
(1980) 08 DEL CK 0013

In the Delhi High Court

Case No : First Appeal No. (OS) 24 of 1970

Bhai Gian Chand Mohan Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-08-1980

Acts Referred:

Citation : (1982) 19 DLT 1 : (1981) ILR Delhi 646

Hon'ble Judges : Rajinder Sachar, J;O.N. Vohra, J

Bench : Division Bench

Advocate : S.N. Marwah, A.K. Marwaha and Vijaya Rao, for the Appellant;

Judgement

Sachar, J.

(1) This is an appeal against the order of P. N. Khanna, J. by which he dismissed the objections filed by the appellant and made the award dated 8-2-1965 given by Mr. O .P. Mittal, the arbitrator, in disputes which had arisen between the appellant and the respondent a rule of the court and passed a decree accordingly.

(2) The appellant entered into a contract for the construction of a trunk sewer along Najafgarh Road near Tilak Nagar, New Delhi in the year 1957-58. The work was to commence on 27-6-1957 and was to be completed within one year. Soon thereafter i.e. in November 1957 after the work had commenced it was decided to lower the depth of the entire sewer length by another 4.25 feet, "than originally planned. A schedule for completing the work was chalked out on 17-6-1959. Later the Union of India by its letter of 7-9-1959 claiming that the appellant had not completed the work in accordance with the agreement or the revised schedule, rescinded the contract. This led to a dispute which was referred to Mr. O. P. Mittal, Additional Chief Engineer, who gave his award on 8-2-1965. By the said award the arbitrator held that there was justification for the department to levy compensation under clause 2 of the agreement. He also held that the action of the department under clause 3 was justified and that an amount of Rs. 57,983 was recoverable from" the contractor for the extra cost

incurred by the department in getting the work executed through a second agency. The claim of the contractor for having suffered loss on account of cost of limbering, machinery etc. due to breach of contract, for the loss of profits and damages due to failure in sanctioning the rates for additional and substituted items of work and for cancellation of contract was found against the contractor/appellant. The Arbitrator held that out of the security deposits and earnest money lying with the department the contractor could be refunded the amount after adjusting recoveries under the two claims awarded in favor of the Union of India. After the award was filed in the Court the appellant filed objections to the award which were rejected by the impugned order of the learned single Judge who passed a decree in terms of the award. The contractor is aggrieved and has come up in appeal.

(3) The award is a non-speaking one and docs not give any reasons for the award of claim in favor of the department or for the rejection of the claim made by the appellant. It cannot be disputed that the arbitrator, was not bound to give a reasoned award. It is well settled that the scope for the court to interfere with an award is extremely limited. The court would be committing an error if it considered the matter as if it was sitting in appeal and in re-evaluating the evidence before the arbitrator *State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd., .*

(4) Broadly the plea before the arbitrator by the appellant was that he had not defaulted in the execution of the work. It was also the plea of the appellant (and this was urged before us by Mr. Marwah, the counsel for the appellant) that no rates were fixed for the extra work, the decision for which, had been taken in November 1957 and until the rates were so fixed the appellant could not be expected to carry on the work and Therefore apart from the fact that there was in fact no delay, but even if there was delay the fault could not be of the appellant. The respondent/union of India however throughout maintained that the fault was of the appellant, its case was that the rates had been fixed for extra work and that on 17-6-1959 a certain time table for completing the work had been agreed to mutually which was to be adhered to in view of the delays that had already taken place in the completion of the work. The arbitrator has allowed the respondents' claim but rejected the appellant's claim which means that according to the arbitrator the plea of the appellant that there was no delay or that no rates were fixed for extra work or that he had suffered damages for delays and failure in sanctioning the rates for additional and substituted items of work was not substantiated. Mr. Marwah sought to urge before us that in fact the rates were never settled and Therefore the arbitrator was wrong in finding that the appellant was at fault. He urged that appellant had carried out the work in time and there was no justification for the action of the department in rescinding the contract and taking action against him under clause 3 as was purported to be done by the Executive Engineer by his letter of 7-9-1959. The whole effort of Mr. Marwah was to persuade us to reappraise and peruse for ourselves the various documents and evidence led before the arbitrator and then to come to our own

