

CALCUTTA HIGH COURT

Calcutta Metropolitan Development Authority

Vs.

Gouranga Lal Chatterjee

Award Case 617 and 618 of 1989

(Monoranjan Mallick, J.)

29.05.1991

ORDER

Monoranjan Mallick, J.

1. In each of the above Award Cases the Calcutta Metropolitan Development Authority hereinafter referred as "C.M.D.A." has filed this application for setting aside the two Awards both dated 24-5--89 made and published by Shri B. C. Mitra and Shri J. K. Dasgupta, the Joint Arbitrators. The Award in the matter of Award Case No. 617 of 1989 relates to a contract for construction of Eastern Metropolitan Bye-pass and that of Award Case No. 618 of 1989 relates to a contract for construction of Barrackpore-Kalyani Express High Way. For the contract in connection with Eastern Metropolitan Bye-Pass and Park Circus Connectors the claim of the Contractor-respondent was Rs. 55,80,895.78 in respect of the items of the claim which are mainly for alleged additional work done, loss for idle labors and escalation of prices of diesel, lubricant and petrol during the execution of the works.

2. In the matter of contract for construction of Barrackpore-Kalyani Express High Way an additional amount of Rs. 39,65,472.98 on different counts which are also for alleged extra work done for loss of idle labors and for extra costs for the escalation of prices of diesel, lubricating oil etc. have been claimed.

3. The Joint Arbitrators for the extra claim in connection with the contract for construction of Eastern Metropolitan Bye-pass and Park Circus Connectors awarded Rs. 35,36,395/- to the claimant interest of Rs. 9,42,096/- till the date of entering upon reference and pendente lite interest of Rs. 16,59,277/- from the date of entering upon reference to the date of making and publishing the Award. It has also been directed that if the Award money be not paid within ninety days from the date of the Award, the respondent-claimant shall be entitled to interest @ 10% per annum on the sum due from the date of the Award till the payment or the decree upon the Award whichever is earlier. In connection with the claim for contract for construction of Barrackpore-Kalyani Express High Way the Joint Arbitrators awarded a claim of Rs. 28,94,052/- and also interest of Rs. 8,16,123/- till the date of entering upon the reference and also pendente lite interest of Rs. 3,12,742/- from the date of entering upon the reference to the date of making and

publishing the Award. It has also been directed that if the payment be not made within ninety days from the date of the Award then the claimant shall be entitled to interest @ 10% per annum on the sum due as afore-said from the date of this Award till the payment of decree by the Court upon the Award whichever is earlier.

4. The petitioner C.M.D.A. in both the petitions have raised the common questions of law challenging both the Awards on the same grounds. The following are the main grounds on which the Award have been challenged- -

(a) Shri B. C. Mitra, one of the Joint Arbitrators is an Ex-Director of C.M.D.A. and in his capacity as the Director he had occasion to deal with the work in question and had given decision relating to such work. As the Director of the C.M.D.A. he rejected the self came claim and has now as one of the Arbitrators awarded it and has, therefore, become a Judge of his own cause. When Shri B. C. Mitra was nominated as an Arbitrator then the Officers of the C.M.D.A. were not aware of this position. But Shri Mitra who was fully aware of the position ought not to have acted as Arbitrator and the Awards made by him jointly with Shri Dasgupta is, therefore, vitiated by misconduct.

(b) The Awards have been made in dis-regard of the express provision of the contract. Claims on account of Escalation ought to have been rejected as Clause 70 of the General Condition of the Contract is a bar against such escalation cost. The claims regarding the extra work ought to have been rejected as the same is also hit by the express provision of the General Condition of the Contract.

(c) The Contractor has received payment under the final bills without any protest and cannot, therefore, make any further claim thereafter.

(d) The Joint Arbitrators has granted pendente lite interest which is not permissible.

