffers from inconsistent finding and consequently non-application of mind on the part of the Arbitrator. He relied upon the judgment of the Delhi High Court in case of M/s. Bombay Ammonia Pvt. Ltd. v. Union of India, reported in AIR 1987 Delhi 148. Thus, it is contended that the confirmation of the said award and conversion thereof in the rule of the Court was not legal and valid and the learned Single Judge, therefore, faulted in decreeing the claim in terms of the award.

6. The learned Counsel for the respondents in reply contends that reading of the award in the manner in which appellant is trying to read is not permissible in law. His further contention is that mental process of the Arbitrator cannot be a subject matter of scrutiny by the Courts, at any rate by the Appellate Court. Learned Counsel for the respondents relied upon the judgment of the Apex Court in Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, .

7. We have given our thoughtful consideration to the arguments advanced and the contentions put forth for our consideration. Perusal of the award clearly demonstrates that the basis of deciding different claims are different from one another. In case of respondent No. 1 it is based on actual cost which respondent had incurred in getting the balance work completed under terms of the contract, while counter claim I and II of the respondents were based upon the ground that there was delay on the part of the appellant in completing work and as such respondents were entitled to loss of profits. However, as per appended note the appellants themselves have chosen to make alternate counter claim No. III, which consists of actual cost of work and loss of profits at 15% on the cost of balance work withdrawn from the appellant. Along with this, there were 3 other counter-claims awarded in the lump sum. It is not possible to dissect each claim from one another so as to reach to a conclusion that amount was awarded for loss of profits. Further counter claim No. III was a restricted one. It had nothing to do with the loss or damages suffered due to default or breach of contract.

8. The Apex Court in the reported judgment in Hindustan Construction Co. Ltd. (supra) has laid down the scope of the Court''s jurisdiction in interfering with non-speaking award and held that the scope of interfering with the award is extremely limited. The Apex Court observed thus:

"In our opinion, there is great force in the contention urged by learned Counsel. The High Court has set aside the award on the above items on the ground that there is an error apparent on the face of the award. This is clearly incorrect. The award is non-speaking one and contains no reasoning which can be declared to be faulty. The scope of the Courts'' jurisdiction in interfering with a non-speaking award on the above ground is extremely limited. The rule of limitation in this respect was enunciated by the Judicial Committee almost seven decades ago in Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd. 1923(50) .App. 324 ; AIR 1923 P.C. 66, in words which have been consistently and uniformly followed and applied in all subsequent decisions. Lord Dunedin said, after noting with disapproval certain attempts to extend the area of the Court''s interference with such an award:

"An error in law on the face of the award means, in their Lordship''s view, that you can find in the award or document actually incorporated thereto, as for instance a note appended by the Arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a

contentions of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties'' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the Arbitrators made. The only way that the learned Judges have arrived at finding what the mistake was is by saying: "inasmuch as the Arbitrators awarded so and so, and inasmuch as the letter shows that the buyer rejected the cotton, the Arbitrators can only have arrived at that result by totally misinterpreting Rule 52". But they were entitled to give their own interpretation to Rule 52 or any other article, and the award will stand unless, on the face of it, they have tied themselves down to some special legal proposition which then, when examined appears to be unsound."

In the present case, arbitration is one and same type as one before the Judicial Committee. The Arbitrator has awarded different amounts under different claims of items enumerated above. The mental process of the Arbitrator cannot be gone into. Even if the Arbitrator has based his award on the mixed items, then also it shall not be within the jurisdiction of the Court to interfere with the basis of various claims so as to reach to a particular conclusion.

In our opinion, this process is not available, as such, if adopted would be erroneous one.

9. The learned Counsel for the appellant relied upon on judgment of the Delhi High Court in Bombay Ammonia Pvt. Ltd. v. Union of India (supra). It was a case where Court came to the conclusion that decision of the Arbitrator on Issue Nos. 1 and 4 was contradictory to each other and hence suffered from non-application of mind. It was therefore held that Arbitrator had misconducted himself and the award was set aside. In the present case, the learned Single Judge has recorded a categorical finding after examining the contentions in detail that there is no such contradiction and dismissed the objections and passed decree in terms of the award. For the above stated reasons we do not find any fault with the approach adopted by the learned Single Judge.

10. In the result, the appeal is dismissed with no order as to costs.

11. Appeal dismissed.