independent conclusion as to the justification or otherwise of the action taken by the department and about the claims both of the department as well as of the appellants. Though Mr. Marwah insisted on taking us through the various documents, communications and material before the arbitrator but we feel that this exercise was in law a futility. We say this because the court does not sit as an appellate court over the award by the arbitrator. An award can be set aside if there is a judicial misconduct by the arbitrator or if there is an error apparent on the face of the award. A bald allegation of misconduct is of no consequence. A party challenging the award on this ground must give specific particulars and they are woefully lacking in the present case. Mr. Marwah of course urged that he was challenging the award within the limitation of the rule of there being an error on the face of the award. But the difficulty was that what Mr. Marwah characterised as only an effort to show error on face of award was in reality an effort to make us function as an appellate court over the award. That is why we feel that though we were taken through the whole record by Mr. Marwah it would not be proper for us to reappraise the evidence for ourselves. It is well settled that it is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. On the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning, the Court cannot proceed to determine whether the conclusion is right or wrong. It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award; vide *Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others*, .

(5) We may however, notice that there was apparently sufficient material before the arbitrator on which, he could have come to the conclusion that there was a default by the appellant. Thus in the letter of 24-7-1959 the Executive Engineer has complained that even a time table which was drawn on 17-6-1959 has not been adhered to by the contractor in as much as it was found that the contractor had fallen short of the time table by 43 per cent in Sector Iii with apparently no progress in Sector II; and that whereas by the end of July 1959 in Sector Ii the progress up to 20-7-1959 when the inspection took place was not even one R. Foot of the barrel, whereas by the end of July 700 R. Foot of barrel was required to be completed.

(6) Mr. Marwah also sought to contend that rate for the extra work had not been fixed and the appellant could not Therefore be proceeded against under clause Ii or III. No doubt that the appellant had mentioned in one of the correspondences complaining that the rate which the department had given was less and should be enhanced. But the department had repudiated the suggestion that the rates for extra work were not fixed and maintained in its letter of 7-9-1959 that rates had been fixed and that for one small item for which rate was being finalised payment had been made at the agreement rate and that the balance, if any, being a very small item will be payable to him. We are mentioning this not with a view to evaluating whether the "stand of the appellant or of the Union of India

was correct because that is not our function. We are making a mention of this only to show that this aspect of the matter was brought to the notice of the arbitrator and Therefore when he gave award in favor of the respondent he obviously found that the appellant was to blame for the delay. Mr. Marwah characterises the award as perverse and being without any evidence and says that because such an allegation is made it entitles the court to go through the whole record of the arbitration proceedings and find for itself whether there is some material on the face of which an award could have been given. Mr. Marwah would have the jurisdiction of this court under the Arbitration Act to be analogous atleast to that of a court in its extraordinary jurisdiction in writ proceedings so that the court should go through the record of the arbitrator with a view to find out whether in arriving ;it its conclusion there was some material on the basis of which it could have given its award. This however, is not within the ambit of the court under the Arbitration Act. It is well settled 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 a proposition of law is stated in the award and which is the basis of the award, and that is erroneous, can the award be set aside or remitted on the ground of error of law apparent on the face of the record; and it is also well settled that the Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out, whether or not the arbitrator has committed an error of law: vide N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, .

