

(1998) 06 MAD CK 0092
In the Madras High Court
Case No : O.P. No. 228 of 1997

Jamshed Burjor Aga

APPELLANT

Vs

M/s. Alankar Constructions and another

RESPONDENT

Date of Decision : 25-06-1998

Acts Referred:

Arbitration Act, 1940 — Section 30, 30(a), 30(c)

Citation : (1998) 06 MAD CK 0092

Hon'ble Judges : S. Thangaraj, J

Bench : Single Bench

Advocate : A. Thiyagarajan in OP 228/97 and Mr. R. Subramaniam in OP 517/97, for the Appellant; R. Subramaniam and Mr. S. Kothandaraman, for the Respondent

Judgement

S. Thangaraj, J.—O.P. No. 228/1997: The petitioner/ arbitrator has filed this petition to receive and pass a decree in terms of award. O.P. No. 517/1997: The petitioner Oriental Hotels Limited has filed this petition to set aside the arbitration dated 7.6.1996 passed by the 2nd respondent/arbitrator.

2. The main averments found in the petition are as follows:

(a) The petitioner in O.P. No. 517/97 Oriental Hotels Ltd. (here-in-after called the petitioner) is a public limited company registered under the Companies Act having its registered Office at Chennai. The 1st respondent M/s. Alankar Construction (hereinafter called the 1st respondent) is having its registered office at Chennai. The 2nd respondent is the Arbitrator who passed the award dt. 7.6.96.

(b) The petitioner through their architects had invited tenders for Civil works for the addition and alteration to Hotel Sea Pearl at Visakhapatnam. The 1st respondent submitted their tender and the contract was awarded in favour of the 1st respondent. The 1st respondent was informed to take over the site for commencing the work from 21.5.90. He was also informed to take ESI Coverage

for their employees and inspite of it the Contractor had restrained themselves from ESI Coverage for their employees. The stipulated time for the completion of work was 15 months. As per the agreement, the contractor had to carry-out works consisting of Sections A to K vide page No. 56 of the said agreement. But virtually they carried out only Sections A and B to the tune of Rs. 75 Lakhs as per 14th Bill. The petitioner had to with hold some amount for want of "No Objection Certificate" from the statutory authorities such as PF/ESI/IT etc. As the Contractor had failed to produce no objection certificate from the authorities, neither the balance dues nor the interest of the balance dues is payable to the contractor regardless of the delay. The 14th Bill and the pre-final bill dt. 15.3.92 was certified by the architect on 7.8.92 and the same was settled by the petitioner on 12.8.92. Subsequently, on 9.12.92 the 1st respondent sent a letter for treating the 14th pre-final bill as the final bill. The architect gave his certificate on 20.5.93 by recommending payment of Rs. 2,16,662.46. As the No Objection Certificate from the authorities concerned was not forwarded, the petitioner could not clear the said bill.

(c) The 2nd respondent in his award dt.7.6.96 awarded to the 1st respondent a sum of Rs. 28,92,522/- with 15% interest per annum from 7.12.94. The award is not a speaking one and the 2nd respondent has dismissed the counter claims made by the petitioner without giving any reasons.

(d) The 2nd respondent was appointed by the 1st respondent in spite of the objections raised by the petitioner. The arbitrator was appointed by the 1st respondent without affording any opportunity to the petitioner, leading to bias and misconduct on the part of the 2nd respondent. As the 1st respondent has not disputed or raised any objection against the final Certificate issued by the architect, as stipulated in Clause 31(7) of the General Conditions of the contract, the 1st respondent is barred from invoking Clauses 55 & 56 of the Contract.

(e) As per the Certificate of the Architect the construction has been virtually completed on 17.3.92 and the completion certificate of final certificate was issued on 20.5.93. The objection has to be filed within 28 days and as the objection has not been filed within the stipulated time, the 1st respondent cannot seek for arbitration and the entire arbitration proceedings are not maintainable. The arbitration ought not to have been entertained in so far as they are opposed to the provisions of the General Conditions of the contract. The certificate issued by the Architect clearly says that the defects liability period of 12 months commenced on 17.3.92 and ended on 16.3.93. The claim raised after the said date would not be liable for approval by the architect and the agreement between the parties for the settlement of dispute by way of arbitration does not arise. The Arbitrator has committed serious errors of law apparent on the face of the award. biased without giving reasons and has also misconduted himself by assuming the sole arbitrator despite the serious objections by the petitioner. The arbitrator ought not to have allowed a sum of Rs. 2,99,471/- towards the final bill with interest. The escalation balance has not been referred to the architect and the

Arbitrator was not justified in allowing the escalation claim of Rs. 1,14,178/-. After verifying the contract, the 1st respondent has done the concrete" work in basement and the 1st respondent was taking up the issue with the architect and has claimed sum of Rs. 91,834.30 for excavation and therefore the same has to be rejected.

