N. Chellappan

Vs

Secretary, Kerala State Electricity Board And Another

Civil Appeal No. 682(N) of 1974

(CJI A. N. Ray, K. K. Mathew, N. L. Untwalia JJ)

21.11.1974

JUDGMENT

MATHEW J. -

1. This is an appeal, by special leave, from the judgment of the Kerala High Court reversing an order passed by the District Judge making an award passed by the umpire a rule of the court after dismissing an application to set aside the award.

2. By a contract date April 21, 1964, the construction of the Kuttiyadi Dam was entrusted by the Kerala State Electricity Board (for short the 'Board") to Shri Chellappan, the appellant. The work was left unfinished and therefore dispute arose between the appellant and the Board by reason of the non-execution of the work. While these disputes were pending, a second contract dated July 15, 1967 was entered into between the appellant and the Board for the execution of the remaining part of the work on or before May 31, 1969. On June 4, 1968, the appellant stopped the work on or before May 31, 1969. On June 4, 1968, the appellant stopped the work an the Chief Engineer terminated the second contract on October 15, 1968. The Board thereafter terminated carried on with the unfinished work. On August 22, 1970, five points were referred for the decision of two arbitrators, both retired Chief Engineers, one to be nominated by the Board and the other by the appellant. The arbitrators entered on the reference and they nominated Shri G. Kumara Pillai, a retired judge of the Kerala High Court as umpire. The arbitrators did not make the award within the time limit which was extended from time to time and which expired on December 18, 1971. Thereupon the appellant filed O.P. No. 11 of 1972 on January 28, 1972 for revoking the authority of the arbitrators under Sections 5 and 11 of the Arbitrators Act. The grounds for the application were that the arbitrators did not make the award within the time limit for submission of the award and they were disqualified by bias from proceedings with the arbitration. The prayer in the application was that Shri Kumara Pillai may be directed to enter upon the reference in his capacity as a umpire and to proceed with the arbitration. The arbitrators filed statements explaining the reasons for the delay in making the award and denying the bias attributed to them. One of the arbitrators in his statement submitted that he has no objection to his being discharged as he no longer wished to be an arbitrator. In this O.P. the appellant filed another application on March 21, 1972 to appoint Shri Kumara Pillai as a sole arbitrator in place of the two arbitrators. By an order dated June 22, 1972, the court allowed O.P. No. 11 of 1972 and revoked the authority of the arbitrators and directed the umpire to enter upon the reference in his capacity as umpire and also 'allowed' the application (1. A. No. 1918/'71) to appoint Shri Kumara Pillai as the sole arbitrator. On February 5, 1972, the Board filed O.P. No. 19 of 1972 for extension of time for passing the award by the arbitrators. This was disposed of by an order date June 22, 1972 stating that since O.P. No. 11 of 1972 had been allowed, it had become unnecessary to extend the period.. The umpire entered on reference in his capacity as

umpire on June 30, 1972. Both the appellant and the Board participated in the proceedings before the umpire without demur and the umpire made the award in favour of the appellant for nearly Rs. 30 lakhs on February 15, 1973. The umpire filed the award in court on March 20, 1973 and prayed by O.P. No. 21 of 1973 that notice of the filing of the award be issued to the parties and that the award be made a rule of the court. Notice was ordered on the application on March 20, 1973. THe Board filed on March 22,1973 [I.A. No. 895 (a)] challenging the award under Sections 16, 30 and 33 of the Arbitration Act and praying to set aside the award. On March 24, 1973, the appellant filed an application to pass a decree in terms of the award and for interest at 15 per cent from the date of the decree. The appellant filed his objection on March 26, 1973, to the Board's application to set aside the award. The case was posted for hearing on April 4, 1973. On that day, the Board filed an application - I. A. No. 1176 of 1973 - stating that it was necessary to file a detailed affidavit in rejoinder to the objections filed by the appellant to the application of the Board to set aside the award and praying for an adjournment of the hearing. The application for adjournment was allowed. The matter came up for hearing on April 6, 1973. On that day, the Board filed I.A. No. 1223 of 1973 praying for time for filing the affidavit in rejoinder. On the same day, the appellant's Counsel stated :

I submit that I shall not be pressing the fresh points raised in the affidavit for the purpose of today's arguments.

