

M/s. Ashok Construction Company

Vs

Union of India

Civil Appeal No. 1749 of 1969

(Shah, J.)

13.02.1970

JUDGMENT

SHAH, J. -

1. The Union of India invited tenders for construction of building at Tezu in the North-East Frontier Agency. The tender submitted by the appellants was accepted and a formal deed incorporating the terms of the contract was executed. Clause 25 of the contract provided that any dispute arising under the terms of the contract shall be submitted to arbitration of the Superintending Engineer, N.E.F.A. Circle or some person appointed by that Officer. The appellants completed the construction of the buildings on October 12, 1957. A final bill for payment to the appellants of the amount due under the Contract was prepared on March 20, 1958. The appellants accepted payment under protest. On October 29, 1960, the appellants by a letter addressed to the Superintending Engineer applied for a reference to arbitration of the disputes relating to "payment under the terms of the contract". The request was repeated by another letter dated August 30, 1961. One Malkani who was appointed arbitrator by the Superintending Engineer died before he could make his award. After certain infructuous proceedings, which it is not necessary to set out, in an application moved by the appellant, the Deputy Commissioner, Shillong, made an order Section 8 of the Arbitration Act appointing one G. N. Dutta as an arbitrator. This order was challenged before the High Court of Assam in a revision petition, and later in appeal to this Court, without success. In the meanwhile on May 21, 1965 Dutta entered upon the reference. The appellants submitted a claim for Rs. 4,41,440-20 under the terms of the contract. On January 17, 1966, the arbitrator made an award directing the Union of India to pay to the appellants Rs. 1,79,843.80, and filed it in the Court of the Deputy Commissioner, Shillong. Notice of the award was given under Section 14(2) of the Arbitration Act to the parties. The application filed by the Union of India for setting aside the award was rejected. In appeal against the order, the Deputy Commissioner set aside the award. The appellant preferred a revision application under Section 36 of the Rules for the Administration of Justice in Khasi and Jaintia Hills and under Section 115 of the Code of Civil Procedure. The High Court dismissed the petition. With special leave, this appeal has been filed by the appellants.

2. The Deputy Commissioner made the order setting aside the award, on three grounds : (1) that the arbitrator in making the award acted in violation of the principles of natural justice; (2) that in making the award the arbitrator exceeded his jurisdiction; and (3) that the claim made by the appellants was barred by the law of limitation and the arbitrator had no authority to make the award. The High Court agreed with the Deputy Commissioner that the arbitrator acted in violation of the rules of natural justice, but they did not consider the plea that the arbitrator acted in excess of his jurisdiction, nor that there was a bar of limitation to the entertainment of the claim.

3. In our view, the judgment of the Deputy Commissioner, for reasons to be presently set out, cannot be sustained. The arbitrator entered upon the reference on May 21, 1965. The proceeding continued before him till December 31, 1965. On December 31, 1965, counsel appearing for the Union of India requested for time till January 10, 1966, to submit "written legal arguments". The arbitrator acceded to the request and gave time till January 10, 1966. On that day counsel for the Union of India did not submit his "written arguments", and addressed a telegram asking for time till January 15, 1966, "to despatch the written arguments". On January 15, 1966, no intimation was received from counsel for the Union of India. The arbitrator then proceeded to make his award on January 17, 1966. In the view of the Deputy Commissioner the arbitrator did not "adopt the principle of fairness in giving time to parties" and that he could not "by any standard of equity and justice be said to have closed their case".

