
(1986) 10 DEL CK 0013

In the Delhi High Court

Case No : Suit No. 1811A of 1985 and Interim Application No. 342 of 1986

Ashwin Vanaspati Industries Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 06-10-1986

Acts Referred:

Citation : (1986) ILR Delhi 506

Hon'ble Judges : Mahesh Chandra, J

Bench : Single Bench

Advocate : S.L. Watel, Madan Lokur, R.K. Anand, S.P. Sharma, Amit Khemka and Rakesh Sidarth, for the Appellant;

Judgement

Mahesh Chandra, J.

(1) By this order I propose to dispose of suit No. 1811-A of 1985 filed by M/s. Ashwin Vanaspati Industries Pvt. Ltd. (hereinafter referred to as Contractor) against Union of India under Sections 14 and 17 of the Arbitration Act for getting the Award filed in the Court and making it a Rule of Court, and objections filed against the award under Sections 30 and 33 of the Arbitration Act and registered as I.A. 342 of 1986.

(2) In suit No. 1811-A/85 it was contended by the Contractor that the contractor had entered into contract with Union of India for supply of 4600 Mt of Vanaspati for supply to defense Services in accordance with the terms and conditions as reduced in acceptance of tender No. .J-13031/17/237180-PUR- Iv dated 3rd October, 1980 but the Contractor could not- complete the supplies for certain acts of omission and commission of the Union of India besides some other reasons and supplied only 3450 Metric Tonnes of Vanaspati, leaving a balance quantity, of 1150 Metric Tonnes when the said contract was illegally and wrongfully cancelled by the Union of India at the risk and cost of the Contractor on 3rd June, 1981 and thereafter the Union of India on 6th June, 1981 issued a risk purchase tender enquiry No. J-12031/2181-PUR-IV dated 6th June, 1981 and

a notice thereof was received by the Contractor and in pursuance of the said notice the Contractor submitted his tender and although the tender of the Contractor was lowest it was not considered even after negotiations during which the Contractor had complied with all the requirements as laid down by the Union of India to the extent of furnishing security deposit of 10 per cent amounting to Rs. 13,31,125 and instead the Union of India insisted on cash security for this amount and as such ignored the offer of the Contractor despite the fact that at the time of placement of risk purchase contract Union of India had a valid bank guarantee of Rs. 24,33,505 and a further sum of Rs. 9,54,935.59 with it on behalf of the Contractor; that in pursuance of an application moved by the Contractor u/s 20 of the Arbitration Act Union of India appointed an arbitrator and the arbitrator after hearing both the parties delivered her award on 29th day of August, 1985 dismissing the claim of Union of India for risk purchase loss against the Contractor and the arbitrator had held that the Union of India had failed to observe the principles of mitigation of damages and directed Union of India to release all amounts withheld with respect to above mentioned claim and also to release all bank guarantees given by the contractor and as such it was prayed that the arbitrator be directed to file the award in the court Along with full record of the case and a Judgment be pronounced in terms of the award u/s 17 of the Arbitration Act together with interest at the rate of 18 percent on the amount withheld by the Union of India from one month from the date of award and costs of the proceedings.

(3) In pursuance of the above mentioned petition notice was issued to the arbitrator, the respondent No. 3 as also to the respondents I and 2 and consequently the award was filed in the Court and it was at that stage that objections registered as I.A. No. 342 of 1986 were filed" by the Union of India. Union of India contended in the objections that on the failure of the contractor to supply full quantity of Vanaspati and consequent cancellation of the contract at contractor's risk and cost, a tender enquiry for the repurchase of the unsupplied quantity of Vanaspati was issued on 6th June, 1981 with a notice thereof to the Contractor and it was categorically indicated in the said notice that in case the offer of the Contractor was found acceptable than the Contractor was to furnish cash security as required under Clause 18(i) of the Terms and Conditions of the agreement" which clearly stipulates a specific condition with regard to the furnishing of security deposit in respect of risk purchase contract and the Contractor submitted its tender which was also lowest but the said tender could not be considered as the Contractor had failed to furnish advance security deposit of 10 per cent in spite of specific condition in this behalf and Union of India was left with no option but to ignore the Contractor's tender and place the contract on the next best possible offer only with a view to reiteration of loss and consequently the next lowest tender of M/s. Madhusudan Vegetable Ltd. was accepted vide At No. J-1203/1/131/81-PUR Iv dated 16-7-1981 and the risk purchase supplier thereafter completed the supply and were paid and in this manner Objector Union of India suffered an actual loss of Rs. 20,78,700 which

