

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.263 of 2011

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M/S Bhasin Contruction Company Pvt. Ltd, having its registered office at B-7/67 Ballygunge Circular Road, Calcutta-700019; and its current address at Blessington House, Kanke Road, Ranchi

.... Claimant Appellant/s

Versus

Bihar Rajya Pul Nirman Nigam Ltd. (A Govt. of Bihar Undertaking) having its registered office at 7, Mangals Road, Patna-800015.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. N.K. Singh
Mr. Rakesh Kumar Singh
Mr. Amit Anand
Mr. Surendra Prasad Singh
For the Respondent/s : Mr. Vikas Kumar.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN

CAV JUDGMENT

Date: 17-02-2016

This appeal filed under section 39 (1) (VI) of the Arbitration Act, 1940 (hereinafter referred to as 'the Act'), is directed against the judgment and order dated 21.8.2010 passed by the learned Sub-Judge-III, Gaya in Title Suit No.238 of 2004/8 of 1999 together with the decree dated 1.11.2010, whereby the learned court below has set aside the award, inter alia, on grounds that the Umpire has mis-conducted himself.

The facts of the case briefly stated is that a tender for construction of high level bridge over river Falgoo at Gaya was invited by the Deputy Chief Engineer, Work Circle-II, Bihar Rajya Pool Nirman Nigam Limited (hereinafter referred to as 'the Corporation'). The appellant along with some others responded to



the tender which was deliberated upon by the tender committee and the work of construction of bridge was finally awarded to the appellant at a lump sum cost of Rs.1,40,00,000/-. The work was completed and whereafter bills were submitted by the appellant. A dispute arose as regarding the claim set up by the appellant in respect of extra work done in sinking and founding of well in rock/dehydrated rock/soft rock or any other strata necessitating chiseling or blasting which claim was rejected by the Corporation. The parties invoked the arbitration clause in the agreement and the matter was referred to the Arbitrator. The two Arbitrators appointed by the contesting parties did not come to any agreement and as such the matter was referred to the Umpire, namely, Mr. Kartik Prasad. The respondent-Corporation opposed the appointment of Mr. Kartik Prasad as Umpire and as such one Mr. U.K. Agrawal was appointed the Umpire by the choice of the respondent-Corporation. A number of sittings was held by the Umpire who gave his award present at Annexure-5 to the appeal. The Umpire upheld the claim put forth by the appellant and awarded a lump sum award of Rs.64,00,000/- payable for all the claims so raised by the appellant inclusive of interest as well as interest @ 18% *per annum* on the award from the date of the award until its payment. The award was sent by the Umpire to the court for making it rule of the court under section 17 of 'the Act' giving rise to Title Suit No.238 of 2004/8 of 1999 and

the learned Sub-Judge-III, Gaya vide judgment and order impugned dated 21.8.2010 has set aside the award, inter alia, on grounds of misconduct by the Umpire in upholding the claim and hence this appeal.

Mr. N.K. Singh has appeared for the appellant while the respondent is represented by Mr. Vikas Kumar.

The argument of Mr. N.K. Singh has been rather brief for while referring to the award present at Annexure-5 pronounced on 10.10.1998 he submits that the Umpire so appointed by the respondent themselves has after holding not less than eight sittings pronounced a lump sum award taking not only the claim for the work done but also the interest part which is rather reasonable but the same has been interfered with by the court below, inter alia, on grounds of being a non-speaking award which is an erroneous conclusion.

Learned counsel while contesting the right of the respondent to contest the award has with reference to Article 119 of the Limitation Act submitted that a limitation of thirty days is prescribed for any party being aggrieved by the award, to file his objection but the same was not complied with by the respondent and thus the objection to the award would not be unsustainable. Learned counsel in support of his submission has relied upon a Full Bench judgment of this Court reported in **AIR 1958 Patna 252**