5. The respondent contests both the petitions by filing Affidavits-in- Opposition separately. The points raised by the respondent are as follows :--

1. There is nothing to show from the documents produced in the Supplementary Affidavit of the petitioner that Shri B. C. Mitra had given any decision in connection with any of these claims made by the respondent, that it is a fact that he was a Director of C.M.D.A. when the contracts were executed by the respondent, that the petitioner having selected Shri Mitra as its Arbitrator and having participated the arbitration held by him with Shri Dasgupta the Arbitrator nominated by the respondent and having at no stage of such holding of Arbitration in which the Arbitrator held as many as 109 sittings raised and protest and is now raising this false plea and the petitioner is estopped from raising the plea that the participation of Shri Mitra as one of the Arbitrators is vitiated by misconduct.

2. It is contended that Clause 70 of the General Condition of the Contract does not operate as a bar in respect of statutory increase. It is also submitted that as regards the claim for extra work the relevant Clause 52 could not be a bar and the same question was raised before the Arbitrators and Arbitrators have given their decision which cannot be challenged in this proceeding because this Court cannot sit in Appeal over the non--

speaking Awards made by the Joint Arbitra-tors.

3. The payments of final bill were accept-ed by the respondent without prejudice because the petitioner threatened not to release even what according to them was due if protest was recorded and the respondent being in acute need of fund accepted whatever was given by the petitioner at that point of time. The claim as made subsequent of the payments of the final bill were proper and valid as no claim has been given up or abandoned. Such claims are very much valid disputes capable of being arbitrated by arbitration and consequently the contention of the petitioner is not acceptable in this respect.

4.It is, however, conceded that in view of the clear decision of the Supreme Court the Arbitrator had no jurisdiction to award pendente lite interest and the respondent, therefore prays that the said awards of pendente lite interest being severable from the other parts of the Award may be deleted and modified by this Court which power this Court possesses under Section 15 of the Arbitra-tion Act.

6. I would first take into consideration as to whether if participation of Shri B. C. Mitra, one of the Joint Arbitrators vitiates the Award on the ground as alleged by the petitioner. It is the case of the petitioner that Shri B. C. Mitra acting as an Arbitrator has violated all the norms of natural justice inasmuch as he as an Arbitrator examined his own decision given as Director General of C.M.D.A. and practically sat on appeal as an Arbitrator against his own decision and such act of Shri Mitra cannot be said to be *bona fide* and as such, be deemed to be mala fide act and awards passed by him jointly with Sri Dasgupta and liable to be set aside. The bone of contention of the petitioner is that as the Officer of C.M.D.A. Shri Mitra turned down all these claims which he awarded along with the other Arbitrator as one of the Joint Arbitrators and that is why according to the petitioner the Award is vitiated by miscond-uct by one of the Joint Arbitrators.

7. On behalf of the respondent my atten-tion has been drawn to the Supplementary Affidavit in which copies of some documents have been annexed in support of the conten-tion of the petitioner with Shri B. C. Mitra while as Director of C.M.D.A. was party to the decision rejecting the claims of the claimant-respondent. Mr. Bhaskar Gupta appearing for the respondent has submitted that none of the documents annexed to the Supplementary Affidavit would show that Shri B. C. Mitra gave any decision as Director of C. M. D. A. in the matter of any of the claims submitted by the respondent-claimant.

8. I have carefully considered those annexures. It is found that Shri Mitra as Director of C.M.D.A. participated in the meeting of the Special Tender Committee pertaining to the construction of the Eastern Metropolitan Bye-pass in which he suggested some deviation and departure of normal procedure of C.M.D.A. with a view to expediting the work. After he made some correspondence the contracts were executed and the respondent was issued the work order. The other documents indicate that he issued several directions to the Executive Engineer and to other Authorities so that the construction work could be completed without any hindrance whatsoever. The Annexure 'J' is the minutes of the meeting dated 5th February, 1982 which shows that Shri Mitra participated in the meeting in which various modalities for dealing with the claim as a result of the statutory increase of price of diesel and other lubricants made by the respondent-Contractors were referred to C.M.D.A. for consideration. In that meeting Shri Mitra

did not give any decision rejecting the said claims. Therefore, even though Shri Mitra as a Director of C.M.D.A. had to take some action in order to see that the work was completed without any hindrance and within the specified period but there is nothing to show that any of the claims which has been made by the respondent and which claims have been decided by the Joint Arbitrators had ever been considered and rejected by him.