the Union of India is entitled to recover from the Contractor and even a notice of demand in this behalf was also served upon the Contractor. It has further been submitted on behalf of Union of India that the award in the instant case of the arbitrator is a speaking one and from the face of the award it is clear that the Arbitrator has committed error by ignoring the agreed terms of the contract and has committed an error in dismissing the actual risk purchase loss and the error was on the face of the award and consequently, the arbitrator has misconducted himself and the proceedings; that the Award is based on no evidence; that the arbitrator has further erred in not only not allowing the loss of difference Between the original contract rate and the rate quoted by the said M/s. Madhusudan Vegetable Ltd. against the risk purchase tender enquiry but also in not allowing atleast the risk purchase loss at the rate of difference between the original contract rate and the rate quoted by the petitioner against risk purchase tender enquiry and as such the objections be accepted and the award be set aside.

(4) The Contractor in its affidavit by way of reply to the objections of the Union of India has contended that the Objections have not been filed within time: that objections have not been filed in proper manner and form; that there is no error or mistake of law apparent on the face of the award and the arbitrator had not misconducted himself or the proceedings and as such the objections be dismissed and the award be made a Rule of Court.

(5) I have heard learned counsel for the parties and have gone through the award and after giving my considered thought to the matter I have come to the following findings :

(6) A perusal of pleadings of the parties reproduced above would show that there is not much dispute with regard to the facts of the case. The parties are precisely in agreement even on the fact that as per risk purchase inquiry if contractor's quotations happened to be lowest acceptable, the contractor was required to furnish security deposit in cash equivalent to the difference between contractor's quotations and the next best quotation or 10 per cent of the proposed contract value, whichever was more, by specified date before placement of the contract on the Contractor, failing which the offer of the Contractor was to be ignored and contract could be placed on the next best offer considered. However, now according to Union of India such security deposit was to be only in cash, whereas according to the Contractor the requisite security deposit could and should have been appropriated from the Bank Guarantee kept alive in this behalf on the original contract or out of the money due to the Contractor lying with the Union of India. It is not even disputed by Union of India that there certainly was existing sufficient bank guarantee and also some cash money with the Union of India under the original contract to the credit of the Contractor. It may be mentioned here that evidence in this petition was recorded on affidavits which are on the pattern of the pleadings of the parties and need not be reproduced here. Reliance has also been placed upon the award and arbitrator's proceedings.

(7) To appreciate the objections of the Union of India reference to the award would be necessary. The award reads as under :-

"Award made this 29th day of August, 1985 Whereas 1. "Mrs. R. Lakshmanan, Additional Legal Adviser to the Government of India, Ministry of Law and Justice, New Delhi, was appointed as Sole Arbitrator by the Secretary Department of Food. New Delhi, vide letter No. J-19011/1/82 Claims dated 13th January, 1984, under the term and conditions agreed to by the parties with reference to the At mentioned above and the difference between them relating to the said A/T were referred to my arbitration; And whereas I took upon myself the burden of the said reference; And whereas I heard and examined and considered the statements of the parties and their evidence; I do hereby make my award as follows :- I find that the contractor committed breach of contract inasmuch as they failed to supply the complete stores as per terms and conditions of the contract. However, I also find that on the date of placement of another contract by Union of India at the risk and cost of this contractor, Union of India was admittedly in possession of an amount due to this contractor for the supplies made to Union of India. I find that this amount is more than the amount of security deposit demanded by Union of India for placing the risk purchase contract, on this contractor, whose offer was the lowest. In. addition. Union of India also had in their possession a Bank guarantee from this contractor, valid on the date of placement of risk purchase contract on another contractor, as protection for any claim Union of India may have against this contractor. Therefore, demanding a further amount in cash as security and ignoring this lowest offer of this contractor on that ground is not valid. I find that Union of India failed to observe the principle of mitigation of damages. Therefore, I dismiss the claim of Union of India for Rs. 20,78,700 (Rupees twenty lakhs seventy eight thousand and seven hundred only) and direct Union of India to release all amount withheld with respect to the above mentioned claim and also to release all bank guarantees given by the contractor. The parties shall bear their respective cost of the proceedings before me. In witness whereof I have signed this award his 29th day of August, 1985. sd/- (Mrs. R. Lakshmanan) Sole Arbitrator."