(7) Mr. Marwah in support of his arguments that the court is competent to look for itself through the pleadings referred us to a Judgment by V. D. Misra, J. in Suit No. 250-A of 1969 decided on 6-12-1973. The claim of the Union of India was that because of the rescission of the contract it had purchased tents at the risk of the contractor and was entitled to recover the amount of Rs. 72,675-27. The arbitrator had however, awarded Rs. 36,000. No reasons were given in the award for the arriving at that figure. Apparently Therefore, the award should have been unchallengeable. In the objections that were filed by the contractor it was specifically averred that after the rescission of the contract the Union of India had only purchased 1163 tents and Therefore under the risk re-purchase clause the loss suffered only on this account could have been awarded. The Union of India in reply took the stand that even if the purchase was effected only with regard to 1163 tents it was entitled to a full amount of Rs. 72,675-27. So notwithstanding that the loss was only on purchase of 1163 tents the government purported to claim loss for 9452 tents which it had admittedly not purchased. Obviously the loss So the government could only be with regard to the purchase of 1163 tents. Now the proposition of law is well settled that under a risk purchase clause the government could only be entitled to claim a loss actually suffered by it and could not claim any amount irrespective of the fact whether any loss was suffered or not; vide Union of India Vs. Tribhuwan Das Lalji

Patel, and Jaswant Rai Vs. Abnash Kaur, . It was in that context that, presumably on an agreed statement of facts that the learned Judge held the award to be vitiated by error apparent on the face of the record. V. D. Misra, J. however, went on to observe that as in the award a reference has been made to the claim of the defendant on the basis of risk purchase loss under the contract the said clause has been incorporated in the award and the court can look into it, and the reference to the pleadings and proceedings before the arbitrator was permissible. We feel, with respect, that these observations were obiter and in any case stated so broadly would run counter to the observation of the Supreme Court in M/s. Alien Berry and Co. Pvt. Ltd. v. The Union of India (AIR 1971 Sc 969) (6) which is as follows:

"Amere general reference to the contract in the award is not to be held as incorporating it. The principle of reading contracts or other documents into the award is not to be encouraged or extended".

The observation of Misra, J. cannot be read as permitting a court to come to its own decision on the merits of the case before the arbitrator by appraising evidence for it is well settled that a mere error in construing a contract between the parties which is referred to in the award simply to earmark the origin of dispute in question between the parties cannot be said to be an error in law on the face of the award; vide The firm of AIR 1927 164 (Privy Council) . The decision of Misra, J.. Therefore, cannot be read to be laying down that when there is a non-speaking award any general reference to the contract means that the whole of the contract becomes incorporated into the award permitting the court to look through the whole of the pleadings and the evidence before the arbitrator, because it would be wrong law if it were to be so read-

(8) We were also referred to a Judgment in Suit No. 136- A/74 decided on 16-5-1974. That case is clearly distinguishable. In that case the arbitrator had after reciting that the disputes and differences as contained in the statement of facts and the counter statement of facts received from both the parties had been considered by him and he thereafter awarded a sum of Rs. 15,000 in favor of the contractor. The learned Judge found that the reference to the arbitration was only in respect of the claim put forward by the objector and Therefore when the arbitrator gave a lumpsum by considering the statement of claim of the contractor as well as of the Railways which was to the extent of Rs. 1,67,772 the decision was on a matter which was outside the scope of reference, as Railways" claim had not been referred. Evidently if an award decides a matter which is beyond its reference it is committing a patent illegality. But that does not entitle the court to consider whether the view of the arbitrator on the evidence is justified.

(9) Mr. Marwah had referred to K.P. Poulouse Vs. State of Kerala and Another, . That case is clearly distinguishable. In that case the award was a speaking one and gave the reasons for its decision against the contractor. The dispute was whether the process of jetting was an authorised extra covered by the