In I.A. No. 1223 of 1973, the Board had stated that it was prepared to satisfy the Court that the application under Sections 16, 30 and 33 of the Arbitration Act was prima facie maintainable and that it was necessary to adjourn the hearing for evidence and for final argument. The endorsement on the petition dated April 6, 1973 is : "Call on the adjourned date". On April 10, 1973 the court passed final orders dismissing the application filed by the Board to set aside the award and passed a decree in terms of the award with interest at 6 per cent from the date of the decree till the realisation of the amount. All these orders were passed in O.P. No. 21 of 1973. On I.A. No. 1223 of 1973, the Court passed the order "rejected" on April 10, 1973.

3. In the appeal filed by the Board against the decree, the High Court came to the conclusion that the umpire as sole arbitrator had no jurisdiction to pass the award as the orders revoking the authority of the arbitrators to pass an award and appointing the umpire as sole arbitrator to pass an award and appointing the umpire as sole arbitrator were bad in law and that no sufficient opportunity was given to the Board to substantiate its objection to the award. The Court further held that the umpire made in respect of two matters referred. The Court, therefore, set aside the order in O.P. No. 11 of 1972 as well as the award and the decree and remitted the case to the Court below for fresh disposal according to law.

4. The main point which arises for consideration is whether the umpire as sole arbitrator had jurisdiction to enter upon the reference and pass the award. To decide the question it is necessary to see whether the order in O.P. No. 11 of 1972 appointing the umpire as sole arbitrator was passed without jurisdiction or was vitiated by an error which made it bad in law. In paragraph 5 of that order, the Court has stated :

When the matter came up for enquiry, it was represented by both sides, that since the petitioner (appellant) has expressed in so many words his want of confidence in the arbitrators and since the arbitrators themselves have expressed their willingness to be relieved of their duties as arbitrators, they may be dispensed with. In view of the agreement, it has become necessary to revoke the authority of respondents Nos. 2 and 3 (arbitrators) and to appoint the fourth respondent as umpire

and to direct him to make the award.

5. We find it difficult to accept the reasoning of the High Court that he umpire had no jurisdiction to enter upon the reference. In the first place, the order in O.P. No. 11 of 1972 was an order passed on consent of the appellant and the Board. Quite apart from this, Rule 4 in the Fist Schedule to the Arbitration Act authorises an umpire to enter upon the reference in case the arbitrators fail to make the award within the time specified. Whatever be the reason, since the arbitrators did not make the award within the extended time, the umpire, by virtue of the provision of rule could have entered upon the expressed his unwillingness to enter upon the reference without an order of the Court. That was because the Board had filed an application for extension of time for the arbitrators to pass the award. We do not think that the umpire lost his jurisdiction to pass the award merely because he wanted an order from court by way of abundant caution authorising him to enter upon the reference.

6. Mr. Tarkunde for the respondent contended that the learned judge who passed the order in O.P. No. 11 of 1972 has said in his order making the award a rule of the court after rejecting the application of the Board to set aside the award, that the order passed in O.P. No. 11 of 1972 was a consideration order and that the Board should have appealed against that order if it felt aggrieved by it and that the order had become final. Counsel submitted that when the Judge who passed the order in O.P. No. 11 of 1972 has himself stated that it was an order passed on merits in his order making the award a rule of the Court and that the Board should have appealed against the order, it can only lead to the conclusion that the order in O.P. No. 11 of 1972 was not a consent order. Counsel also submitted that although the appellant filed an objection to the application of the Board to set aside the award, that objection was withdrawn when the respondent sought to file an affidavit in rejoinder to that objection, and the effect of the withdrawal of the objection by the appellant was that the averment in the application filed by the Board to set aside the award that the order in O.P. No. 11 of 1972 was not passed on the basis of consent, stood uncontradicted.

7. As we already said, paragraph 5 of the order in O.P. No. 11 of 1972 leaves no room for doubt that it was a consent order. The Board made no endeavour to have that order vacated by filing a review, if the statement in that order that it was passed on the basis of consent proceeded from a mistake of the court. On the other hand, we find that the Board participated in the proceedings before the umpire without any demur to his jurisdiction. The only inference from this conduct on the part of the Board is that it had no objection to the order revoking the authority of the arbitrators. Therefore, by acquiescence, the Board was precluded from challenging this jurisdiction of the umpire :

If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence (see Russell on Arbitration, 17th ed., p. 215).