(f) The claim for sum of Rs. 1,62,317.80/- towards the extra sum for alteration and modification for Banquet Hall does not arise as already the said claim has been made in 14th RA/Final Bill. The claim for Rs. 3,85,612.27 for centering work at different levels is not justified and untenable.

(g) The claims regarding the rocks excavation in basement, restoration, extra amount for over stay on works, compensation for loss due to cancellation of works in the superstructure, refund of cost of materials purchased on behalf of the Contractor, payment for the modification, centering work, loss on hire charges of machinery, refund of rendition amount for water proofing work and similar claim Nos. 13 and 14 are also untenable and have to be rejected.

3. The petitioner in O.P. No. 517/1997 Oriental Hotels Limited entered into a contract with the 1st respondent M/s. Alankar Construction for Civil works for the addition and alteration to Hotel Sea Pearl at Visakhapatnam. The 1st respondent submitted their tender dt. 11.1.1990 and after due verification the contract was awarded to the 1st respondent. As per the grounds of contract the work has to be completed within 12 months from the date of issue of an intimation from the Architect, and if remained incomplete, damages for non-completion shall be paid by the Contractor subject to the conditions of the contract relating to extension of time.

4. Clause 56 of the Contract says that all disputes and differences of any kind whatsoever arising out of or in connection with the contract, shall be referred to and settled by the Architect whose decision may be in the form of a final certificate or otherwise. Any dispute in the Certificate shall be referred to an Arbitrator, agreed upon and appointed by both parties, and in case if the parties do not agree upon for a single arbitrator each one shall appoint Arbitrator who shall pass their award and in case of dispute, between the awards, the matter shall be referred to an Umpire. Accordingly one Mr. Jamshed Burjor Aga was appointed as the sole Arbitrator. The Arbitrator has dismissed the preliminary objection raised, as not maintainable.

5. Oriental Hotels Limited the petitioner, has challenged the award on many grounds under the two main objections stated u/s 30 (a) & (c) of the Arbitration Act, 1940.

In (M/s. Chahal Engineering and Construction Company v. Irrigation Department Punjab, Sirsa) AIR 1993 SC 2541 the Supreme Court held:

"The misconduct of the Arbitrator referred to in Section 30(a) and the expression "is otherwise invalid" in Section 30(c) would include an error apparent on the

face of the record. Where the award suffers from several patent errors, a party could raise objections for getting it set aside u/s 30".

6. One of the main grounds on which the objection has been raised by the petitioner Oriental Hotels Ltd. is that the award dt. 7.6.1996 passed by the 2nd respondent is a non-speaking award. The award was readout in the open Court and there is no valid reason to contend that the award is a non-speaking one. The 1st respondent herein has contended that the award cannot be set aside on the ground that it is a non-speaking award.

In (M/s. Premier Fabricators, Allahabad v. M/s. Heavy Engineering Corporation Ltd., Ranchi) AIR 1997 SC 3603, the Umpire was required to give his findings on the issue of arbitrability of the claims 2 to 5 and reasons in support thereof. Their Lordships of the Supreme Court by majority have held that the Umpire cannot, conclusively decide for himself in non-speaking award of the arbitrability of the claims, and the award cannot be construed that by implication he had considered the arbitrability of the claims.

In (Food Corporation of India v. Jagdish Chandra Saha) AIR 1994 SC 219 the Supreme Court held-

"We, therefore, agree with the High Court that the award cannot be set aside merely on the ground that the arbitrator has not given reasons for the award made by him. However, in our opinion, the High Court should have remitted the matter to the subordinate Judge for considering the objections of the parties on merits to the extent they are permissible in the case of a non-speaking award. We, therefore, allow this appeal in part and restore the matter to the subordinate judge and direct him to dispose of the objections in accordance with law."

From the above decision, it is clear that the award cannot be interfered with on the ground that it is a non-speaking award, however, the matter can be sent back to the arbitrator for reconsidering the objections of the parties on merits to the extent they are permissible in the case of non-speaking award. These two decisions are not on the merits of the award passed by the arbitrator.

In the decision in (M/s. Premier Fabricators. Allahabad v. M/s. Heavy Engineering Corporation Ltd. Ranchi) AIR 1997 S.C. 3603 the matter was remitted back to the Umpire with a direction to give his findings on the issue of arbitrability of the claims 2 to 5 and reasons in support thereof. However, the Umpire without deciding the question of arbitrability has conclusively decided the matter in a non-speaking award. Therefore their Lordships of the Supreme Court per majority expressed the view it should be sent back to the Umpire for considering the arbitrability of claims 2 to 5. In (Food Corporation of India v. Jagdish Chandra Saha) AIR 1994 SC 219, the matter was remitted back to the Subordinate Judge for considering the objections of the parties on merits, to the extent they are permissible in a case of non-speaking award

In both these decisions, the award was not remitted back either to the Umpire or

to the Subordinate Judge on the ground that it is a non-speaking award, but on the ground that of these specific reasons. Therefore these two decisions cannot be taken as the view expressed by the Apex Court on the merits of non-speaking award.

