IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

The Hon'ble Justice Sabyasachi Bhattacharyya

A.P. No. 654 of 2011

State of West Bengal
Vs
Sambhu Nath Ghosh and another

For the Petitioner	:	Mr. Dhruba Ghosh, Sr. Adv. Mr. P. Sinha, Adv. Mr. A. Mandal, Adv. Mr. Ritoban Sarkar, Adv. Mr. Aishik Chakraborty, Adv.
For the respondents	:	Ms. Noelle Banerjee, Adv. Mr. Akash Agarwal, Adv. Mr. Saptarshi Kar, Adv.
Hearing concluded on	:	12.08.2024
Judgment on	:	16.08.2024

Sabyasachi Bhattacharyya, J:-

1. The present challenge has been preferred under Section 30, read with Sections 33 and 41 of the Arbitration Act, 1940 (hereinafter referred to as "the 1940 Act"), against an arbitral award passed under the said Act. The award initially matured into a decree of court, which was later recalled.

2. Learned senior counsel appearing for the petitioner contends that the award is vitiated, being devoid of reasons. Moreover, the award is perverse, being not based on any evidence. Thus, the learned Arbitrator misconducted himself or the proceedings within the contemplation of Section 30(a) of the 1940 Act, which is a valid

ground for setting aside of the award under Section 30 of the 1940 Act.

3. Learned senior counsel cites the judgment of *State of Rajasthan and another v. Ferro Concrete Construction Private Limited* reported at *(2009) 12 SCC 1* for the proposition that an Arbitrator can be said to have committed a legal misconduct by ignoring the terms of contract. In the said case, the Arbitrator had overlooked the fact that an additional provision regarding mobilization advance was introduced in the agreement itself.

4. Learned senior counsel also relies on a Division Bench judgment of this Court in the matter of *State of West Bengal v. Bharat Vanijya Eastern Private Limited,* reported at *2019 SCC OnLine Cal 3605* where it was observed that reasons are the links between the facts and the conclusions and they reveal the application of mind to the matters in issue and trace the journey from narrative to directive. Reasons are the life-blood of any acceptable process of adjudication and, as to whether an award or an order is reasoned or not depends more on the quality than the quantity of the words expended.

5. Learned senior counsel then cites *Dyna Technologies Private Limited v. Crompton Greaves Limited* reported at (*2019) 20 SCC 1*, where the Supreme Court stressed on the requirement of a reasoned award. The characteristics of 'reasons' were found in the said judgment to be that the reasons are proper, intelligible and adequate.

6. Learned senior counsel for the petitioner also relies *on Bharat Coking Coal Ltd. v. L.K. Ahuja,* reported at *(2004) 5 SCC 109,* where it was

enunciated that loss of opportunity/profits must be proved by evidence which is well-settled and accepted.

7. Next relying on *Unibros v. All India Radio*, reported at (*2023) SCC OnLine SC 1366,* learned senior counsel appearing for the petitioner argues that it becomes imperative for the claimant to substantiate the presence of a viable opportunity through evidence. The evidence should convincingly demonstrate that had the contract been executed promptly, the contractor would have secured the supplementary profits utilizing its existing resources elsewhere.

8. The petitioner also relies on *Ssangyong Engineering & Construction Company Limited. v. National Highways Authority of India (NHAI)* reported at (*2019) 15 SCC 131* in support of the proposition that perversity is still a good ground for challenge of an award and a finding based on no evidence at all or an award which ignores vital evidence would be perverse and liable to be set aside on the ground of patent illegality.

9. Learned senior counsel also argues that the reasons purportedly given by the learned Arbitrator are not legally sustainable. It is contended that the grounds for challenge of an award under the 1940 Act are much broader than those provided in Section 34 of the Arbitration and Conciliation Act, 1996 (for short, "the 1996 Act"). Giving reasons, it is submitted, is a basic requirement of natural justice.