(**Seonarain Lal vs. Prabhu Chand**) to submit that the Full Bench of this Court after examining the provisions of section 17 of 'the Act' and the provisions of the Limitation Act has held in paragraph 17 that an objection not filed within the time frame cannot be entertained. It is the argument of Mr. Singh that every application to question the award should state the reasons as well as the date of cause of action for the purpose of calculation of limitation in the court below. He submits that since in the present case the parties were present on the date the award was pronounced i.e. 10.10.1998 hence the cause of action to maintain any objection by the respondent-Corporation would start running from the said date. He submits that although the award was filed on the same date i.e. 10.10.1998 but the objection was filed by the respondent Corporation on 12.9.2000 i.e. beyond the limitation prescribed which cannot be condoned even if a limitation petition is filed. Learned counsel in this context also referred to a judgment of the Supreme Court reported in **AIR 1962 SC 666 (Nilkanta Sidramappa Ningashetti vs. Kashinath Somanna Ningashetti)** **paragraph-18**. He submits that since the award was pronounced in presence of the parties hence no issue can be raised by respondent-Corporation as to the requirement of notice.

Mr. Singh with reference to the finding of the court below recorded in paragraph 17 of the judgment has submitted that



the court below has misdirected itself in searching for reasons by the Umpire for awarding the lump sum contract. It is argued that an arbitration proceeding under 'the Act' in question, neither mandates assignment of reasons to grant a lump sum award nor absence thereof can be a ground for interference therewith. Learned counsel in support of his submission has referred to the following decisions of the Supreme Court:

- (a) AIR 1990 SC 1426 (Raipur Development Authority vs. M/s Chokhamal Contractors), paragraphs 33 and 34.
- (b) AIR 2001 SC 2516 (M/s. Ispat Engineering and Foundry Works vs. M/s Steel Authority of India Ltd.);
- (c) AIR 2005 SC 3701 (Rajendra Construction Company vs. M.H. and A.D. Authority), paragraphs 15, 18 and 19;
- (d) 2007 AIR SCW 985 (M/s Engineers Syndicate vs. State of Bihar), paragraphs 7 to 11;
- (e) 2007 AIR SCW 5910 (M/s Marfed Vanaspati and Allied Industries vs. Union of India), paragraphs 15 & 18.

On the strength of the judgments so noted above, it is argued by Mr. Singh that the opinion of the Supreme Court in each of the cases relied upon, would squarely cover the present case where the Arbitrator on examination of the rival contentions has



concluded in a lump sum award. Proceedings herefrom it is argued by Mr. Singh that a mere absence of reasons is no ground to set aside the award unless the agreement provides as such. He submits that neither in the agreement nor in the reference made to the Arbitrator there is any requirement to assign reasons. Learned counsel has primarily questioned the judgment and order impugned on grounds of objection not filed within the limitation prescribed and secondly that the court below faulted in searching for reasons for a lump sum award. It is argued that the court below was probing into the mental process of the Umpire which in the face of the agreement and Annexure-G thereof, was not open for probe by the court below.

The argument of Mr. Singh has been contested by Mr. Vikas Kumar who while disputing that the award was filed on 10.10.1998, has submitted that it was filed in 1999. Mr. Kumar straightaway referred to the provisions of section 30 of 'the Act' to submit that the grounds on which an award can be set aside stands explained in the provisions and it is clause (a) and (c) thereof, which has formed the basis for the opinion of the court below to set aside the award. According to Mr. Kumar, it is on the sole ground that the Arbitrator has travelled beyond the agreement which constitutes a misconduct that the award was set aside and not on grounds of absence of reasons. Learned counsel in support of his



submission has referred to paragraph 10 of the impugned judgment to submit that the court was conscious of the jurisdiction vested in him under the provisions of section 30 or 35 of 'the Act'. Learned counsel has next referred to paragraph 13 of the judgment to submit that the scope of the claim in the backdrop of the agreement has been considered by the court below to hold that the Umpire had clearly violated the terms of agreement and had twisted the words present at item no.3 of Annexure-G. With reference to the finding of the court below at paragraph 17 and paragraph 18 he submits that the conclusion drawn by the court is covered under clause (a) and (c) of section 30 of 'the Act' since the Umpire had travelled beyond the terms of contract and not in absence of reasons. Learned counsel in support of his submission has referred to the judgment of the Supreme Court reported in **AIR 1992 SC 232 (Associated Engineering Co. vs. Government of Andhra Pradesh)** and with reference to paragraphs 26 to 29 it is submitted that an Arbitrator cannot arbitrarily irrationally, capriciously or independently of the contract. It is argued by Mr. Kumar that the arbitration has to be in terms of the contract but the moment the arbitrator wanders outside the contract he commits a serious error. Learned counsel next referred to a judgment of the Supreme Court reported in **2007(3) PLJR (SC) 206 (Food Corporation of India vs. M/s Chandu Construction)** and with reference to paragraphs 10 and 11 of the

judgment he submits that the view recorded in the case of **Associated Engineering Co.** (supra) stands supported.