Learned counsel for the respondent has relied on certain decisions.

The Supreme Court in (State of Orissa v. Lall Brothers) AIR 1988 SC 2018 held that the fact that there is an unreasoned award is no ground to set aside an award.

In (Hindustan Construction Co. Ltd. v State of Jammu and Kashmir) AIR 1992 SC 2191 the Supreme Court held that the non-speaking award cannot be error apparent on the face of the record for impeaching its validity. From these decisions it is clear that non-speaking or unreasoned award cannot be set aside on those grounds. However, there is a slight exception to this general rule that whenever the arbitration agreement says that the arbitrator should assign reasons in support of his conclusion then only the non-speaking award becomes material and further consideration is needed.

In (Secretary, Irrigation Department. Government of India v. G.C. Roy) AIR 1992 SC 732 the Supreme Court held that the arbitrator is not under a legal obligation to give reasons for his award unless it was so stipulated in the agreement itself. This confirms the view that the arbitrator should assign reasons if it was so stipulated in the agreement itself.

In (Harcharan Singh v. Union of India) AIR 1991 SC 945 the Supreme Court held-
"In the instant case, the arbitration agreement or the deed of submission did not require the arbitrator to give reasons and therefore the award cannot be questioned on the ground of an error on the face of the award."

From this decision it is clear that the arbitrator is not required to give any reason where there is no stipulation to that effect in the agreement. In the instant case also there is no stipulation that the arbitrator should assign reasons in support of his conclusion. Whenever no reason is assigned by the arbitrator it is not for the Court to contribute its own reasons.

The Supreme Court in (State of Orissa v. Lall Brothers) AIR 1988 SC 2018 stated supra held-

"It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled him to arrive at his conclusions. (See in this connection the observations of the Judicial committee in Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd 50 Ind App 324 : (AIR 1923 PC 66) and of this Court in Jivarajbhai Ujamshi Seth v. Chintamanrao Balaji, (1964) 5 SCR 480 : (AIR 1965 SC 214)."

These decisions would go to show that the award passed by the arbitrator though non-speaking cannot be set aside on that ground; alone. There must be some

more reasons to show that the award cannot be upheld on the ground of error apparent on the face of the award. The petitioner though argued that there is an error apparent on the face of the award, the reason shown was that the arbitrator has not assigned any reason in support of his conclusion. The unreasoned award cannot be challenged on the ground that the arbitrator has not assigned any reason. The award also cannot be challenged on the ground that it is a non-speaking one. The petitioner has not shown any valid reason to show that there is an error apparent on the face of the award. The said ground is also not applicable to the instant case.

7. The umpire has followed the conclusion shown in the letter of M/s. Alankar Constructions dt. 18.2.94 wherein the total value of the work awarded was shown at Rs. 1,01,30,615/-, that the value of the contract items executed at Rs. 64,07,792/-, that the value of non-tendered items executed at Rs. 10,97,652/-, and that value of contract items omitted from contract at Rs. 38,85,885/-. The arbitrator after deducting the value of non-tendered items executed to a sum of Rs. 10,97,652/- from the value of the contract items omitted and arrived at the figure of Rs. 28,92,522/-. If the value of the non-tendered items executed is deducted from the value of contract items omitted, it would be Rs. 27,88,233/-. But, however, the arbitrator has arrived at the figure of Rs. 28,92,522/- for which there is no explanation. This Court is not sitting in appeal over the award passed by the arbitrator. To substantiate this contention the respondents herein have relied upon a ruling of the Apex Court in (Puri Construction Pvt. Ltd. v. Union of India) AIR 1989 SC 777 at page 780 wherein it was held-

"When a Court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the Court is limited, as expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits."

A Division Bench of this Court in (P.K. Chinnasamy v. The Superintending Engineer, Execution Circle, Twad Board, Madurai) 1989 TNLJ 315 = AIR 1990 Mad 347 held-

"The Court has no jurisdiction to deal judicially with the merits of a case determined by the arbitrator. It is not the function of the Court to scrutinize the award on merits as if it is sitting in appeal on the verdict of the arbitrator."

