Bharat Coking Coal Ltd vs L.K. Ahuja on 12 April, 2004

Equivalent citations: AIRONLINE 2004 SC 590

Author: S. Rajendra Babu

Bench: S. Rajendra Babu

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           CASE NO.:
Appeal (civil)  5489-5490 of 1995

PETITIONER:
Bharat Coking Coal Ltd.

RESPONDENT:
L.K. Ahuja

DATE OF JUDGMENT: 12/04/2004

BENCH:
S. RAJENDRA BABU & BHAN.

JUDGMENT:
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JUDGMENT RAJENDRA BABU, J. :

In respect of certain contracts of work assigned by the appellant certain disputes having been arisen, the matter was referred to arbitration. Two awards were made and the same were filed in the court of the Civil Judge in two Title (Arbitration) Suits Nos. 37/86 and 40/86. By a common order, the trial court made the awards rule of court in entirety and decrees were drawn in terms thereof. An appeal was filed against the said common order before the High Court. The High Court having dismissed the said appeal, the matter was carried to this Court.

On February 21, 2001 by an order made by this Court, the awards were set aside after quashing the orders made by the High Court and the trial court and the matter was remanded to the arbitration for a fresh consideration of all points by appointing a new arbitrator Shri Justice Uday Sinha, former Judge, High Court of Patna. He made an award and on 25.01.2002 sent the copies of the award and on 12.02.2002 minutes of the proceedings before the him to the Court. Report in this regard was placed before this Court on 18.02.2002, copies of which were served upon the concerned advocates. Objections to the award and application to set aside the award have been filed on 11.04.2002. Now, an objection is raised on behalf of the respondents that the application filed for setting aside the award in terms of Article 119(b) of the Limitation Act should have been filed within a period of 30 days from the date of filing of the award into the Court; that inasmuch as the office report had been served

> upon all the parties, it must be deemed that the said office report gives sufficient notice of filing of the award in the Court; that the period of limitation of counting 30 days commenced on 18.02.2002; that, therefore, the objections filed on 11.04.2002 are hopelessly barred by limitation. It is further submitted that the Court itself may order a notice of filing of the award or even the Registry can take steps to issue such a notice and reliance is placed on certain decisions of this Court as to how in situations of this nature 30 days limitation period is to be computed in Indian Rayon Corporation Ltd.

vs. Raunaq and Company Pvt. Ltd., 1988 (4) SCC 31; Food Corporation of India & Ors. vs. E. Kuttappan, 1993 (3) SCC 445, and State of Bihar vs. Hanuman Mal Jain, 1997 (11) SCC 40. In our view, none of these decisions can have any application to the situation arising in the present case.

The office report was prepared on 18.02.2002 and the matter was listed before this Court on 11.03.2002 when this Court ordered that "call after four weeks". On 02.04.2002 the learned counsel for the respondents filed a separate application in both the appeals under Section 17 of the Arbitration Act, while on 11.04.2002 the appellant filed an application under Section 15 read with Section 30 of the Arbitration Act raising objections to the passing of decree in terms of the award.

Article 119(b) of the Limitation Act has been enacted to fix a definite time limit within which the validity of the award can be challenged after the award is filed in the court. The said provision prescribes a period of limitation of 30 days for making an application after the required notice regarding filing of the award in the court is given to the parties. If there is no material to show that a notice of filing of the award has ever been given to the parties, any period of limitation as prescribed in Article 119(b) loses its significance. The law is clearly to the effect that mere knowledge of passing of an award is not enough. The period of limitation will commence as provided in Article 119(b) of the Limitation Act only upon notice as to filing of the award in the court has been given to the parties concerned.

In the present case the situation has arisen in very special features. This Court made an order appointing a new arbitrator who was directed to file an award in the Court and he submitted the award in the Court after publishing the same to the parties. Though on 18.02.2002 the Registry notified the submission of the award in the Court by way of an office report, but the same cannot be treated to be in the nature of a notice. The noting made by the Registry in the office report merely brought to the notice of the Court as to what had transpired and as the matter was being listed before the Court, a copy was served upon the parties concerned. It is only thereafter it can be said that the Court directed issue of notice to the parties regarding filing of the award which has been sent by the Registry. The Registry on its own could not have issued a notice without a direction from the Court in this regard. In that view of the matter, we do not think, there is any notice of filing of the award in the Court to the parties as contemplated in Article 119(b) of the Limitation Act. Further, on 11.03.2002 when the matter was listed before the Court, the parties concerned took notice of the same and thereafter, objections have been filed by the parties. In these circumstances, we think that the first contention urged on behalf of the respondents that the objections raised by the appellant are barred by limitation is incorrect and the same stands rejected.