9. It is an undisputed fact that Shri Mitra was the Arbitrator nominated by C.M.D.A. It is contended that fact that Shri Mitra gave decision on any of these claims was not known to the then officers of C.M.D.A. who sponsored the name as their nominee Arbitrator. As there is nothing to show that Shri Mitra gave any decision as Director of C.M.D.A. of any of the claim then the explanation given by the petitioner as to under what circumstances Shri Mitra was nominated as the C.M.D.A. Arbitrator is not at all acceptable. Moreover, during the course of Arbitration for which 109 sittings were held the concerned officers of C.M.D.A. were fully aware about what Shri Mitra did as a Director of C.M.D.A. But at no point of time any point was raised before the Joint Arbitrators that Shri Mitra should not continue as Arbitrator in view of his personal involvement in the contract whatever involvement Shri Mitra had as Director and the petitioner on being satisfied that Shri Mitra being in the know of the things would be better suited as their nominated Arbitrator he was selected and the petitioner having participated in the arbitration for so long cannot now take the plea that Shri Mitra in view of his personal involvement in the contract ought not to have acted as one of the Arbitrators. I am satisfied that regard being had to the facts and circumstances of the case the petitioner is not estopped from taking the plea that Shri Mitra having participated in the Arbitration as one of the Joint Arbitrators has committed misconduct.

10. Mr. Bagchi appearing for the petitioner has drawn my attention to decisions of the Supreme Court reported in (*F.C.I. v. Joginder Paul and Mahinder Paul*¹), (*Olga Tellis v. Bombay Municipal Corpn*².) and a passage from Russel on Arbitration 19th Edn. at Page 219 where it has been observed by the Ld. Author that the first duty of the Arbitrator is to act fairly and he must not favor one party more than another. I have carefully considered the above decision. I am of the view that there is nothing to show that Shri Mitra while conducting the Arbitration as one of the Joint Arbitrators did not act fairly or that he gave any favor to the respondent. In that view the first contention of the petitioner fails.

11. I would take up now the second contention of the petitioner namely whether the claims are expressly barred by the provision of the General Condition of the Contract.

12. It is an admitted position that the respondent-Contractor to whom the works in these two contracts were given on acceptance of the tender were bound by both the General and Special Conditions of the Contract. It is the case of the petitioner that the escalation costs awarded by the Arbitrators for the enhancement of statutory price of diesel, lubricating oil etc. in these two contracts were contrary to the express provision of Clause 70 of the General Condition of the Contract. As regards the other claims it is the case of the petitioner that the provision of Clause 52(4) and (5) is a bar to the allowing of the said claims.

13. Mr. Gupta appearing for the respondent has submitted that it being a non-peaking Award it is not open to the petitioner to take the said plea when the provision of the contract to which reference has been made by the petitioner in these petitions have not been incorporated in the Award. The Supreme Court in

¹ AIR 1989 SC 1263

² AIR 1986 SC 180

*State of Andhra Pradesh v. R. V. Rayaniam*³ has observed that when the Award is challenged on the ground that the Arbitrator has exceeded his jurisdiction the Court can look into the Arbitration Agreement only for the purpose of ascertaining as to whether the Arbitrator has exceeded the jurisdiction or not. In AIR 1990 Supreme Court 864 the Supreme Court has also reiterated that when the Court has to decide whether the Arbitrator has exceeded the jurisdiction by making the Award contravening the express provision of the Agreement then the Court can look into the Agreement itself even though it does not form part of the Award. In *Continental Construction Co. Ltd. v. State of M. P.*⁴ it has been held by the Supreme Court that the Arbitrator while deciding the dispute has to act according to law and is also bound to follow and apply the law and if does not do so he can be set right by the Court provided his error appears on the face of it. In *M/s. Sudarsan Trading Co. v. Government of Kerala*⁵ it has been observed that an Award which ignores the express term of the contract is bad.

