
(2001) 10 DEL CK 0119

In the Delhi High Court

Case No : Suit No. 2003/95 and is 9534/97

Brij Basi Udyog

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 09-10-2001

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2002) 95 DLT 739

Hon'ble Judges : Vinod Sagar Aggarwal, J

Bench : Single Bench

Advocate : Ashok Bhasin and Chetan Dutt, for the Appellant; Dalip Singh, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Aggarwal, J.—The petitioner, Brij Basi Udyog, had entered into a contract with respondent No. 1 for supply of crash wire tenders with mounted equipment. The said contract had an arbitration clause whereby the disputes between the parties were to be settled through arbitration. Certain disputes had arisen between the petitioner and respondent No. 1 and respondent No. 3 (Brig. Gur Das Verma) was appointed as the sole arbitrator. The arbitrator has since submitted the award and Therefore the petition had been filed for making the award a rule of the court and for passing a decree in terms of the said award.

2. In pursuance of the notice having been issued objections had been filed on behalf of respondent NO. 1 u/s 30 and 33 of the Arbitration Act, 1940. The objector/respondent No. 1 pleaded that according to the delivery schedule two numbers required for aviation research centre were to be supplied by 31.3.1983 and the balance quantity were to be supplied at the rate of two numbers per month commencing 12 weeks after receipt of chassis. The chassis were to be imported from West Germany. The import recommendation certificate was to be issued by the Department of the respondent/objector on application of the petitioner. The petitioner took seven months to submit the application to the

department for issuance of the import recommendation certificate. Thus delay of seven months was entirely on the petitioner. The objector on receipt of the application immediately had forwarded the same to the relevant department for no objection certificate. After receipt of no objection certificate the objector forwarded the petitioner's application of Chief Controller of Imports and Exports. Therefore, the objectors case was that delay was entirely caused by the petitioner. The petitioner got delivery of all the nine chassis in July 1983 but caused delay in importing BCF and pumps in stages. All the facts were given by the objector that petitioner is responsible for delay in procurement of pumps and BCF.

3. It is pleaded that these stores were urgently required for operational preparedness of the Air Force and due to non-availability of this equipment because of failure of the petitioner to supply the same within the stipulated period, a great loss was caused to the respondent/objector. Therefore, for the delay caused by the petitioner the liquidated damages of Rs. 1,27,000/- were levied. These liquidated damages were levied after the time was extended under Clause 12(8)(a) of Schedule B to the supply order. The extension had been accepted by the petitioner unconditionally. The objectors suffered a loss of Rs. 30,23,125/-. On reviewing the position objector claimed in all liquidated damages of Rs. 18,97,949/-. It has also been asserted that the arbitrator had not applied his mind to the controversy. He had only incorporated the pleadings of the parties and then stated his conclusions. Plea has also been raised that reimbursement of custom duty of Rs. 25,601/- has wrongly been adjusted. The arbitrator projected the defense of the government that customs duty was to be paid on actuals. This in fact was not the defense of the government. The defense of the government was that extension of time was allowed on specific condition. It has also been contended that with respect of the liquidated damages which was later enhanced to Rs. 18,97,949/- the case of the government was that under Clause 9(iii)(a) of the Conditions of the contract it was agreed between the parties that should be contractor fail to deliver the stores or any consignment thereafter within the period prescribed for such delivery, the purchaser shall be entitled to recover for the contractor as agreed liquidated damages and not by way of penalty. A sum of 2% of the price of any store which the contractor had failed to deliver as aforesaid for each month or part of the month exceeding 15 days could be charged. The arbitrator failed to consider the relevant documents and Therefore it was asserted that the award is liable to be set aside.

4. In the reply filed the petitioner contested the objections. It was the case of the petitioner that the arbitrator has given a reasoned award. This court will not sit as a court of appeal. No illegality has been committed. While of the award is based on the disputed facts which has been appreciated by the arbitrator. As per the petitioner the claimants case is that supply order dated 26.2.1983 was placed on the firm for fabrication of CFT with mounted equipment as per terms and conditions, price per unit, and specifications etc. Clause 9 of the schedule to the supply order "Price per unit" inter alia, provided that "ARC shall be issued for

the import of components and on these imported components custom duty shall be paid extra as actual" whenever delay in delivery has concurred it was due to involvement of different government departments. Adverting the pleas of the petitioner it was contended that since CFT were to be equipped with imported pumps and BCF systems, an application for import license was moved by the firm on 5.10.83. The petitioner was vigorously pursuing the claim. The import license was received by the claimants in the last week of June 1984 and the firm placed the orders for pumps etc. thereafter. Four units of pumps were got airlifted to hasten the delivery of fabricated CFT. The remaining sets were received in September/October 1984. Thus it is denied that delay was on account of the petitioner. The imposition of liquidated damages was stated not justified because delay is alleged to be on part of the different government departments. The objector took nine months for getting DGTD clearance for import of pumps. There was abnormal delay in delivery of chassis and it took considerable long period to move the papers for re-fixing the delivery dates each time.