4. The Deputy Commissioner was also of the view that the arbitrator had made his award without "giving the chance to the Union of India to close its case before him" and that "amounted to a clear violation of the principles of natural justice", and that constituted misconduct on the part of the arbitrator. The arbitrator was not charged with legal misconduct. The arbitrator gave to the counsel for the Union of India time to file "written arguments" on questions of law. The time given cannot be said to be inadequate. Counsel for the Union did not comply with the order. Further time of 5 days was given, but no steps were taken to file the "written arguments". It does not appear that any request was made for further extension of time. The arbitrator did not act in a manner not consonant with general principles of equity and good conscience which governed his conduct as an arbitrator. We fail to appreciate how the arbitrator acted in violation of the principles of natural justice. In refusing to show any more indulgence the arbitrator did not act improperly, nor did he act in a manner contrary to the rules of natural justice. The grounds given by the Deputy Commissioner in setting aside the award proceed upon a complete misconception as to what constitutes "misconduct" on the part of the arbitrator.

5. The High Court declined to enter upon an enquiry whether the arbitrator acted improperly in making an award after the Union had failed to file its "written arguments" on January 15, 1966, for, in their view, the question was one of fact. We are unable to agree with the High Court. The reasons given by the Deputy Commissioner were, in our judgment, irrelevant in determining what misconduct in the Law of Arbitration means. The High Court was in error in refusing to enquire on the assumption that the appellants were asking the Court to investigate a question of fact.

6. The High Court did not record a finding on the plea of the Union that the arbitrator exceeded jurisdiction in making the award. The claim made by the appellants before the arbitrator consisted of three items : Rs. 64,006.71 for works done; Rs. 1,83,393.77 for damages at 18% per annum ; and Rs. 1,96,099.88 for "depreciation for purchase value of money". It is true that the last claim was unjustifiable. But out of the total claim made by the appellants for Rs. 4,41,440.20 only Rs. 1,79,843.80 were awarded. The arbitrator has given no reasons for accepting the claim of the appellants for the sum awarded by him. It cannot be said that he has taken into account any amount claimed as "depreciation for purchase value of money". In the view of the Deputy Commissioner under Clause 25 of the arbitration agreement, the arbitrator was not empowered to go into the "questions of loss of goodwill, or damages by way of interest, and that the arbitrator could not award interest by way of damages for detention of money and that is really what the claim for 'damages' amounts to". The appellants made a claim for interest on the amount withheld after the due date and the arbitrator was competent to decide that claim. The arbitration agreement by Clause 25 provides :

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other questions claim, right, matter or thing, whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whatever, arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the Superintending Engineer * * * * ."

The terms of the arbitration agreement did not exclude the jurisdiction of the arbitrator to entertain claim for interest, on the amount due under the contract. The award of the arbitrator cannot be said to be invalid.

7. It was urged that the appellants had made a claim which was in excess of the claim made before Malkani. But before Malkani the appellants had not valued their claim; they had merely set out the heads of dispute without specifying the amounts claimed under each head. It is true that before Dutta, two of the claims made before Malkani were given up. But no inference can be raised therefrom that the claims made before Malkani did not aggregate to the amount decreed.

8. The High Court did not also deal with the place of the bar of limitation to the claim of the appellants. The Assistant to the Deputy Commissioner was of the view that the claim was within limitation; the Deputy Commissioner disagreed with that view. Under Section 37 of the Arbitration Act, by subsection (1), it is provided that all the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court. By subsection (3) it is provided :

"For the purposes of this section and of the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated."

In the present case the work of construction was completed on October 12, 1957. The bill was prepared on March 20, 1958, and the appellants had demanded of the Superintending Engineer that a reference be made by letter, dated October 29, 1960. The request was repeated in the subsequent letter, dated August 30, 1961. The first demand cannot on account of the second request be wiped out. No objection was raised at the time when Dutta was appointed arbitrator by the order of the Court of the Deputy Commissioner that the claim was barred by the law of limitation, nor was the contention raised before the High Court or this Court in appeal from the order of the High Court confirming the appointment of Dutta. Even before the arbitrator no contention appears to have been raised that the claim was barred by the law of limitation. The question of limitation was not a pure question of law. Whether the claim was barred by the law of limitation depended upon proof of facts. From the date of the settlement of the claim three years had not elapsed before a notice asking for a reference was made. Prima facie, the claim was not barred by the law of limitation.

9. The appeal is allowed with costs.

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