In Chowdhri Murtaza Hossein v. Mussumat Bibi Bechunnissa (3 IA 209, 220 : Suth WR 342) the Privy Council said :

On the whole, therefore, their Lordships think that the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favorable to himself; and that it is too late for him, after the award has been made, and on the application to file

the award, to insist on this objection to the filing of the award.

The High Court said that acquiescence of the Board by participating in the proceeding before the umpire as sole arbitrator would not confer jurisdiction as there was inherent lack of jurisdiction in that the order in O.P. No. 11 of 1972 was bad in law and that it did not clothe the umpire with any jurisdiction. We are of the view that even assuming that the order in O.P. No. 11 of 1972 was not passed on consent the umpire had power to pass the award. As we said, the umpire could have entered upon the reference under Rule 4 of the First Schedule when the arbitrators failed to make the award within the extended time. Neither the fact that the umpire wanted an order from the court to enter upon the reference not the fact that an application was made by the Board on February 5, 1972 to extend the time for the arbitrators to make the award would denude the umpire of his jurisdiction to enter upon the reference and pass an award under Rule 4 of the First Schedule. Therefore, when the Board without demur participated in the proceedings before the umpire and took the chance of an award in its favour, it cannot turn round and say that the umpire had no inherent jurisdiction and therefore its participants in the proceedings before the umpire is of no avail. The fact that the umpire did no purport to act in the exercise of his jurisdiction under Rule 4 of the First Schedule but under the order of the Court, would not make any difference when we are dealing with the question whether he had inherent jurisdiction. As the umpire became clothed with jurisdiction when the extended period for making the award by arbitrators expired, it cannot be said that he had no inherent jurisdiction. As we said, neither the fact that the umpire expressed his unwillingness to enter upon the reference without an order of the Court nor the fact that an application to extend the period for making the award has the effect of depriving him of his jurisdiction under Rule 4 of the First Schedule. The High Court was, therefore, clearly wrong in thinking that acquiescence did not preclude the Board from challenging the jurisdiction of the umpire as sole arbitrators. we do not find any substance in the contention of the Board that the application for setting aside the award was not posted for evidence as normally such an application should be disposed of an the basis of affidavits. We do not think that there was any exceptional circumstance in this case so that the court should have allowed the Board to adduce other evidence (see Section 33 of the Arbitration Act).

8. The next question for consideration is whether the High Court was right in its view that the claim of the appellant in respect of the two matters dealt with by it was validity allowed by the umpire.

9. The terms of the agreement for reference to arbitration between the appellant and the Board provided :

It is agreed that the Contract Agreement No. 155/CEC/67/68 stands terminated by letter No. C2F. 359/66, dated 15-11-1968 of the Chief Engineer, Civil. The Contractor agrees to withdraw the Suit No. O.S. 38/1970, filed in the Badagara Sub-Court by him.

It is agreed that there is no other question of dispute or difference arising for settlement except those specifically detailed below in respect of the above contract.

All other questions or claims of contractor, if any, whether existing now or if arising or otherwise are hereby withdrawn and are deemed to be abandoned.

POINTS OF REFERENCE

1. Regarding the first contract, i.e. Agreement No. CEC/4/64-65.

Whether the claim to the sum 'reserved by the contractor to be enforced' in his letter dated 1-7-1967 to the Chairman, or any other lesser sum, is tenable and if so, whether the same is recoverable from the Board.

2. Regarding the second contract, Agreement No. 15/CEC/67-68 dated 15-7-1967

(a) What is the sum still payable for the work under the said Agreement and Departmental Instructions.

(b) What is the sum payable to the Board in respect of supplies and/or services rendered to the Contractor by the Board in respect of the Contract.

(c) What is the price payable to the Contractor of such of the materials at site of Contract as were taken by the Board.

(d) What are the claims of the Board against the Contractor in respect of and/or under the provisions of the said Agreement.

10. The contention of the Board before the High Court was that the claim reserved by the appellant by his letter dated July 1, 1967 to the Chairman had not been agreed to be reserved for adjudication by the Board but had been rejected by it definitely and unequivocally by the letters prior to 1967, that the appellant's letter of July 1, 1967 had been incorporated in the contract and therefore the claim referred under point No. 1 had been barred by limitation.