10. By placing various portions of the award under the different heads of claims, learned senior counsel appearing for the petitioner argues that the Arbitrator's statements were sweeping generalizations and

conclusions drawn at the whims and fancy of the Arbitrator, which cannot qualify as findings of fact at all.

11. It was a fallacy on the part of the Arbitrator, it is argued by the petitioner, to grant the different claims of the claimant merely because compensation (LD) was not imposed by the respondent/petitioner. Mere non-imposition of penalty or compensation by the employer does not mean that the claim of the claimant is admitted or that the claimant is entitled to be compensated.

12. It is argued that while granting the reliefs, the Arbitrator has observed that "hindrances which the claimant had obtained in proceeding with the work could not be removed by the respondent in time, causing delays thereby". However, the specific hindrances and/or how the respondent/present petitioner was responsible to remove them have not been specified in the award.

13. No reason has been given regarding any particular breach having been described or proved, rendering the award perverse, being based on no evidence. Also, there is no explanation as to how reasonable expenditure was calculated and why 75 per cent of the same was awarded whimsically. Similarly, for Claim 2(b), 50 per cent of the alleged entitlement of the claimant was awarded without any rhyme or reason. The award on Claim 2(b) was also entirely devoid of reason. While granting Claim 2(a), the learned Arbitrator held that the respondent/present petitioner was "partly" responsible for the prolongation of the work and therefore the claimant is entitled to be

compensated for increment in price of materials. However, no particulars have been given.

14. The award given under the other heads is also devoid of reason. The Arbitrator goes on to make his own calculations and allow different percentages of the amount quantified, without furnishing proper break-ups or adverting to any evidence.

15. The learned Arbitrator applied his own calculations based on his own formula of the expected profit per month for 50 months and allowed one-third of it, again whimsically and without any evidence.

16. With regard to the Claim 2(g), for loss on account of non-execution of profitable items of works, the Arbitrator merely noted that the claimant had revised its claim from Rs. 6,00,000/- to Rs. 3,68,262/- and held that since the jobs were based on drawings, the claimant cannot be responsible for less execution of work. The said observation is meaningless, it is argued, and cannot be construed as 'reason'. Even the adjudication on the other claims, it is argued, was entirely devoid of reasons.

17. Learned counsel appearing for the claimants/respondents controverts the submissions of the petitioner and argues that the Arbitrator furnished elaborate reasons for grant of the award under different heads. It is pointed out that only some of the claims were allowed. If the award was tainted by perversity, some of the claims would not have been turned down. Learned counsel argues that the award was passed after consideration of pleadings, documentary evidence on record as well as other evidence.

18. Learned counsel for the respondents submits that the specific grounds for each of the claims were specified by the Arbitrator. For Claim 2(a), relating to damage and loss caused by the increase in the cost of work due to rise in the price in the labour and material for 50 months, the Arbitrator held that despite delay, the respondent/present petitioner, although entitled under the contract, did not impose any liability or demand compensation from the claimant. The State/petitioner was partly responsible for the delay beyond 24 months and the calculation was based on the relevant RBI Bulletin which was verified by the Arbitrator. The computation of the claimant was thoroughly scrutinized by the Arbitrator and widely accepted formulae in the commercial field were applied by the Arbitrator in coming to his conclusions.

19. With regard to Claim No. 2(b) as well, the Arbitrator found that the head office of the claimant's firm and site of work were in the same city which led to reduction of the amount claimed by 50 per cent.

20. Regarding Claim No. 2(c) in respect of extra additional on-site expenses for the overrun period of 50 months, the Arbitrator categorically scrutinized the correspondence exchanged between the parties and found that the State did not remove the hindrances that cropped up during the execution of the work, which caused the delay. The hindrances could be removed if the State took diligent steps.

21. The break-up in support of the claims was set out in the award itself. Reasons were given and documentary evidence was considered for grant of the other claims as well.

22. Regarding Claim No. 2(g), the Arbitrator found that since the job was executed strictly based on the drawings furnished by the State, the claimant could not be held responsible for less execution of the work and allowed ten per cent of the amount of unexecuted work by deducting the amount of work executed from the value of the contract.