Responding to the argument of Mr. Singh as regarding the absence of obligation on the Umpire to give reasons for the award, learned counsel has referred to a recent judgment of the Supreme Court reported in **AIR 2015 SC 125 (Ms. Anand Brothers P. Ltd. vs. Union of India)** to argue that the Supreme Court in consideration of the judgments relied upon by Mr. Singh to canvass that non-speaking award cannot be a ground for its reversal, has upheld the view of the Delhi High Court in remitting the matter back to the Arbitrator for fresh determination of dispute *inter alia* on grounds that the Arbitrator had not recorded his finding as required under the general conditions of contract.

Responding to the issue of limitation raised by Mr. Singh it is argued that the issue of limitation was never raised by the appellant in the court below. With reference to section 14 of 'the Act' he submits that although the provision mandates a notice to be given to the parties and Article 119 of the Limitation Act provides thirty days to a person aggrieved to file his objection from the date of such notice but since no such notice was issued at all by the Umpire hence there cannot be any question of limitation.

I have heard learned counsel for the parties and I have perused the records. Although extensive arguments have been

advanced by either sides in support and in opposition of the impugned judgment but the core issue which falls for consideration before this Court is:

“Whether the award has been set aside for want of reasons or it has been set aside on grounds that the Umpire had mis-conducted himself, in travelling beyond the terms of agreement.”

There is nothing in paragraphs 17 and 18 of the impugned judgment which gives any reflection that the court below has set aside the award on grounds that it assigns no reasons for grant of a lump sum award. Mr. Singh has understandably picked up a word from paragraph 17 of the impugned judgment to canvass that the judgment of the court below is fit to be set aside on this count since ‘the Act’ in question does not mandate giving reasons for a lump sum award but in my opinion picking up a word from a paragraph would not reflect a correct appreciation of the opinion expressed by the court below on the issue rather the issue has to be tested on a complete reading of the judgment. I am in no confusion that paragraphs 17 and 18 of the judgment impugned makes it eloquent that the award has been set aside by the court below on the grounds that the Umpire had travelled beyond the agreement to uphold the claim and which default would stand covered by the ground mentioned in clause (a) and (c) of section 30 of ‘the Act’



relatable to misconduct by the Umpire. While I do agree with the argument of Mr. Singh that section 30 of 'the Act' which sets out the grounds for setting aside an award given under 'the Act', does not list a non-speaking award as one of the grounds for such reversal but then this is not the ground either taken by the court below to reverse the award. The court below is very clear for opining in paragraphs 17 and 18 that the award is against the terms and conditions of the agreement. Meaning thereby that the Umpire had travelled beyond the agreement. It is thus to be seen whether the claim put forth by the appellant under the terms of reference, is supported by the terms of agreement. The terms of reference stands noted in the award as well as in the impugned judgment and runs as follows:

- (I) Interest on delayed payment for well-sinking in rock, soft rock or dehydrated rock;
- (II) And non-payment of well sinking in "any other strata" needing chiseling and/or blasting claimed as per Item no.3, variation rate of Annexure-G of the agreement;
- (III) And further interest claimed up to 31.12.1997.

Item no.3 of Annexure-G stands noted in paragraph 5 of and paragraph 12 of the judgment and runs as follows:

"Extra cost for sinking of wells in rock/dehydrated rock/soft rock or any other strata

necessitating chiseling or blasting- 55,000/- per meter.”

The rates so quoted by the appellant was objected to by the respondent-Corporation while issuing a questionnaire and the appellant while responding thereto in paragraph 53 has answered thus:

“In reply to paragraph 49 of the questionnaire we have clarified regarding sinking of well in strata as indicated by the bore hole chart but excluding rock/dehydrated rock/soft rock. For sinking in rock/dehydrated rock/soft rock we shall carry out all the normal method including chiseling or blasting etc that may come under the process of well sinking in rock. We agree to delete item no.4 of the variation rates- Annexure-G. Our item no.3 variation rates of Annexure-G shall become operative in the event of sinking of well in rock in excess of one meter.”