14. In view of the above Supreme Court decisions I am of the view that this Court has the limited jurisdiction to ascertain as to whether the Joint Arbitrators have exceeded their jurisdiction by awarding any claim contravening any express terms of the contract. If this Court finds that the Awards have been made on the face of it by contravening the express terms of the contract, the Court has jurisdiction to set it aside.

15. Mr. Gupta has also submitted that even if it be conceded that this Court can look into the terms of the General Conditions of the Contract to ascertain as to whether the Awards which are challenged the proceedings have been made by contravening any of the express conditions of the contract, it is submitted that the petitioner raised all these questions before the Joint Arbitrators, that the respondent also took the plea that the provision of the contract to which the attention of the Joint Arbitrators drawn did not stand in the way of the Joint Arbitrators considering those claims on merits, that Joint Arbitrators have given their interpretation of those terms and on being satisfied that those terms of the contract did not stand in the way of the claimant getting the escalation cost for the diesel, lubricating oil etc. and also regarding the claims for the extra work done by them, then if the view taken by the Joint Arbitrators would be a possible view of interpretation of the terms of the contract then the Court cannot sit in appeal over such decision of the Joint Arbitrators.

16. As regards the claim regarding the escalation cost of diesel, lubricating oil etc. there is no doubt that even during the execution of the contract such claims were raised before the C.M.D.A. and C.M.D.A. at one point of time referred such dispute to the Finance Wing. On a perusal of Clause 70 of General Condition of the Contract and Clause 12 Part I, Clause 20 Part II and Clause 65 Part I and Clause 70 I am of the view that the terms of the contract did not absolutely prohibit the escalation on the ground of rise of diesel prices etc. absolutely and under all circumstances. The attention was drawn to all these provisions to the Joint Arbitrators in various sittings of the Joint Arbitrators and the Ld. Advocate for the respondent had drawn my attention to several such sittings and it is, therefore, submitted that when the Joint Arbitrators considered all these contentions raised by the petitioner and the respondent and when on interpreting such terms of contract awarded the escalation cost, the interpretation of the Joint Arbitrators cannot be

³ AIR 1990 SC 626

⁵ AIR 1989 SC 890

held to be perverse and the awards are not vitiated.

17. It is also contended that the claims for extra works were also made before the concerned Engineer of the C.M.D.A. But the Engineer did not give any decision in spite of the claims having been made. All these sub-missions were made before the Joint Arbitrators which will appear from the minutes of the Arbitrators to which Mr. Gupta has drawn my attention. It is also submitted that the respondent has complied with the provision of Clause 52(4) and Clause 52(5) of the General Condition of the Contract which will appear from a letter referred to in para 17 of the statement of claim. The Joint Arbitrators appeared to have considered all these aspects of the case and have given their decision.

18. There is no doubt that it is competent for the Joint Arbitrators to give their own interpretation regarding the terms of the contract to ascertain as to whether the claim of the claimant is barred by the express terms of the contract. When on a perusal of the terms of the contract, the Court is of the view that it is a matter of interpretation of the terms of the contract as to whether the claim is barred by those provisions or not then the Arbitrators were quite competent to give their own interpretation and if such interpretation may be one of the two possible views to be taken then the awards of the arbitrators cannot be interfered with by this Court. The question will be otherwise if on the fact of such terms of contract the claim is barred on the face of it. But if on the contrary it is a matter of interpretation of the terms of the contract to ascertain as to whether the claim is barred or not and if the Joint Arbitrators on hearing both the parties have given their own interpretation, then only on the ground that the contention of the petitioner has not been accepted by the Joint Arbitrators while interpreting the terms of the contract the awards cannot be vitiated. In that view this contention of the petitioner also fails.

19. The third contention of the petitioner is that after accepting the final bills by the respondent in respect of these two contracts and accepting the same without any reservation the claimant is not entitled to put forward any further claims and by payment and acceptance of the final bills there is accord and satisfaction of the contract and the claims made by the petitioner-claimant in any of these two cases was, therefore, not entertainable by the Joint Arbitrators.