23. As regards the refund of security deposit, it is argued that the same was awarded after taking into consideration the final bill prepared by the respondent/petitioner, containing a positive figure which stood released by the respondent/petitioner.

24. Learned counsel argues that initially the present petitioner had argued that Clause 25 of the General Conditions of Contract contained a mandate on the Arbitrator to pass a speaking award by reciting facts and reasons in support of the same. However, upon being pointed out by the claimant/respondent that the said Clause came into effect only subsequently vide G.O No. PWD Circular no. 11235A dated October 1, 1986, whereas the work order was of October 9, 1983, the said argument was not pressed by the respondent/petitioner.

25. However, from the very same Circular, it is evident that before 1986, the PWD arbitrations did not require the Arbitrator to pass a speaking award with reasons.

26. Learned counsel for the claimant submits that under the old Act, in the absence of any requirement in the arbitration agreement to record reasons, an award could not be set aside on the ground that the same was not supported by reasons. In such context, learned counsel cites

Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and Others reported at *(2005) 6 SCC 678.*

27. Learned counsel for the petitioner next relies on a co-ordinate Bench judgment of this Court in the matter of *Reliance Industries Limited V. Khaitan Transport Company Private Limited* reported at *MANU/WB/0022/2010* where it was held that an award merely recording submissions and conclusions by awarding damages was not to be interfered with as it was a non-speaking award and the arbitration agreement did not require the Arbitrator to give reasons.

28. Learned counsel next cites *Harish Chandra & Company. v. State of Uttar Pradesh through superintending engineer* reported at *(2016) 9 SCC 478* where it was held by the Supreme Court that errors of fact, inadequacy of reasons, alternate and more plausible view and improper appreciation of evidence are not grounds on which an award can be set aside.

29. Learned counsel relies on *Hindustan Tea Co. Vs. K. Sashikant Co. and Another* reported at *AIR 1986 (Supp) SCC 506* for the contention that an award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or failed to appreciate facts, since the Arbitrator is made a final arbiter of the disputes between the parties.

30. Learned counsel next relies on *NTPC Limited v. Deconar Services Private Limited* reported *at (2021) 19 SCC 694*, where the Supreme Court reiterated that courts do not sit in appeal over an award. The possible view of Arbitrator in the said case under the 1940 Act, upon an interpretation of the contract, to allow escalation cost beyond the

contractual period, was not to be questioned or be interfered with on another different view.

31. Learned counsel then cites *M/s Sudarsan Trading Co. v. Govt. of Kerala and another* reported at *(1989) 2 SCC 38* for the proposition that unless the terms of the contract were so incorporated with the award, the court is not entitled to refer to them to conclude that the award was wrong in law or under the contract. Learned counsel relies on *Union of India v. Bungo Steel Furniture Private Ltd* reported at *AIR 1967 SCC 1032* where the Supreme Court held that unless the law/Rules were incorporated in the award, the court is not entitled to refer to them for ascertaining whether there was an error of law on the face of it.

32. In controverting the arguments relating to the award not being based on evidence, learned counsel for the claimant/respondent cites *Eastern and North East Frontier Railway Co-operative Bank Ltd. v. B. Guha and Co.*, reported at *AIR 1986 Cal 146*, where the Arbitrator had allowed the claim without indicating the basis or disclosing any proposition of law. However, it was not proved to the satisfaction of the court that there was no evidence at all before the learned Arbitrator, for which the award was not interfered with.

33. Next relying on *Bharat Coking Coal Ltd. Vs. L.K. Ahuja*, reported at *(2004) 5 SCC 109*, learned counsel submits that the scope of interference by the court is limited once the Arbitrator has applied his mind to the matter before him. For interference, the absence of evidence must be apparent on the face of the record.

