SUPREME COURT OF INDIA

Star Construction & Transport Co.

Vs.

India Cements Limited

C.A.No.9420-9423 of 1995

(K.G.Balakrishna and S.R.Babu JJ.)

13.02.2001

JUDGMENT

Rajendra Babu, J.

1. In respect of a dispute arising out of a money claim made by the appellants against respondent the matter was referred to arbitration. The reference was entered into in January 1983. The arbitrators published their award on 15.2.1986 which, after setting out certain matters which were preliminary in nature, inter alia, stated as under:-

2. We J.C. Shah and P.S. Subramaniam, Arbitrators appointed by the parties do hereby award and order that the Company (Indian Cements Ltd.) do pay to Star Construction and Transport Company Rs. 65,00,000 (in words Rupees Sixty Five Lacs) in full and final settlement of the claim of Star Construction and Transport Company with interest at the rate of 9(nine) per cent per annum from the date hereof; and we further award and declare that all the disputes referred to by the parties under the claim made by the Star Construction and Transport Company and denied by the Indian Cements Ltd. are finally disposed of by this Award and that no part of the claim remains undetermined; and we further award and order that each party to bear its respective cost of and incidental to the arbitration proceeding including its share of the amount of remuneration paid by it to the Arbitrators.

3. Made this 15th day of February, 1986 at Bombay, in token whereof the Arbitrators have subscribed their signatures which are duly attested.

4. The award was filed in court on 15.4.1986 in O.P. No. 174 of 1986 under Section 14(2) of the *Arbitration Act, 1940* (hereinafter referred to as the Act). A decree was passed in terms of the award under Section 17(1) of the Act. Thereafter, the respondent by its letter dated 8.8.1986 paid a sum of Rs. 49 lacs while withholding a sum of Rs. 16 lacs which is stated to be money claims due to it in Suit No. C.S. 246 of 1984 and C.S. 315 of 1984, although this was disputed by the appellants in their letter dated 5.8.1986. It was stated therein that a Reconciliation of Account had been furnished to the arbitrators showing an amount of about Rs. 16 lacs claimed to be due from them in respect of which they had instituted the said two suits. The respondent contended that the issues before the arbitrators by way of several

claims recorded in the award which the arbitrators had settled did not take into account moneys received by the appellants from it as advance and moneys paid by them on their behalf and which stand to their credit and accordingly credit should be given thereto. In the two pending suits applications were filed under Order XXIII, Rule 3 of the Code of Civil Procedure to record the satisfaction of the suit claim and dismiss the suit with other incidental reliefs. The learned single Judge of the High Court who was dealing with the suits passed a judgment on 17.4.1989 allowing the applications by holding that it was at the instance of the respondent that the claim in the suit was brought in before the arbitrators on 8.2.1986 and elected to claim this set off immediately under the award to be pronounced which was not opposed by the appellants and, therefore, under these circumstances, instead of an award of Rs. 81 lacs, an award of Rs. 65 lacs was made. On appeal the Division Bench of the High Court reversed the judgment of the learned Single Judge by holding that whether there was a settlement or not between the parties is a matter to be decided as an issue in the suit and that the award per se cannot be considered as having resulted in a settlement of suit claims.