In the view we have taken, it is unnecessary to refer to the various decisions relied upon by the learned counsel for the respondent.

Further, it may be useful to refer to one decision of this Court, which was not cited by either party, in which the effect of non-service of notice was considered by this Court. In Dewan Singh vs. Champat Singh & Ors., AIR 1970 SC 967, it is observed by this Court "that if a party files an objection before the service of notice, the question of limitation does not arise at all. But also in the absence of clear proof to the effect that notice of the filing of the award had ever been given to the applicant, application filed by him cannot be rejected on the ground of limitation."

Originally, though the respondent had made large claims totalling to a sum of Rs. 78,41,350.00, the same got slashed to Rs. 32,03,755.10p. Now, the subsisting claims are :-

"Claim No.	Rs.
1. Payment of final bill	2,18,862.42
2. Payment of P.O.L. escalation	18,417.31
3. Compensation for making late	

Payment of running account bill 3,75,500.00

4. Payment of labour escalation 2,66,321.55

5. Refund of sales tax 35.050.95

6. Payment of extra items 8,77,115.82

7. Payment of material escalation 4,12,487.46

8. Keep back account N I L

9. Payment of compensation to loss arising out of turn over due to prolongation of work 10,00,000.00

Total 32,03,755.10

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The arbitrator took notice of the fact that the difference in the original claim and the subsequent claim is to the order of Rs. 45,62,376/- which casts serious doubt as to the nature of the claim and the veracity of quantum of the claim.

Out of the claims mentioned above, Shri Mukul Rohtagi, learned Additional Solicitor General who appears for the appellant, did not contest the award made by the

arbitrator in respect of claim Nos. 2 and

3. However, serious contest has been raised in regard to interest awarded by the arbitrator.

There are limitations upon the scope of interference in awards passed by an arbitrator. When the arbitrator has applied his mind to the pleadings, the evidence adduced before him and the terms of the contract, there is no scope for the court to reappraise the matter as if this were an appeal and even if two views are possible, the view taken by the arbitrator would prevail. So long as an award made by an arbitrator can be said to be one by a reasonable person no interference is called for. However, in cases where an arbitrator exceeds the terms of the agreement or passes an award in the absence of any evidence, which is apparent on the face of the award, the same could be set aside.

The learned Additional Solicitor General submitted that in the present case the arbitrator found that there was delay in execution of the contract of work for which both the parties were liable and apportioned the same between them without clearly examining whether there was any material for that claim at all. His contention is that there is absolutely no evidence to sustain any of the claims and in the absence of the same, it is not permissible for the arbitrator to have made the award.

Shri V.A.Mohta, learned Senior Advocate appearing for the respondent, submitted that the material on record clearly indicated that there were certain joint statements before the arbitrator and they were all based on the measurement books or other material and if that piece of material is treated as evidence, there cannot be serious doubt that the view taken by the arbitrator is justified and no interference would be call for.

On the first claim regarding non-payment of the final bill, reliance was placed by the parties before the arbitrator on a joint statement and the entries made in the measurement book. On the question whether reliance could be placed on the joint statement, the arbitrator held that he cannot attach any conclusiveness to the joint statement. However, he would examine the claims on their intrinsic merit. One of the contentions raised was that the final bill had been fully paid inasmuch as 13th and 14th running account bills having been passed, the arbitrator relied upon a letter sent on 14.3.1986 by Sri Srinathan, Deputy Chief Engineer [Civil] that the final bill had not been paid and that clinched the matter in favour of the claimant. Thereafter having held that the final bill is yet to be paid, he proceeded to examine the quantum of the same. The final bill disclosed that as per the agreement, the value of the work is Rs.86,43,730/- as against this amount, the actual cost of the work was Rs.90,46,842.14, out of which a sum of Rs.89,97,311.12 had been paid. Thus a balance of Rs.49,531/- had not been paid. Therefore, he held that this part of the claim is allowed.