34. Mere alternate view that actual proof is required cannot be a reason to interfere, it is argued. In support of such proposition, the claimant/respondent cites *F.T. Kingsley Vs. The Secretary for Indian in Council*, reported at *MANU/WB/0258/1922* and *Alstom Projects India Limited Vs. Galaxy Engineering Contractors*, reported at *MANU/WB/0314/2010*.

35. Learned counsel for the respondent next relies on *McDermott International INC. Vs. Burn Standard Co. Ltd. and others*, reported at *(2006) 11 SCC 181*. It was observed there that the method used for computation of damages will depend on the facts of each case and that the Arbitrator can quantify a claim by taking recourse to various formulae applicable in building contracts like Hudson, Emden, Eichleay, etc.

36. Learned counsel also cites *Santa Sila Devi and another vs. Dhirendra Nath Sen and Others*, reported at *AIR 1963 SC 1677*, where a Three-Judge Bench of the Supreme Court held that the court should approach an award with a desire to support it rather than to destroy it by calling it illegal.

37. *Batokristo Roy Co. (Pvt.) Ltd. Vs. H. Polesy and Co. (Importers) Pvt. Ltd. and others*, reported at *AIR 1975 Cal 467*, is cited by the present respondent for the proposition that there was no scope to assess merits or re-decide damages awarded by the Arbitrator in an application under Section 30 of the 1940 Act.

38. Lastly, learned counsel cites *S.D. Shinde Tr. Partner Vs. Govt. of Maharashtra and Others*, reported at *2023 SCC OnLine SC 1045*,

where the Supreme Court held that when adjudging whether an award calls for interference, the Court must be conscious that the Arbitrator is the sole judge of facts and unless an error of law is shown, interference with the award should be avoided.

39. Before entering into the merits of the case, the argument of the respondent/present petitioner that the grounds of challenge to an award under the 1940 Act was much broader than the 1996 Act, is required to be considered. Under Section 34 of the 1996 Act, an award can be challenged if a party has some incapacity, the arbitration agreement is not valid under the law to which the parties are subjected, the applicant was not given proper notice of appointment of Arbitrator, the arbitral award deals with a dispute beyond the contemplation of the arbitration or the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement between the parties.

40. Also, the subject-matter of the dispute not being capable of settlement by arbitration under the law in force and the award being in conflict with the public policy of India afford grounds of challenge.

41. Among the other grounds, relevant in the context is the award being in conflict with the most basic notions of morality and justice. Conspicuously, the 2015 Amendment to the 1996 Act has also introduced patent illegality appearing on the face of the award as a ground of challenge, although the proviso thereto cautions that the said ground cannot be attracted merely because of an erroneous application of law or by re-appreciation of evidence.

42. As opposed to the same, the grounds under Section 30 are much limited and stringent. The said provision is set out below:

> ***"30. Grounds for setting aside award.***—*An award shall not be set aside except on one or more of the following grounds, namely:-*
> *(a) That an Arbitrator or umpire has misconducted himself or the proceedings;*
> *(b) That an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;*
> *(c) That an award has been improperly procured or is otherwise invalid.****"***

43. By judicial opinion, patent perversity has been incorporated into the ground stipulated under Section 30(a) of the 1940 Act by treating the same to be a misconduct of the proceedings by the Arbitrator.

44. Seen in such context, the argument of the petitioner that the 1996 Act grounds are more stringent, cannot be accepted. Rather, the 1940 grounds are much more limited in context.

45. Adverting to the impugned award in the present case, it is found that the learned Arbitrator has assigned some reason or the other to back up most of the components of the award. Some of the claims have been turned down and need not be looked into, having not been challenged by the claimants.

46. Under Claim 2(c), which was for extra additional on-site expenses during the overrun period for 50 months, the Arbitrator has awarded Rs. 2,51,250/-. Elaborate reasons were assigned for passing such award. The award reflects that the learned Arbitrator scrutinized the relevant correspondence and found that the hindrances which the claimants had faced in proceeding with the work could not be removed

by the respondent/present petitioner in time, causing delays. It was also recorded that the claimant could have completed the work but for the hindrances which could be avoided if the respondent/petitioner took steps more diligently towards removal of the same.