In (Radhakrishna v. Sponge Iron India Ltd.) AIR 1997 SC 1324 at page 1328 the Supreme Court after referring many earlier decisions on this point held -

"Bearing in mind, the principles laid down by this Court in the abovesaid cases, if we look into disposal of the matter by the High Court, it would be evident that the High Court has substituted its own view in place of the Arbitrator's view as if it was dealing with an appeal. That is exactly what is forbidden by the decision of this Court. Therefore, we have no hesitation to set aside the judgment of the High Court on this issue."

The Supreme Court has consistently held that the High Court is not sitting in appeal over the award passed by the arbitrator. The arguments advanced by the petitioner that the arbitrator has erred in coming to the conclusion cannot be accepted as the award itself is a non-speaking one.

8. It was argued on the side of the petitioner herein that the arbitrator was biased against the petitioner herein. However the reason assigned by the petitioner was that the arbitrator was appointed by the 1st respondent and they had not given any opportunity to appoint an arbitrator of their choice and therefore the arbitrator was biased against the petitioner. The arbitrator must be a person independent of the parties who has no interest, direct or remote, in the subject matter of the controversy.

In (International Airport Authority of India v. K.D. Bali) AIR 1988 SC 1099 at page 1103 & 1104 the Supreme Court held -

"But we agree with the learned Judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person.....Vague suspicions of whimsical, capricious and unreasonable people are not our standard to regular our vision. It is the reasonableness and the apprehension of an average honest man that must be taken note of."

The petitioner herein did not say, the arbitrator had any personal interest in the subject matter or that he considered himself to be the Advocate of the party appointing him or that he had acted grossly improper and inconsistent with the plain duty of an arbitrator. When the petitioner herein alleges bias against the arbitrator, the burden is upon him to prove the same. Except the mere allegation that the arbitrator was biased, the petitioner has failed to supply any further material to substantiate the said allegation and in such circumstances the said allegation has not been proved.

9. It was further argued on the side of the petitioner herein that the entire arbitration is without jurisdiction. Clause 56 of the terms of the contract clearly says that the Arbitrator should be a Fellow of the Indian Institute of "Architects to be agreed upon and appointed by both the parties or in case of" disagreement as to the appointment of a single Arbitrator be the arbitration of two Arbitrators both being Fellows of the Indian Institute of Architect one to be appointed by each party, which Arbitrators shall before taking upon themselves the burden of reference appoint an Umpire. The 1st respondent herein has named the present Arbitrator Sri Jamshed Burjor Aga as the Arbitrator. Time was given to them to name another Arbitrator of their choice and same has not been done by the petitioner herein. They took part in the Arbitration proceedings before the Single Arbitrator. However, earlier they have raised certain preliminary objections on the grounds that the claim was barred by limitation that the Arbitrator was not

appointed property that the Arbitrator has no jurisdiction to decide the claim and lastly to refer the matter to a competent Court. The Arbitrator by his Order dt. 29.5.1995 rejected every one of such objections and even thereafter the petitioner herein participated in the arbitration proceedings. They have also filed a counter claim before the same Arbitrator which show:-that they had faith in the arbitrator. It is only after the rejection of their case by the Arbitrator they have come forward questioning the appointment of the Arbitrator and therefore the arguments advanced on the side of the petitioner herein cannot be accepted.

10. It was further argued on the side of the petitioner that the architect Thiru I.M. Kadri has issued his final Certificate bearing No. 14 under Reference No. 515/BiIIs/815, dated 20.5.1993 and the same was received by the 1st respondent immediately thereafter, that if the 1st respondent had any objection to the Certificate issued by the Architect, he has to raise the dispute within 28 days from the date of the Certificate, that as the 1st respondent has not disputed the said Certificate within 28 days as contemplated in Clause 31(7) consequently the Certificate shall be final as per the Clause 56 of the said Agreement and the Arbitration raised thereafter is barred by limitation and therefore not maintainable. The said plea has not been considered by the Arbitrator. For the failure to consider the said plea, the Arbitrator cannot be blamed. If the Arbitrator fails to consider and decide any legal plea on that ground the award of the Arbitrator cannot be interfered with.

In (Firm Madanlal Roshanlal Mahajan v. Hukumchand Mulls Ltd., Indore) AIR 1967 SC 1030 the Supreme Court held -

"The Court cannot review his award and correct any mistake in his adjudication, unless an objection to the legality of the award is apparent on the face of it."

From this decision, it is clear if any illegality of the award is apparent on the face of it, then only the Court can interfere with the said award. On the ground of failure to consider the plea of limitation, the award cannot be interfered with, as there is no illegality on the face of the Award.

11. For all these reasons, the arguments of the petitioner herein cannot be accepted and the award passed by the Arbitrator has to be upheld. In the result, O.P. No. 228/97 is; allowed and decree passed in terms of award, and O.P. No. 517/97 is dismissed. No costs.