(8) A perusal of this award would show that this is a speaking award in which the finding of the arbitrator is that "contractor committed breach of contract inasmuch as they failed to supply the complete stores as per terms and conditions of the contract". This brings out that reference has been made in the award to the terms and conditions of the contract in the B award itself. It has been further stated by the arbitrator in the award that "I also find that on the date of placement of another contract by Union of India at the risk and cost of this contractor. Union of India was admittedly in possession of an amount due to this contractor for the supplies made to Union of India. I find that this amount is more than the amount of security deposit demanded by Union of India for placing the risk purchase contract on this contractor, whose offer was the lowest". This fact appears to be wrong inasmuch as only Rs. 9,54,935.59 as

against demanded cash security deposit of 10 per cent (amounting to Rs. 13,31,125.00) were lying with Union of India due to contractor. It has been further observed in award that "in addition, Union of India also had in their possession a Bank guarantee from this contractor, valid on the date of placement of risk purchase contract on another contractor, as protection for any claim Union of India may have against this contractor". In the face of these facts the arbitrator has come to the conclusion, "therefore demanding a further amount in cash as security and ignoring this Lowest offer of this contractor on that ground is not valid. I find that Union of India failed to observe the principles of mitigation of damages". These observations of the arbitrator show that the arbitrator is wrong on facts and also the arbitrator after by passing the terms and conditions of the risk purchase contract as to security deposit in cash, may be on equitable grounds, has tried to carve out and set up a new Contract between the parties as against the actual contract existing between the parties and this makes clear that he has thereby erred both on fact and in law and this error of the arbitrator is apparent on the face of the award itself. Once his conclusion is arrived at that there is an error of law on the face of the award, principle of law laid down in Chaspsey Bhara & Company v. Jivraj "Balloo Spinning and Weaving Company Ltd.; Air 1923 P C 66(1) and followed in various Supreme Court rulings would come into play. It has been held in Air 1923 P C 66 :

"Where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final Judge of all questions both of law and of fact. The only exceptions to that rule are cases where the award's the result of corruption or fraud, and one other, which though it is to be regretted is now, firmly established viz. where the question of law necessarily arises on the face of the award or upon some paper accompanying and forming part of the award".

It has been observed thereafter that :-

"An error in law on the face of the award means that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

(9) After referring to , 1923 P C 66, it was similarly held by the Supreme Court in Union of India (UOI) Vs. A.L. Rallia Ram, as under :-

"An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclose by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which ate entrusted with the power to facilitate arbitrator and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding, if it be

reached fairly after giving adequate opportunity to the parties to place the grievances in the manner provided by the arbitration agreement. But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous".

The Supreme Court further also observed that :-

"An error in law on the face of the award means : "you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a "reference is made to a contention of one party, that opens the door to setting first what that contention is, and then going to the contract on which the parties" rights depend to see if that contention is sound."

(10) It was similarly held in *Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI)*, New Delhi, as follows :-

"As the parties choose their own Arbitrator they cannot when the award is good on the face of it, object to the decision either upon the law or the facts. Therefore, even when an arbitrator commits a mistake either in law or in fact in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake. Mere reference to the contract in the award is not to be held as incorporating it."

(11) It was reiterated by the Supreme Court in *N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another*, that :

"The Umpire as sole arbitrator was not bound to give a reasoned award and if in passing the award he makes a mistake of law or of fact. that is no ground for challenging the validity of the award. It is only when an erroneous proposition of law is stated in the award and which is the basis of the award. can the award be set aside or remitted on the ground of error of law apparent on the face of the record."

(12) It has always been open to the arbitrator to give a non speaking award but where the arbitrator chooses to speak in his award and the award is a speaking one and it can be shown that there is an error in law on the face of it, the award is liable to be set aside. This principle has not been deviated even in *Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore*, relied upon by a counsel for contractor wherein 1923 Privy Council 66 was quoted with approval but it was further held therein that :-

"In the present case, the arbitrator gave no reason for the award. We do not find in the award any legal proposition which is the basis of the award, for less a legal

proposition which is erroneous. It is not possible to say from the award that the arbitrator was under a misconception of law. The contention that there are errors of law on the face of the award is rejected."