The objections raised by the Corporation to the rates proposed by the appellant and the replies thereto are on record at Annexure-2 series at page 36 and 47 respectively.

The court below has exhaustively discussed the claim in the finding recorded from paragraph 11 onwards more particularly in paragraphs 12 and 13. While there is no dispute that the proposal in the tender conditions at Annexure-G did provide for extra cost for sinking of well in rock/dehydrated rock/soft rock or any other



strata necessitating chiseling and blasting at the rate of 55,000/- per meter but the rates so quoted by the appellant was objected to by Corporation saying that it was very high and a request was made to reduce the same. It was also clarified that the work of sinking of well in rock/dehydrated rock/soft rock or any other strata necessitating chiseling or blasting would fall under the process of well sinking and is not an extra item and hence no extra payment can be made to the firm. A similar objection was also raised by the Corporation as regarding the M.S. lining in respect of extra payment. A request was made to delete these two items from Annexure-G. The reply of the appellant stands noted hereinabove and leaves no room for confusion that the appellant agreed to delete out item no.4 of variation of rates at Annexure-G while agreeing that item no.3 at Annexure-G would become operative only in the event of sinking of well in rock in excess of one meter.

Now once such an understanding has been agreed upon between the parties then the claim advanced by the appellant relying upon the original item no.3 of Annexure-G could not have been a basis for arbitration for the same stood modified by their response to the objection raised by the respondent-Corporation.

The entire gamut of argument of Mr. Singh rested on the plea that under 'the Act' in question an Arbitrator or Umpire was not required to support the award by giving reasons and that



absence of reasons cannot be a ground for setting aside the award. There is no legal flaw in the argument advanced by Mr. Singh. The catena of judgments relied upon by Mr. Singh, leaves no room for any discussion on the proposition so advanced **provided** the claim is supported by the terms and conditions of the agreement entered in between the parties. The rider attached to the proposition advanced is that the claim raised under 'the Act' in question should stand supported by the terms of the agreement and if this essential prerequisite is satisfied then certainly the Arbitrator(s) or the Umpire as the case may be, is not required to give reasons for the award but the case in hand is not as such and the documents on record confirm such position.

The records of the proceedings have been called upon by this Court and I have gone through the claim raised by the appellant as well as the response filed by the Corporation. The Corporation while responding to the claim has very specifically stated that whatsoever claim stood supported by the agreement has been paid by them but since the claim raised under item no.3 of Annexure-G was objected to by the Corporation and stood modified by the appellant themselves, they cannot turn around to raise the same relying upon the original condition until such time they are able to show that the sinking of well in rock is in excess of one meter. In my opinion, where the claim was resisted by the



respondent-Corporation before the Umpire, inter alia, on grounds that it was beyond the terms and conditions of the agreement then the contest required an application of mind and even if the award may not have accompanied reasons therefor but in the nature of the contest and resistance advanced it definitely merited a discussion thereon.

On the contrary a plain reading of the award present at Annexure-5 would confirm that it has been passed mechanically and even while noting the resistance of the respondents the nature whereof which goes to the very root of the claim advanced but the Umpire has conveniently ignored the objection to uphold the claim.

Despite the record being summoned, Mr. Singh never attempted to support the claim with reference to the terms of agreement. On the contrary Mr. Singh limited his contest to the impugned judgment solely on grounds that an Umpire under 'the Act' in question was not required to give reasons for his opinion. As I have already discussed the judgment and order of the court below is not on grounds that the award is not supported with reasons rather the exhaustive finding recorded by the court below from paragraph 11 onwards until its conclusion confirms that the Umpire had gone beyond the terms of the contract in upholding the claim and which amounts to misconduct and thus was rightly interfered with by the court below. Such misconduct on the part of

the Umpire cannot be defended by taking refuge under ‘the Act’ in question by the appellant on grounds that the umpire was not obliged to give reasons.

For the reasons so discussed I am not persuaded by the argument of Mr. Singh to interfere with the judgment and order impugned.

The appeal is dismissed but without any order as to costs.

Let the lower court records be returned to the court concerned in a sealed cover forthwith.

(Jyoti Saran, J)

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