47. Another important consideration before the Arbitrator, as reflected in the award, was that despite being entitled under the contract, the employer/present petitioner did not impose on the claimants penalty/compensation in terms of the in-built provisions of the contract. On such premise, the learned Arbitrator proceeded to hold that the claimants were not responsible for the delay. Since the delay admittedly occurred, in view of the finding that the claimant was not responsible for the same, the conclusion that the respondent/present petitioner failed to remove the hindrances was perfectly justified.

48. Although the learned Arbitrator, in the passing, refers to "partial breach", he records that on perusal of the records available with him, pleadings filed by the parties and correspondence by way of various letters exchanged between the parties, he found that the execution of the job was prolonged beyond the time-frame fixed in the contract due to various defaults on the part of the respondent/present petitioner.

49. Importantly, the detailed breakup in support of the claim in Annexure-II to the Statement of Claims was considered at length and the learned Arbitrator considered the individual components of expenses with regard to Site-in-Charge, Site Supervisor, guards/watchmen, etc. and arrived at his conclusion regarding the expenditure incurred by the claimants during the 50 months' enlarged

period. In spite of the same, only 75 per cent of the amount was awarded.

50. The respondent/petitioner has raised a question as to why 75 per cent was allowed and seeks to insinuate that the same shows the whims of the Arbitrator. However, it is not for the respondent in the arbitral proceeding to challenge the same, since the consequential reduction of the claim by 25 per cent went in favour of the respondent/present petitioner. If at all, the claimants would be aggrieved with partial refusal of their claim and could have challenged the said portion of the award.

51. Moreover, the learned Arbitrator, in his discretion, chose to award the claim partially, for which it cannot be automatically deduced that the award was tainted by arbitrariness.

52. With regard to sub-head (b) under Claim 2 in respect extra additional on-site expenses during the overrun period, undoubtedly the Arbitrator held that the claimants had not been able to prove their entitlement to the amount "fully" as claimed. However, the Arbitrator also held that while adjudging the claim, the very aspect of infrastructure which the claimant was expected to maintain for execution of the job was taken into consideration. The Arbitrator also considered the fact that the head office of the claimants' firm and the site of work are situated in the same city. Based on such premise and looking into the pleadings of the parties, the Arbitrator quantified the entitlement of the claimant at Rs. 3,000/- per month on account of the extra additional on-site expenses. Even thereafter, only 50 per

cent of the same was allowed. Reasonable guesswork is permissible in such cases for arriving at the quantum, in the absence of specific details. Thus, the quantum awarded cannot be said to be perverse on such count. Also, it cannot be said that the same was not backed by any reason at all.

53. The Supreme Court, while dealing with challenges to awards under the 1940 Act, has repeatedly reiterated that the quality or sufficiency of reasons cannot be looked into at all by the court under Section 30 of the said Act. In fact, the very introduction of Clause 25 in the General Conditions of the Contract (standard form), incorporating the necessity for the Arbitrator to pass a speaking award by reciting the facts and reasons in support of the award, shows that prior to the introduction of the said Clause in 1986, at the relevant point of time which is applicable to the present case, there was no such requirement in the contract at all.

54. In *Rajendra Construction Company (supra)*, the Supreme Court categorically held that under the 1940 Act, there was no requirement for the Arbitrator to pass a speaking award with reasons. A co-ordinate Bench of this Court in *Reliance Industries (supra)* also held that in a non-speaking award where the arbitration agreement did not require the Arbitrator to give reasons, mere recording of submissions and conclusions would suffice.

55. The next component of argument of the respondent/petitioner is that the reasons purportedly given by the learned Arbitrator are not legally sustainable.

56. However, the said argument is not tenable in the eye of law, since it is not for the court, within the limited jurisdiction under Section 30 of the 1940 Act, to explore and examine the sufficiency or quality of evidence and/or to re-appreciate the evidence on such count. In *Harish Chandra (supra)*, the Supreme Court held that an award/order cannot be set aside on the ground of error of fact, inadequacy of reasons, alternate or more plausible view and/or improper appreciation of evidence.