agreement or not. The arbitrator had in its award at one place stated that Jetting is not an authorised extra covered by the agreement but it also found the Chief Engineer's rejection of the claim of the contractor for being paid extra for Jetting on the ground of non-inclusion of Jetting in the agreement by specifically relying upon that very letter wherein the issue of extra payment for jetting was left open even after the execution of the agreement. The Supreme Court found this conclusion of the arbitrator rejecting the claim of the contractor for extra payment for jetting to be rationally inconsistent and Therefore suffering from a manifest error apparent ex facie. It was in that context that the Supreme. Court noticed that there were two documents Ex. P-11 and P-16 which clearly had great relevancy to the matter in issue decided by the arbitrator and Therefore observed that if the arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision, the award will be vitiated. This case does not Jay down as Mr. Marwah sought to Urge that the court can go through the evidence on its own and come to its own independent conclusion, an argument rejected consistently by the Supreme Court, as is clear from some of the authorities noticed previously. Reference was made to The The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board, . Tins case is also distinguishable. In that case it was a speaking award. The court found that in giving the compensation the Umpire had made calculations for arriving at the market value of appellant's undertaking and had expressly excluded the value of the portion of services installed at the cost of consumers. This exclusion was against the provisions of the Indian Electricity Act and it was for that reason that it was held that the award was erroneous on its face. As a matter of fact it was reiterated in para 10 that an award is ordinarily not liable to be set aside on the ground that either on facts or on law it is erroneous. This contention of Mr. Marwah, Therefore, fails.

(10) Mr. Marwah had also contended that there was no evidence at all that rates for the extra work were fixed, He wanted to rely on the evidence of Mr. Patwari given in the suit in this court which is said to have been given on 21-7-1969 lo the effect that no separate rates were fixed for the extra work of 4.25 feet. But as the learned Judge has mentioned, Patwari was examined as RW1 and has specifically stated in his evidence on 5-11-1969 that rates for the alteration were fixed on 18-5-1969 and he produced documentary evidence in support of his statement that the rates were so fixed. It is Therefore not correct to say that no rates were fixed and Therefore no work could have been performed. That apart again the argument is sought to convert this court into a court of appeal over an award which is a non-speaking one. The question really urged by Mr. Marwah seems to be that applying the technical rules of evidence Patwari could not have been asked to give his evidence subsequently. We do not find that any such objection was taken to the production of the document Ex. R.W. 1/B by which the rates were said to have been fixed. In any cass this was a matter for the

arbitrator to go through, who was apparently satisfied that there was default by the appellant and we cannot go into it.

(11) Next contention was that the requirement of Clauses Ii and Iii of Conditions of Contract under which award has been made against the appellant were not satisfied. We cannot agree. Clause Iii permits the Divisional Officer to rescind the contract in case there is any breach of the clauses of the agreement and also permits the Divisional Officer to give the unexecuted work to another contractor to complete, in which case any expenses which may be incurred in excess of the sum which would have been paid to the original contractor if the whole work had been executed by him, shall be borne and paid by the original contractor and may be deducted from any money due to him by the Government under the contract or otherwise. Now claim No. 2 is under this head. Mr. Marwah says that no compensation is payable unless loss was proved. That no doubt is so. The arbitrator has found Rs. 57,983 due to the government from the appellant for the extra cost incurred by the department, and the action of the government under clause 3 to be justified. Evidently he must have been satisfied at the proof given to him about the extra cost incurred. Mr. Marwah wants us to hold that there was no evidence in support of it. On what precisely he bases this argument escapes us because no reasons are given for this finding. So how do we hold that reasons given in Law for this finding are erroneous, when the arbitrator has given no reasons. Objection is seriously taken to the award finding in favor of department under clause 2. The said clause provides that if the contractor failed to comply with the conditions to complete the work in the time allowed he shall be liable to pay as compensation an amount equal to I per cent or such smaller amount as the Superintending Engineer (whose decision in writing shall be final) may decide on the estimated cost of the whole work provided always that the entire amount of compensation to be paid under this clause shall not exceed 10 per cent on the estimated cost of work as shown in tender. Much was sought to be made by Mr. Manwah on the ground that 10 per cent compensation had been claimed and given by the arbitrator. The objection was that this was given as a lump without there being any proof of delay in executing the work. It will be seen that clause Ii provides for compensation, I per cent for each days" delay but on the maximum it cannot exceed 10 per cent. Evidently the number of days on which delay occurred and the loss that was suffered had to be shown to the arbitrator, who has found the action of department justified. That such a clause for according compensation for delay in executing work is perfectly legal and the decision within the sole ambit of the arbitrator is not open to any argument. In *Sardar Baldev Singh Sardool Singh V. The Union of India* AIR 1965 J & K 28) (10), on the ground that work had been delayed 10 per cent compensation was claimed under a similar condition like Clause 2 in the instant case. Arbitrator awarded 5 per cent compensation. Contractor challenged the award on the ground that arbitrator had committed an error in awarding compensation by misconstruing the provision of Section 74 of the Contract Act. Rejecting the contention M. Fazal Ali. J. (as his lordship then was) said that where, however, no reasons are given