5. The principal objection raised on behalf of the respondent is that the two applications filed under Order XXIII Rue 3 C.P.C. could not be maintained. It was also disputed that the amounts claimed in the suits related to the agreement dated 27.7.1979 which was not the subject matter of arbitration. It was contended that the subject matter of the suits could not be the subject matter of arbitration without further submission by the parties requesting the arbitrators to include the said matter and factually there was no such submission. The learned single Judge considered the case on the original statements filed by the respondent before the arbitrators. The claim in suit C.S. No. 315 of 1984 was for recovery of a sum of Rs. 19,75,821.60 together with interest on Rs. 14,55,625.08 and the costs. The claim in the plaint comprised of a sum of Rs. 9,20,452.17 being the difference between the value of the assets taken over by the respondent and the amount was stated to be due from the appellants to the respondent which formed the subject matter of the agreement dated 27.7.1979 and a sum of Rs. 5,35,172.91 was said to be the liability of the appellants on account of accrued and unavailed leave of the workmen employed by the appellants. Other suit C.S. No. 246 of 1984 was filed for recovery of a sum of Rs. 1,53,812.50 with interest at 12% per annum from the date of plaint and for costs. The claim of the respondent is that this amount represented the motor vehicles tax demanded by R.T.O. Salem for the period from 1.4.1974 to 31.3.1982. According to the respondent, the amount was payable by the appellants and the respondent was obliged to pay it when the permits for the vehicles were transferred to it. It is after the decree in terms of the award was passed that the appellants wrote a letter to the respondent without prejudice referring to reconciliation statement of account filed by the respondent before the arbitrators showing an amount of Rs. 16 lacs claimed to be due from the appellants and proposing that the respondent should pay a sum of Rs. 49 lacs being approximately the amount decreed in O.P. No. 174 of 1986 less the amount claimed by the respondent. The appellants also undertook that on such payment being made they would not execute the decree till these two suits are disposed of or the matter is settled in a manner acceptable to both parties. This proposal was accepted by the respondent without prejudice and along with a letter dated 8.8.1986 a cheque of Rs. 49 lacs was sent by the respondent to the appellants. In that letter it was made clear that in respect of amounts settled by the

arbitrators the claims in the two suits were not included in the settlement arrived at by the arbitrators. The appellants suggested that both the parties or their advocates should obtain clarifications from the arbitrators as to whether or not the amount shown by the respondent as due to it in the statement of reconciliation of accounts filed before the arbitrators had been adjusted by them in awarding the sum of Rs. 65 lacs to the appellants. The respondent did not agree to the suggestion as in its opinion there was no scope for obtaining any clarification from the arbitrators as there was no ambiguity with regard to the issue before them. The stand of the respondent is clear that the arbitration did not pertain to the agreement dated 27.7.1979 but only the matters arising under the agreement dated 20.8.1974. An affidavit of Shri P.S. Subramaniam Iyer, one of the arbitrators and two documents were filed which are zerox copies of the statements filed by the respondent before the arbitrators on 8.2.1986. As the original statements filed before the arbitrators were also produced in the suit with all other records of the arbitrators, the learned single Judge did not rely upon the affidavit of Shri P.S. Subramaniam Iyer as he had not been examined before the court and he ignored the same. However, the learned Judge proceeded to consider the case on the basis of the original statements filed by the respondent before the arbitrators which have been produced in the court along with O.P. No. 174 of 1986 and a letter dated 1.2.1986 written by Shri S. Padmanabhan, who was one of the advocates appearing for the respondent, to the effect that the respondent had worked out loss at Rs. 72.51 lacs subject to adjustment of amounts payable and receivable. It was also stated that items marked 9B to 9E could not be accepted in working out the basis for any compromise. The learned Judge proceeded to analyse the statement of reconciliation of account which referred specifically to a sum of Rs. 9,20,452.17 which is one of the amounts claimed in suit C.S. No. 315 of 1984 and the other amount claimed for leave wages as Rs. 5,35,000/- which are set out in para 6 of the plaint in C.S. No. 315 of 1984. With reference to the claim in C.S. 246 of 1984 the amount was split into two paras in the statement. A sum of Rs. 30,000/- was shown as paid to R.T.O. towards differential tax and the balance of Rs. 1,53,812.50 was shown as a separate entry tax arrears in respect of vehicles taken over from the appellants paid on 28.6.1982. Thus, the learned Judge came to the conclusion that the amount claimed in the two suits found place in the statement of reconciliation of account. The learned Judge thereafter referred to proceedings dated 8.2.1986 in which the list of documents attached to the original petition submitted during the arbitration proceedings and the description given in the list attached to the original petition contained 21 items The last of which is further documents of claimant and respondent compromise proposal and reconciliation of Accounts by respondent. On this basis, the learned Judge found that it was clear that the arbitrators have taken into account the statement of reconciliation of account filed by the respondent before passing the award. The learned Judge proceeded to observe that the arbitrators would not have taken the statements on record but returned the same to the respective parties and proceeded without any reference to the said statement and, therefore, the respondent was taking undue advantage of the fact that the award is a non-speaking one. The learned Judge relying upon the decision of this Court in *Smt. Santa Sila Devi and another v. Dhirendra Nath Sen and others*[1] held that the award finally disposed of all the matters in difference inasmuch as there is an express declaration by the arbitrators to that effect and no part of the claim remained undetermined. The learned Judge also gave further findings that when the appellants had approached the arbitrators with a particular claim and the respondent in defence put forth its claim arising

out of the same contract but crystalised to a large extent by the agreement dated 27.7.1979 which, in fact, set off before the arbitrators there was no necessity for submission of a fresh or independent reference, much less through court and relied upon the following passage in Russell on Arbitration, 9th Edn, at pages 102 and 103 :-