In addition to this, he also stated that certain work had been done by him by way of extra works and made a claim of Rs.91,013.72. There is a separate claim made by the claimant under claim No.6 as claim for extra work done. Claim made therein is to the extent of Rs.1,02,350/-. On this aspect of the matter, the contention advanced on behalf of the appellant is that separate claim for extra works of items under claim No.6 includes the claim of Rs.91,013.72 and the claim for extra items of work can be made only on the written order of the Engineer-in-Charge in terms of clause 11 of the agreement and, therefore, the contractor will not be entitled to make any claim unless he has received such an order for substituted or altered work in terms of clause 11 of the agreement. On this aspect while dealing with the claim for extra works under claim No.6, the arbitrator adverted to the decision of this Court in State of Bihar & Ors. vs. Hanuman Mal Jain, 1997(11) SCC 40, wherein this Court interpreted a similar clause as laying down the procedure as to how a claim could be lodged and not to oust the jurisdiction of the arbitrator in deciding the dispute on merits. It is not clear from the pleadings raised on behalf of the appellant before the arbitrator whether the claim covered by the final bill as extra items to the tune of Rs.91,013.72 is included in the extra item of works which had been rejected by the arbitrator. The arbitrator adverted to this aspect of the matter while deciding claim No. 6 and held that out of the claim of Rs.1,02,517/-, Rs.11,503/- had been paid leaving a balance of claim of Rs.91,013/- which has been clearly allowed by him while consider claim No.1 regarding non-payment of final bill and having claimed Rs.91,013.72 which had been allowed by him the contractor could not once again claim the same amount under another head and the arbitrator rejected this claim on two grounds, namely, that there is no order in writing by the Engineer-in-Chief and secondly even if it had been executed, it had been paid for. The contention put forth on behalf of the appellant that there is absolutely no material to make a claim by the contractor in this regard cannot be accepted because these extra items have been mentioned in the measurement book and which clearly indicated that the work had been executed and he treated that the entry in the measurement book will itself amount to order in writing in terms of clause 11 of the agreement and, therefore, allowed the claim. In these circumstances, it cannot be said that the item claimed for extra works referred to in the final bill is the same as the claim under claim No.6 for extra works wherever such a situation has arisen the arbitrator has examined the same, say for example, in regard to petrol, oil and lubricant, he has separately, treated the same. If appropriate pleadings had been raised, the arbitrator would have certainly considered this aspect and in the absence of the same we think that the view taken by the arbitrator in this regard cannot be interfered. Only two items which had been allowed by the arbitrator which have been adverted to by us as a sum of Rs.49,513.02 which was still to be paid and a sum of Rs.91,013.72 as extra items of works which was disclosed in the measurement book. Therefore, we find no infirmity on this aspect of the claim.

Claim Nos. 2 and 3 not having been disputed before us, we now proceed to consider claim NO.4. The arbitrator considered various aspects made under this head for claim for payment of labour escalation. The arbitrator took the view that the

appellant alone was not responsible for prolongation of the works and there were lapses on the part of the contractor as well and both were responsible for the delay. The arbitrator, after into consideration that there was definitely a escalation between April 1983 and April 1984 in regard to wage bill of the claimant, took the view that as against a claim of Rs.2,66,343/- awarded a sum of Rs.1,30,000/-. When on the basis of the pleadings and overall view of the situation arising as to the rise in the cost of wages, having awarded a lumpsum amount under this head, we do not think it is necessary to interfere with the award on this aspect of the matter.

The claim for refund of sales tax in a sum of Rs.35,050/- has been upheld by the arbitrator on the basis that in terms of a notification issued by the Government which lays down that if the works had been handed over prior to 1.4.1984, sales tax was not leviable but the works having been executed on 31.5.1984, it cannot be said that the terms of the notification had been complied with and, therefore, no claim could have been made by the claimant and, therefore, an award of Rs.35,050/- based on the notification dated 19.2.1985 would not be correct and, thus, this amount of award in a sum of Rs.35,050/- stands allowed. There is a clear error apparent on the face of the award in having allowed this claim by the arbitrator.

Claim No. 6 consists of four items. So far as the first item regarding extra work is concerned, the claim has been rejected by the arbitrator which we have adverted to while considering claim no. 1 under final bill. The second item under this claim relates to watch and ward expenses. The arbitrator, after examining various aspects of the matter, took the view that the expenditure over watch and ward staff could not be more than Rs.10,000/- per month for 14 months and the bill on that account would come down to Rs.1,40,000/-. However, taking all the factors in respect of this claim, the expenditure under this head would not come to more than Rs.84,000/- for the whole period and taking a lenient view of the matter, the arbitrator awarded a sum of Rs.1,25,000/- under this head.