by the arbitrator and the point of law argued is not apparent from any material which has been made the basis of the award by the arbitrator, it cannot be said that such an error of law is an error of law which is apparent on the face of the award. Where the arbitrator, Therefore, has granted what he considered reasonable compensation according to the terms of the parties, it cannot be said to involve an error of law much less an error of law apparent on the face of the award. It is not for the court to interfere with the discretion exercised by the arbitrator.

(12) Similarly is Union of India (UOI) and Another Vs. Vishwanath Sud and Another, wherein the arbitrator awarded compensation of Rs. 20,000 to the government under this very clause 2, namely for delay in executing the work. Refusing to interfere with the award the Division Bench speaking through, Pathak, C. J. (as his lordship then was) observed that the Award made by the Arbitrator is not a speaking award. The court is not entitled to make a roving and sifting investigation of the record and proceedings before the arbitrator, and constitute itself a regular court of appeal from the award. Thus the challenge to the award of compensation under clause 2 is incompetent.

(13) Another objection is that award of compensation under clause 2 and clause 3 is duplication and compensation can only be awarded under either clause. There is a fallacy in the argument. Under clause 2 compensation is awarded because of the delay in executing the work. It is the delay which has been occasioned during the course of doing work. As in the present case the fact that work had been delayed, even after a time table had been agreed on 17-6-1959 is apparent, though Explanation for the same was sought to be given by the appellant, which evidently has not been accepted by the arbitrator. Clause 3 deals with compensation for an entirely different matter. namely for excess payment for getting the incomplete work done from other contractor. Thus the argument of damages being awarded for same default twice is without any merit.

(14) Mr. Marwah. next wanted to invoke Section 55 of the Contract Act which provides that if a party to a Contract fails to do certain thing at a specified time the contract becomes voidable at the option of the promise and in that case if the promise accepts performance of such promise at any time other than that agreed, the promise cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed. Again this argument suffers from infirmity of assuming that there was an agreement not to hold the appellant responsible for the breach of contract in the matter of delay which had been occasioned earlier to 17-6-1959. Not only this is not so, but the correspondence shows that the case of the government was that even after 17-6-1959 the Contractor had committed breach. The question of invoking Section 55, Therefore, could not arise because in terms of clause 2 the delay to comply with the time condition renders the contractor liable to pay compensation for every day that the due quantity of work remains incomplete. The mere fact that the contractor carries on work after having committed a default does not mean that

the previous default has been washed off. He still remains liable in terms of the contract clause. Mr. Marwah refers us to clause 12 of the contract. The argument being that though this clause permits the Engineer-in-charge to direct the contractor to carry on the additional work but it also permits that in case the extra work is of a class of work for which no rate is specified in the contract, and is not entered into the schedule of rates, then the contractor will inform the Engineer- in-charge of the rate which he intends to charge and the Engineer-in-charge, if he does not agree to the rate, shall be at liberty to carry out such class of work that may appear to him to be necessary or advisable. We do not appreciate the relevancy of reference to this clause, because the rates had already been agreed to at which, the contractor was to work as is clear from the evidence which was read out by Mr. Marwah himself. Again this is a matter relating to the question whether in fact the rates were agreed to or not. The arbitrator has found the contractor responsible for the delay in carrying out the work which evidently means that the pleading that the rates had not been agreed to by the contractor and Therefore he could not be blamed for any fault was not accepted by the arbitrator and we cannot hold an enquiry on our own into the correctness of this finding. "

(15) As a result of the above we find no merit in the appeal. We dismiss the same. The parties will bear their own costs of the appeal.