6. It has been often held that a submission by A and B of the one part and C of the other, of all matters in difference between them authorises the arbitrator to decide on all matters that either of the two has against the third jointly or severally, such as an action by A alone against C, on the ground that the words are to be taken distributively. This view was adopted in the Court of Exchequer and affirmed in the Exchequer Chamber Six partners by two bonds submitted to arbitration all matters relating to their trade. By the one bond three of them became jointly and severally bound to the other three to obey the award as to all matters between the partners or any of them. But the second bond the latter three became bound to the former three in like manner. It was held that the arbitrator was authorised to award on a matter in dispute between two co- obligators only, on the ground that the reference was of all matters between them or any of them *Winter v. White*[2].

7. A reference of all matters in difference gives an arbitrator power over all matters down to the period of the submission, but does not except under very special circumstances, enable him to award on future and contingent claims, or to give damages in respect of money demands becoming due after the date of the submission, though pursuant to an agreement made previous to it, or indeed respecting any subjects of dispute arising after the reference.

8. Even if the submission be of all differences and of anything in anywise relating thereto these latter words do not extend the power of the arbitrators to matters which though relating to the existing differences, arise after the date of the submission nor do they authorise the calculation and awarding of interest subsequent to that date.

9. The parties may, however, if they please give the arbitrator power to determine on contingent claims, or on matters in dispute or demands arising after the date of the submission and this course has often been perused.

10. The learned Judge, therefore, held that it was open to the arbitrators to arbitrate the same. Alternatively, the learned Judge proceeded to state that even if the reference was limited, it was open to the parties to enlarge the scope thereof as it was not a reference made by a court. The statements in writing filed by the parties before the arbitrators were sufficient to serve the purpose and the absence of signature of any representative of the respondent does not at all matter. The learned Judge also proceeded to consider that the respondent had elected to claim set off before the arbitrators and having chosen to work out that remedy it is not open to the respondent to pursue the same by ignoring the award. It was held that the respondent having obtained the benefit under the award, namely, the adjustment of the amounts due from the appellants as against the amounts found payable to the appellants, it is not open to the respondent to challenge the validity of the award in the proceedings, particularly when the appellants had not raised any objection to a decree being passed by the court in terms of the award. Appeals were filed before the Division Bench of the High Court by the