11. The gist of the correspondence evidenced by the letters which passed between the parties would show that while the Board was insisting that the appellant's claim for rain damage, flood damage and power failure had all been rejected and could no longer be re-agitated, and that the second contract should be executed without any reference to these, the appellant was insisting on his claims under these heads being reserved for adjudication in such ways as may be open to him under law. Counsel for the Board contended that there was nothing to show that the Board agreed to the reservation of these claims or that it had acknowledged its liability in respect of these claims, and that, without considering these aspects and examining the relevant correspondence and documents, the umpire found that the claims had been substantiated and awarded a sum of about Rs. 5 lakhs to the appellant in respect of these claims. In other words, the contention was that the umpire should have examined the genuineness of the claims and considered whether the claims had been rejected by the Board and if so when, and whether at any subsequent stage, the claims had been kept alive by any acknowledgment by the Board, or in any other manner known to law and in so far as the umpire did not address himself at all to plea of limitation, the award was vitiated by an error of law apparent on the face of the record.

12. The High Court did not make any pronouncement upon his question in view of the fact that it remitted the whole case to the arbitrators for passing a fresh award by its order. We do not think that there is any substance in the contention of the Board. In the award the umpire has referred to the claims under this head and the arguments of the Board for disallowing the claim and then awarded the amount without expressly adverting to or deciding the question of limitation. From the findings of the umpire under this head it is not seen that these claims were barred by limitation. No mistake of law appears on the face of the award. The umpire as sole arbitrator was not bound to give a reasoned award and if passing the award he makes a mistake of law or fact, that is no ground for challenging the validity of the award. It is only when a proposition of law is stated in the award and

which is the basis of the award, and that is erroneous, can the award be set aside or remitted on the ground of error of law apparent on the face of the record :

Where an arbitrator makes a mistake either in law or in fact in determining the matters referred, but such mistake does not appear on the face of the award, the award is good notwithstanding the mistake, and will not be remitted or set aside.

The general rule is that, as the parties choose their own arbitrator to be the judge in the disputes between them, they cannot, when the award is good on its face, object to his decision, either upon the law or the facts. (see Russell on Arbitration, 17th ed., p. 322).

13. An error of law on the face of the award means that you can find in the award or a 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 (See Lord Dunedin in Champsey Ehara & Co. v. Jivraj Baloo Co. (1923 AC 480)). In Union of India v. Bungo Steel Furniture Pvt. Ltd. ((1967) 1 SCR 324 : AIR 1967 SC 1032), this Court adopted the proposition laid down by the Privy Council and applied it. The Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of dinging out, whether or not the arbitrator has committed an error of law.

14. The only other point which remains for consideration is whether the direction in the award to return the security deposit of Rs. 1,81,000 to the appellant cant be said to be a matter arising out of the second contract and referred to arbitration, under point No. 2(a) or point No. 2(d) of the points reference.

15. Counsel for the appellant contended that the security, though given in connection with the first contract, was transferred to and treated as part of the second contract and, therefore, the return of the said amount to the appellant which had been directed by the umpire was covered by point No. 2(a) or 2(d) of the reference.

16. On the other hand, it was contended for the Board that point No. 2(a) of the reference related only to the sum still payable for the work done under the second contract and therefore the return of the security amount could not be covered by point No. 2(a). And, as regards point No. 2(d), the contention of the Bard was that it related to the claims of the Board against the respondent in respect of or under the agreement. The Board, therefore contended that the matter as not referred to the arbitrators either under point No. 2(a) or 2(d).

17. The High Courts did not express any final opinion on this question. No doubt, the agreement to refer makes it clear that there were no other questions of dispute or difference arising for settlement except those which were specifically detailed in the agreement and it was also stated in the agreement that all other questions and claims of the respondent were withdrawn and should be deemed to be abandoned. Whether the return of the security amount would fall under point No. 2(d) would depend upon the answer to the question whether it is a claim of the Board. The question whether the Board can retain the amount under the contract is a claim of the board falling within point No. 2(d).

18. We allow the appeal and set aside the judgment of the High Court, but in the circumstances, we make no order as to costs.

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