The arbitrator considered the fact that the appellant took possession of the quarters for two days on 30.4.1984 and 1.5.1984 to accommodate delegation for the All-India Labour Union Congress but it was not in dispute that the same was handed over after a couple of days. Thereafter the quarters were allotted to employees in stages and actual delivery of possession was made on 10.3.1986. While the arbitrator considered that the claim on account of watch and ward to the tune of Rs.7,09,000/- is fantastically high and in the written submissions it had been claimed that the building had to be maintained at a cost of Rs.5,500/- per month, he doubts as to whether the claimant had retained any watch and ward staff to the extent of 18 members, he held that three watch and ward staff would have been enough and the period for which the same had been maintained comes down to 18 months and with reference to the pleadings raised in this Court on earlier occasion took note of the fact that possession had not been given since April 1984. Therefore, he reduced the period to 14 months. He rejected the claim that for the whole period from April 1986 it had

retained the services of plumber, electrician, carpenters, supervisory, etc. and watch and ward staff and he held that the flats were not in such a condition that the appellant could have taken possession and, therefore, the entire claim cannot be justified. Having taken into consideration the fact that the watch and ward staff could be three, he awarded a sum @ Rs.10,000/- per month for 14 months.

The learned Additional Solicitor General submitted that there is absolutely no basis for awarding this item as no material had been placed before the arbitrator. We cannot say that in assessing such a situation, the arbitrator has exceeded his jurisdiction or that there was no material at all before him in assessing the situation that there was some delay in handing over the flats and watch and ward had to be maintained, he has awarded for a reduced period of 14 months @ Rs.10,000/- per month. Therefore, we cannot hold this conclusion as suffering from an error apparent on the face of the award.

Next two items regarding rolling margin and refund of security deposit had been rejected by the arbitrator and, therefore, do not require any consideration.

On the question of material escalation, the arbitrator considered the claim made in a sum of Rs.4,12,487.46 under this head. The arbitrator took note of the situation that it was not the contention of the appellant that the material referred under this head had not been used for the completion of the project but having secured a sum of Rs.17,70,085/- by way of advance, the escalation would get off-set by the advance paid and further running accounts payments had been made from month to month which must have taken into consideration the rise in prices. He held that there was no evidence on record as to the nature of the purchases made by the claimant during the extended period although some purchases had been made attracting escalation in the prices. Secured advance was only made to the extent of 60 to 75%. Therefore, he held that 25% of the escalation has to be compensated on that basis and allowed half of the claim of the contractor. When there was no dispute as to the fact that materials had been used for the purpose of the project and the value thereof, the claim made by the appellant having been duly examined by the arbitrator and after giving due allowance to the advances that have been made the award made by the arbitrator cannot be stated to be as one suffering from any error apparent on the face of the award. Therefore, this conclusion also cannot be interfered with.

Claim No. 8 has been rejected by the arbitrator. Now we proceed to consider claim No. 9 for loss arising out of turnover due to prolongation of work. The claim made under this head is in a sum of Rs.10 lakhs. The arbitrator rightly held that on account of escalation in wage and prices of materials compensation was obtained and, therefore, there is not much justification in asking compensation for loss of profits on account of prolongation of works. However, he came to the conclusion that a sum of Rs.6,00,000/- would be appropriate compensation in a matter of this nature being 15% of the total profit over the amount that has been agreed to be paid. While a sum

of Rs.12,00,000/- would be the appropriate entitlement, he held that a sum of Rs.6,00,000/- would be appropriate. He also awarded interest on the amounts payable at 15% per annum.

Here when claim for escalation of wages bills and price for materials compensation has been paid and compensation for delay in the payment of the amount payable under the contract or for other extra works is to be paid with interest thereon, it is rather difficult for us to accept the proposition that in addition 15% of the total profit should be computed under the heading 'Loss of Profit'. It is not unusual for the contractors to claim loss of profit arising out of diminution in turn over on account of delay in the matter of completion of the work. What he should establish in such a situation is that had he received the amount due under the contract, he could have utilised the same for some other business in which he could have earned profit. Unless such a plea is raised and established, claim for loss of profits could not have been granted. In this case, no such material is available on record. In the absence of any evidence, the arbitrator could not have awarded the same. This aspect was very well settled in Sunleyn (B) & Co. Ltd. vs. Cunard White Star Ltd., [1940] 1 K.B. 740, by the Court of Appeal in England. Therefore, we have no hesitation in deleting a sum of Rs. 6,00,000/- awarded to the claimant.

So far as interest that is payable is concerned, the arbitrator has appropriately considered the same and no real objection can be raised in this regard. As regards arbitration costs also there cannot be any serious dispute. Therefore, except for the sums coming under the heading No. 5, that is, Refund of Sales Tax and claim for payment of losses arising out of turn over due to prolongation of work, other part of the award having been upheld by us, the award made by the arbitrator shall stand modified accordingly.

In similar terms in respect of second contract, for the very reasons stated in this part of the order, we disallow the claim for refund of sales tax and compensation for losses arising out of on account of prolongation of work. In other respects, we maintain the award made by the arbitrator.

The civil appeals stand disposed of in the aforesaid terms.