respondent, which were allowed relegating the parties to thrash out the question whether there is a settlement or not between the parties is a matter to be decided as an issue in the suit and that the award per se cannot be considered as having resulted in a settlement of the suit claim. These appeals are directed against that order of the Division Bench of the High Court. Shri F.S.Nariman, learned senior Advocate for the appellants, submitted that if the conclusion is that the award has resulted in a settlement of the suit claim, the court ought to have given a finding that there was a settlement between the parties and hence nothing remains in the suit to be decided. He focussed his attention mostly to the question that the award on the face of it indicates the settlement of the suit claim. To support this proposition, he heavily relied upon the view expressed by the learned Single Judge while disposing of the suits on the basis of the applications filed under Order XXIII, Rule 3 CPC to which we have made elaborate reference. He submitted that the fact is that the reference to the arbitration was made in pursuance of clause 24 of the agreement dated 20th August, 1974 as a private reference validly made without the intervention of the court. He submits that clause 24 is very wide in its terms to include all questions of difference whatsoever touching upon the agreement or subject matter thereof or arising out of or in relation thereto and whether as to construction of the agreement or otherwise. When the appellants approached the arbitration with a particular claim, the respondent in defence thereto put forward its claim arising out of the same contract but crystallised to a large extent by the agreement dated 27.7.1979. The later agreement between the parties emerged only out of the earlier contract which was the foundation of the transaction between the parties. The respondent pleaded only a set off or a counter-claim before the arbitrators while defending the claim put forward by the appellants. Thus there was no necessity for submission of a fresh or independent reference and much less through a Court. The fallacy in this approach is that when the reference was made in respect of the disputes arising out of the agreement dated 20.8.1974 and those disputes had to be settled no claim by way of set off or a counter-claim was raised by the respondent herein. It is only at the last stage of the proceedings a reconciliation statement is stated to have been filed which, it is said, has reference to certain claims made in the two suits and those claims are stated to have been taken into consideration in the non-speaking award in deciding the claims of the parties by the arbitrators. In the case of a non-speaking award, trite to say that the mental process of the arbitrators in reaching the conclusion cannot be gone into or examined as the same are not disclosed in the award. Therefore, to glean into the minds of the arbitrators to find out whether they included the claims stated to have been made in the reconciliation statement is a very torturous process, not an easy one, hazarded with too many difficulties. To get out of such a quagmire Shri Nariman very astutely contended that there was a reference to the documents filed in the case and the reconciliation statement is one such which was also produced before the court when the award was filed for passing the decree in terms thereof which would indicate that this was present to the minds of the arbitrators. Whether it is so or not can only be imagined and not definitely inferred from the facts. Therefore, this line of reasoning adopted by the learned Single Judge does not appeal to us nor are we impressed with the alternative view taken by him that even assuming that the scope of the original reference was limited, it was open to both parties to enlarge the same before the arbitrators as it was not a reference made by a court. Even if it were so, there is no way of finding out the rationale on which the arbitrators passed the award. Though it may have been permissible to refer such a dispute, whether in fact done so, is the question.

That is a matter which is under serious dispute between the parties. Shri Nariman pointed out the conflict in decisions in relation to the question whether the matters in difference in a pending suit can be referred to the arbitration without the order of the court and when the same would result in settlement of claim in the suit. However, that aspect also does not arise for consideration at this stage of the proceedings. We may also notice that the learned Single Judge is of the view that the respondent having taken advantage of the award which, in fact, took note of the reconciliation statement they are estopped from contending that there is no significance of the suit claims in the arbitration proceedings. Again, this view proceeds on the basis of award being made after taking note of the reconciliation statement, which conclusion we have pointed out to be slippery. Hence this aspect also does not assist the appellants.

11. In this case, applications are filed under Order XXIII, Rule 3 CPC. This rule is a provision for making a decree on any lawful agreement or compromise between the parties during the pendency of the suit by which claim is satisfied or adjusted. The agreement, compromise or satisfaction may relate to the whole of the suit or part of the suit or it may also include matters beyond the subject matter of the suit. But Rule 3 clearly envisages a decree being passed in respect of part of subject matter on a compromise. Whether in fact there has been compromise or adjustment of the suit claim or any part thereof is itself put in dispute in this case. Unless it is clearly established that such accord or compromise has been entered into between the parties, the powers under Order XXIII Rule 3 CPC could not be exercised. The respondents case is that the claim made in the suit were never before the arbitrators in any form and even the figures mentioned in the reconciliation statement also do not pertain to the suit claim and the scope of reference to the arbitrators does not enable them to make an award on that aspect of the matter. Those objections have to be dealt with appropriately on full trial. That is the course now adopted by the Division Bench of the High Court. Although many other arguments were addressed before us as to the scope of the proceedings before an arbitrator as to how in the course of arbitration, additional claims can be raised before them and an adjudication thereof, if results, an award is binding on parties. These aspects also do not help the appellants in any manner for we find that there must be factual foundation for those claims and established in the course of a trial. Uninfluenced by the views of the Division Bench we have examined the correctness of the order of the learned Single Judge made in the two suits on applications filed under Order XXIII Rule 3 CPC and we are clearly of the opinion that the order of the learned Single Judge cannot be sustained. The Division Bench of the High Court has not shut out the case put forth by the appellants but only relegated the parties to work out their respective rights in an appropriate manner in the course of a suit. Therefore, we find no merit in these appeals and the same shall stand dismissed. The parties shall bear their own costs.

[1]*AIR 1963 SC 1677*
[2]*(1819) IB & B 350*