5. From these pleadings of the parties on 24th September, 1998 this court had framed the following issue:

"1. Whether the impugned award is liable to be set aside for the reasons stated in para 7 of the objections?

6. Evidence was led by way of affidavits.

7. Learned counsel for the objector highlighted the fact that issues had been frame after the closure of the case and Therefore the award is liable to be set aside. In this regard the said contention which though well taken necessarily must be repelled. It has to be remembered that arbitrator is not to act like a civil court. He is a tribunal appointed with the consent of the parties and is Therefore not strictly governed by the provisions of Code of Civil Procedure. If points in controversy have been drawn towards the later part of the proceedings that by itself will not vitiate the award. This has to be examined and adjudicated on the touchstone of whether any prejudice is caused to either party by this act of the arbitrator. The parties had laid their claims and reply has been filed then obviously they were conscious of the disputes that arise for adjudication. therefore if points in controversy had been referred to subsequently and in the absence of it being shown prejudice if any is caused the argument necessarily must fail and has to be rejected.

8. In that view it was further urged that arbitrator has simply produced the contentions of the parties and thereafter recorded his reasons. In view of the learned counsel on this court the award is liable to be set aside because the arbitrator had not applied his mind.

9. Even on that count the contention is simply to be stated to be rejected. The reason being that the arbitrator is not required to record his reasons in the form of a judgment. All that has to be seen is as to whether the arbitrator was conscious of the controversy and had applied his mind thereto. A perusal of the

award reveals that the arbitrator was conscious of the controversy between the parties and he has recorded his number of reasons after recording the contentions of the parties. In that view of the matter it cannot be termed that he had not applied his mind this regard.

10. The main thrust of the argument however was that the arbitrator has gone beyond the agreement because according to the learned counsel the disputes between the parties were about levy of the liquidated damages of Rs. 18,97,949/- and reimbursement of the custom duty of Rs. 25,601/- besides interest. It is asserted that contractor had agreed to pay liquidated damages at the rate of 2% of the price of any store which the contractor failed to deliver within the period of delivery fixed for each month. As regards the claim of the excise duty the extension of time was allowed to the contractor on specific condition that no excise duty shall be levied and the contractor was accepted to ask this condition. It is further contended that case of the objector was that under Clause 9(iii)(a) of the conditions of contract it was specifically agreed that if the contractor failed to deliver stores or any consignment within the period prescribed for such delivery purchaser shall be entitled to recover from the contractor the liquidated damages and not by way of penalty a sum of 2% of the price for each month or part of the month exceeding 15 days. The arbitrator has not referred to this clause.

11. In support of his argument learned counsel relied upon the decision of the Supreme Court in the case of N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, . The Supreme Court had held that where the umpire or the sole arbitrator had awarded a sum to the contractor on account of certain claims made by contractor after considering the argument but without advertng to the question of limitation award is not vitiated on account of any error apparent on the face of the record. He is the sole judge of the facts. But when an erroneous proposition of law is stated which is the basis of the award then the same indeed can be set aside.

12. Indeed there is no dispute with the said proposition of law because as held by the Supreme court in the case of K.P. Poullose Vs. State of Kerala and Another, if the arbitrator ignores material documents only then the award can be set aside. Otherwise it would be taken to be a final court pertaining to the findings of fact.

13. It was not disputed at either end that the arbitrator is the final court pertaining to the facts and if he has appreciated the facts that were in controversy before him ordinarily the court would not interfere unless he ignores material document or there are other factors which can never exhaustively be stated to prompt the court to interfere. In the matter of King and Duveen and Ors. (1913) 2 K B D 32, the same principle had been reiterated that even if the decision is erroneous construction of facts the court would be reluctant to interfere it was held:

"But however that may be, it cannot affect our decision on this motion, for the arbitrator has undoubtedly given his decision in the terms of the submissions, and if his decision involves an erroneous construction of the agreement, the same words were used in the submission, and Therefore that question of law was referred to him. he has either given an erroneous decision on a specific question of law which was referred to him, or he has decided a question of facts. In either case no grounds exist for setting aside the award."