57. In *Hindustan Tea (supra)*, it was held that an award cannot be set aside on the ground that the Arbitrator had reached a wrong conclusion or had failed to appreciate facts, since the Arbitrator is the final arbiter of the dispute between the parties.

58. In *NTPC Limited (supra)*, it was observed that the possible view of the Arbitrator under the 1940 Act, upon an interpretation of the contract, to allow escalation cost beyond contractual period cannot be questioned by the court.

59. In *Bharat Coking Coal Ltd (supra)*, it was observed by the Supreme Court that absence of evidence, for the purpose of interference with an award, must be apparent on the face of the record. In *Eastern and North East Frontier Railway Cooperative Bank Limited (supra)*, it was again reiterated by this Court that in case the Arbitrator allowed the claim without indicating the basis or disclosing any proposition of law, it had to be proved to the satisfaction of the court that there was no evidence at all before the learned Arbitrator.

60. The same view has been repeated time and again by the Supreme Court, as is evident from the judgments cited on behalf of the claimants/respondents.

61. In fact, as discussed above, the present impugned award sufficiently reflects application of mind by the learned Arbitrator and detailed break-ups being given by the Arbitrator. The learned Arbitrator also took into account different factual considerations on the basis of evidence and pleadings of the parties. The same being reflected from the award itself, the quality or sufficiency of the reasons cannot be gone into under Section 30 of the 1940 Act.

62. As laid down in *McDermott International INC. (supra)*, the method used for computation of damages depends on the facts of the case and it is within the discretion of the Arbitrator to apply the various formulae applicable in building contracts. The Arbitrator has precisely done so in the present case which, thus, cannot be faulted.

63. In *Batokristo Roy Co. (Pvt.) Ltd. (supra)*, this Court had held that there is no scope to assess the merits or re-decide the damages awarded by the Arbitrator in an application under Section 30 of the 1940 Act. The Supreme Court held in *S.D. Shinde Tr. Partner (supra)* that the court must be conscious that the Arbitrator is the sole judge of facts. An award has to be approached with a desire to support it rather than to destroy it by calling it illegal, since such an award is "*de praemissis*", as observed by the Supreme Court in *Santa Sila Devi (supra)*.

64. With regard to the dismissal of the counter claims of the respondent/present petitioner as well, it cannot be said that no

reasons whatsoever were attributed. The Arbitrator, in his discretion, considered the facts of the case and held that there was no reason to allow the counter claims. The award itself reflects that the learned Arbitrator thoroughly scrutinized the counter claims together with the break-ups given in the same and calculations as set out in the counter statement. The learned Arbitrator also recorded that it did not escape his attention that the amount which according to the respondent was payable had been released through the final bill prepared by it, that too without any reservation for claiming any sum from the claimant.

65. The entire award is strewn with reasons. Even while granting the claim of loss on account of non-execution of profitable items of works, the learned Arbitrator considered the break-up of the claim as appearing in Annexure-II of the Statement of Facts, the details of which were also submitted in the Minutes of the 8th Sitting dated September 24, 2010, where the claimants had restricted their claim, which is also reflected in the award.

66. The learned Arbitrator reasoned that the job-in-question was executed strictly based on the drawings furnished by the respondent/present petitioner and therefore, the claimant cannot be held responsible for less execution of the work, be it on account of preparation of incorrect estimate by the respondent or for any other reason. Such premise cannot be called into question within the limited span of Section 30 of the 1940 Act.

67. Thus, on a comprehensive assessment of the award and the arguments of the parties as well as the law applicable, this Court is of

the firm opinion that no interference is called for with the impugned award under Section 30 of the Arbitration Act, 1940. Accordingly, A.P. No. 654 of 2011 is dismissed on contest, thereby affirming the impugned award dated October 23, 2010.

68. There will be no order as to costs.

69. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)