(13) Similarly there can be no dispute with the principle enunciated in *The President; Union of India and another v. Kalinga Construction Co. (P) Ltd.*, therein it was held that :-

"In proceeding to set aside award appellate court cannot sit in appeal over the conclusion of the arbitrator by re-examining and re-appraising the evidence considered by the arbitrator and held that the conclusion reached by the arbitrator is wrong".

However, even in this ruling it was not disputed that if there was any error apparent in the award on the face of it, the award can be set aside.

(14) General proposition of law which emerges from these rulings is that the arbitrator, be he a layman or learned in the laws, is the chosen judge of the parties" and is the master of law and facts and his award so long as it is non-speaking is binding and cannot be set aside. But where the award is speaking one and there is any error of law on the face of the award, the Courts would interfere to set aside such an award; whether a particular award suffers from error of law on the face of it is a question which has to be considered in the light of observations in the award and where arbitrator has ignored the contract between the parties and /or has misconstrued the terms of the contract or misinterpreted the contract, and it can be gathered from the award on the face of it; it would tantamount to an error of law on the face of the award. In these circumstances it would be open to courts to even lift the veil and look into the terms of the contract.

(15) In the instant case, the award is contrary to the contract and the arbitrator has set up an all together new contract between the parties and has thereby misdirected himself and incorporated an error in law in the award which has resulted in the present situation and calls for setting aside of the award. Then the arbitrator in his award misunderstands the provision of the clause of the contract, there would be an error in law apparent on the face of the award and the Court would interfere and set aside the award. As the award was not based on the contract but dehors the same, it is to be set aside. It is well settled that the question of construction of any agreement, document of terms of the contract is a question of law. True that the Courts do not sit in appeal over the awards of arbitrators but the Courts are not powerless to interfere if it appears from the award. That the arbitrator has bypassed the contract between parties and has proceeded illegally in reaching his decision. In *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, had held :

"SECTION 16(1)(c) covers cases in which an error of law appears on the face of the award. But in determining what such an error is, a distinction must be drawn between cases in which a question of law is specifically referred and those in

which a decision on a question of law is incidentally material (however necessary) in order to decide the question actually referred. If a question of law is specifically referred and it is evident that the parties desire to have a decision from the arbitrator about that rather than one from the Courts, then the Courts will not interfere, though even there, there is authority for the view that the Courts will interfere if it is apparent that the arbitrator has acted illegally in reaching his decision, that is to say, if he had decided on inadmissible evidence or on principles of construction that the law does not countenance or something of that nature."

(16) Similarly in *F. R. Absalom Limited and Great Western (London) Garden Village Society Ltd.* 1933 A.C, 592, where the arbitrator had misconstrued the contract, it was held that award suffered from an error of law apparent on the face of the award. In this context it was observed in *M/s. Patel*

"It is also equally well settled that the question of construction of any agreement, document, or term of the contract is a question of law. Even in such cases, however, there is high authority both of Indian and English Courts for the view that the Courts are not powerless to interfere if it appears from the award that the arbitrator has proceeded illegally in reaching his decision for example, he has decided on evidence which is inadmissible or on principles of construction which the law does not countenance or some thing of that nature."

(17) In the case in hand, the arbitrator has held in the award that demanding a further amount in cash as security and ignoring the lowest offer of this contractor on that ground is riot valid" which is contrary to the terms of risk purchase notice and as such the award suffers from error of law on the face of it and as such is liable to be set aside. Similarly in this award arbitrator after holding that "contractor committed breach of contract inasmuch as they failed to supply the complete stores as per terms and conditions of the contract" has misdirected herself by thereafter holding that "I dismiss the claims of Union of India for Rs. 20,78,700" because the rates quoted by this contractor in risk purchase offer were much higher than his original contract rates and as such the Union of India would be in any case entitled to their differences at least. This again is error in Law on the face of award.

(18) There is nothing to suggest even remotely that objections of Union of India are time barred or that objections have not been filed in proper manner or form. Notice of filing of award was served on 3-1-1986 and objections were filed on 6-1-1986 and hence are within time. There is no specific manner or form of filing the objections which has been shown to have been violated in this case. In view of my discussions and findings above, the objections are allowed and this award is set aside.