14. Similarly in the case of Attorney General for Manitoba v. Kelly and Ors. (1922) 1 BTC 268. It was concluded that the award being within the jurisdiction conferred by submission and unless there is error apparent on the face of the record, the court will not interfere and in identical terms were findings recorded by the Supreme Court in the case of Gobardhan Das Vs. Lachhmi Ram and Others, . The Supreme Court held that agreement for reference to arbitration should be liberally construed by the courts so as to lean in favor of upholding the award the award given by the arbitrator only if the arbitrators have misdirected themselves, the court would interfere. The findings can well be reproduced for sake of facility and are:

"So long as the arbitrators act within the scope of their authority there can be no doubt that their decision must be accepted as valid and binding. In the present case however we are of opinion that the arbitrators acted in excess of their authority and the award must Therefore be set aside."

15. A few years later in the decision rendered in the case of Smt. Santa Sila Devi and Another Vs. Dhirendra Nath Sen and Others, the Supreme Court went on to hold that presumption is always in favor of the award. If the award is silent on a particular item of dispute then the claim in that regard must be taken to have been rejected.

16. As to what would be misconduct by the arbitrator on which ground the award is claimed to be set aside, the Supreme Court in the case of Food Corporation of India Vs. M/s. Veshno Rice Millers, . The Supreme Court went on to hold that no exhaustive definition could be given as to what amount to misconduct by the arbitrator. This jurisdiction in any case is not to be likely exercised and exhaustive definition is not possible but still the Supreme Court held:

".....If that is the position assuming even for the argument that there was some mistake in the construction, such a mistake is not amenable to be corrected in respect of the award by the court. This was fair order after considering all the records. The conclusion arrived at by the arbitrator is a plausible conclusion. the court has, in our opinions, no jurisdiction to interfere or modify the award in the manner sought for by the appellant and in the manner done by the learned Subordinate Judge in the first instance in this case. In that view of the matter, the learned Additional District Judge was justified in correcting the order of the learned Subordinate Judge and the high Court was also justified in not interfering with the order of the Additional District Judge. The award on the aspect

canvassed before us by Dr. L.M. Singhvi is a plausible construction of Clause g(i) of the contract. it cannot, in our opinion, be interfered with either on the ground that there was error apparent on the face of the award or on the ground that the arbitrator has misconducted himself in not giving the effect to the penal rate as contemplated under Clause g(i) of the contract referred to hereinbefore in the award....."

17. Conclusion for purposes of the present judgment, Therefore, is obvious. the court would only interfere if the arbitrator has misconducted himself. It is not possible to give a precise definition as to what would be a misconduct by the arbitrator. It has to be seen on appreciation of facts and circumstances of each particular case. If there is an error apparent on the face of the record the award can be set aside. if the court finds that the arbitrator has applied his mind to the facts of the controversy in that event the court will not interfere. If he has travelled beyond the scope of the agreement even in that case the court in peculiar facts can set aside the award.

18. Learned counsel for the objector as already referred to above claimed that the arbitrator had travelled beyond the scope of the agreement and particular reference was made to the fact that the case of the Union of India was that under Clause 9(iii)(a) of the Conditions of Contract contained in Schedule B to the agreement it was specifically agreed between the parties that if the contractor failed to deliver the stores or any consignment the purchaser shall be entitled to a liquidated damages and in this regard the arbitrator has not applied the mind.

19. Perusal of the record reveals that the arbitrator had carefully gone into the contentions and the claims of the parties. He looked into the relevant controversies and thereupon had recorded his reasons. As already referred to above it is a reasoned award. Once he has applied his mind it cannot be termed that merely because the matter has not been discussed from the point of view of Union of India the court as such would interfere. What was projected before him had been considered. The same has been taken note of. In that view of the matter taking stock of the ration decidendi of the decision in the case of Smt. Santa Sila (supra) indeed there is no scope for interference.

20. For these reasons the objections must fail and are dismissed. The award is made a rule of the court and decree in terms of the award is passed. The interest would only be awarded at the rate of 12% from the date of the judgment till the final payment is made.