20. In support a Division Bench Judgment of Bombay High Court reported in AIR 1990 Bombay 45 has been referred to. The Division Bench of Bombay High Court in that decision has observed that when the Contractor had not only submitted the final bill and given a no claim certificate without reservation in all cases and also in all cases but one received the final payment in full and final satisfaction of the claim, that at no stage thereafter the Contractor has alleged that the bill was submitted or "no claim certificate" given or payment received under coercion or protest or without prejudice and that neither in the correspondence prior to the proceeding nor in the proceeding under Section 8 nor before the Arbitrator nor in the combined proceeding in the application for the decree in terms of the Award any such plea was taken that the final payment was received with protest, then there was accord and satisfaction of the claim by the payment of the final bills and there was nothing more to arbitrate. On behalf of the respondent it is contended by Mr. Bhaskar Gupta that the Division Bench of Bombay High Court was dealing with an extreme case and the facts of the present case are absolute otherwise. It is submitted that the respondent was claiming escalation cost even during the execution of the contract, that even though the respondent was obliged to accept the final bill without protest but the respondent

immediately submitted the claims and the respondent could not raise any protest to the C.M.D.A. in which case their payment would have been withheld by the C.M.D.A. that in the claim petitions it was clearly indicated as to in what circumstances the payments of the final bills was received and that in the above view the petitioner cannot take the plea that there was accord and satisfaction by the acceptance of the payment under the final bills.

21. It is well-settled by several decisions of Supreme Court as well as our High Court as regards the circumstances under which the Court can come to the conclusion that there was accord and satisfaction of the contract by payment and acceptance of the final bill and "no claim certificate" given by the Contractor. In *Jiwani Engineering (P) Ltd. v. Union of India*⁶, it was held that "no claim certificate" issued by the Contractor did not prevent him from invoking the Arbitration Clause. The Division Bench of Calcutta High Court relied on the Supreme Court decision reported in *D.V.C. v. K. K. Kar. Mr. Bhaskar Gupta*⁷ has also referred to me the Supreme Court decision reported in *Union of India v. L. K. Ahuja and Co*⁸. in which Sabyasachi Mukherjee, J. as his Lordship then was has observed that in order to be entitled to ask for a reference under Section 20 there must be an entitlement to money or a difference or dispute in respect of the same, that it is true that on completion of the contract right to get payment normally arises and it is also true that on a settlement of the final bill the right to get further payment gets weakened but the claim subsists and whether it does subsist is a matter which is arbitrable.

22. In view of the above decisions I am unable to rely on the Division Bench decision of the Bombay High Court referred to by the Ld. Advocate for the petitioner because I am of the view that the facts of the above reported decision are entirely different from the facts of these present cases. In these cases even during the execution of the contract such claims were made. The respondent in their claim petition clearly indicated that the final payment was received not by way of accord and satisfaction but on being forced to get whatever payment the respondent could get as they were hard hit financially. In that view this contention also fails.

23. As regards the contention, of the petitioner that the Arbitrators were not competent to award pendent lite interest the Ld. Advocate for the respondent concedes that they were not so entitled. It is, therefore prayed that the same be deleted from the award.

24. I would therefore modify the awards deleting this position (portion) of the awards in which pendent lite interest have been granted.

25. I am also of the view that the Arbitrators in view of the Supreme Court decision reported in AIR 1989 Supreme Court 973 is not competent to award interest from the date of the Award to the date of decree. But this Court in a proceeding under Section 17 of this Arbitration Act can award such interest. Therefore, the Award of interest from the date of the Award to the date of the decree is also deleted.

⁶ AIR 1981 Cal 101

⁸ AIR 1988 SC 1172

⁷ AIR 1974 SC 158

26. In the result both the petitions are allowed in part. The awards of pendent lite interest made by the Joint Arbitrators in each of the two Awards be deleted. The Award of interest from the date of the decree is also deleted from each of these two awards. The respondent may, however, claim such interest on the awards from the date of the Award to the date of the decree before the Court when it passes a Judgment and decree on these two Awards. Subject to this modification

both the Awards made by the Arbitrators are affirmed. No order for costs is passed.
Petitions partly allowed.