
(1997) 11 KL CK 0005
In the High Court Of Kerala
Case No : M.F.A. No. 650 of 1990

Joseph Vilangadan

APPELLANT

Vs

Fertilizers and Chemicals Travancore Ltd. and Another

RESPONDENT

Date of Decision : 28-11-1997

Acts Referred:

Arbitration Act, 1940 — Section 30

Citation : AIR 1998 Ker 99 : (1998) 1 CivCC 489 : (1998) 1 ILR (Ker) 844

Hon'ble Judges : P.A. Mohammed, J; P. Shanmugam, J

Bench : Division Bench

Advocate : K.L. Varghese, for the Appellant; C.M. Devan and A.M. Shaffique, for the Respondent

Final Decision : Dismissed

Judgement

Mohammed, J.—This appeal has been filed against the judgment and decree dated 20-6-1989 in O.P. (Arb.) No. 40 of 1987 on the file of the Principal Subordinate Judge, Parur. The appellant before us is the petitioner in the above O.P. and the respondents are the respondents before the Court below.

2. The above petition has been filed under Sections 14, 15, 30 and 33 of the Arbitration Act, 1940 (for short "the Act"). In that petition the petitioner, inter alia, prayed for setting aside the award dated 15-7-1987 published by the arbitrator in the matter of dispute between the petitioner and the first respondent. It is alternatively prayed to modify the award deleting or dispensing with the provision in the award directing the petitioner to pay liquidated damages of Rs. 2 lakhs to the respondent under para 2 of page 6 of the award.

3. The case of the appellant can be summarised thus: The appellant who is a contractor doing Engineering Construction Works entered into a contract with the first respondent for the work of "ASCL Project-Site levelling construction of roads, drains, temporary security offices etc." under work order No. 66113 dated 7-12-1985. Due to the breach of the terms of contract committed by the first

respondent on various heads, particularly in the matter of rendering facilities for the work the appellant could not perform his part of the contract. However, the Bank guarantee furnished by the appellant in lieu of security deposit was sought to be encashed. In view of the aforesaid situation, dispute and differences arose between the parties to the contract and those disputes will have to be settled in arbitration in the light of the arbitration clause contained in the agreement. Appellant filed O.S. (Arb.) No. 224 of 1985 before the Principal Sub Court, Parur praying for a direction to the first respondent for filing the agreement before the Court and appointing an arbitrator to settle the disputes between the parties and also to restrain the first respondent from encashing the Bank guarantee. While so, the Chairman and Managing Director of the first respondent company appointed Sri. T. Thanickachalam, the then Chief Engineer (Civil) Cochin Shipyard Limited, Cochin 15 as the sole arbitrator as conveyed to the appellant. In view of this communication he filed a memo intimating to the Court as to the appointment of the arbitrator and expressing his consent to the said appointment for adjudication of the dispute. In view of the said memo the suit was dismissed without costs.

4. Consequently the arbitrator, second respondent, entered upon the reference and called upon the appellant to submit the claim statement with exhibits. Accordingly the appellant submitted statement of facts and claims along with exhibits in support thereof. First respondent also submitted counter statement and documents in support thereof. In the counter statement first respondent had put forth certain claims including the claim of liquidated damages. Finally by proceedings dated 29-1-1987 the arbitrator notified the parties of preliminary hearing of the case on 22-2-1987. The second respondent finally made and published the award dated 15-7-1987. Being dissatisfied with the award the appellant filed the present O.P. with the prayers aforesaid. Before the Court below, the first respondent filed counter statements, inter alia, contending that the petitioner had committed breach of contract causing delay in the performance of contract and hence it suffered damage. It is further pleaded that respondent was forced to invoke the Bank guarantee as envisaged in the terms of agreement and that the arbitrator was within his powers to award liquidated damages. After the inquiry the Court below refused to set aside the award dated 15-7-1987 but passed a decree according to the terms of the said award. Being aggrieved by the said judgment this appeal has been filed.

5. There is no dispute that the award passed by the second respondent arbitrator on 15-7-1987 is a non-speaking award. As per the said award certain claims of the appellant was allowed. The appellant claimed as per claim No. 1 a sum of Rs. 16,79,000/- as per the final bill but the arbitrator directed the first respondent to pay Rs. 1,50,000/- under this claim. Under claim No. IV the first respondent was directed to release the Bank guarantee to the appellant. Under claim No. V first respondent was directed to release (Cash retention) an amount of Rs. 1,21,583/-. Towards the claim of the first respondent for liquidated damages of Rs. 7,47,812,60 appellant was directed to pay first respondent Rs. 2 lakhs.

6. The main contention urged by the appellant centres round the award of Rs. 2 lakhs towards liquidated damages claimed by the first respondent. It is argued that this award of counter claim by the Arbitrator is totally without jurisdiction. In this context it is pointed out that O.S. (Arb.) No. 224 of 1985 was filed when there was apprehension that the invocation of the Bank guarantee has been made at the instance of certain officers of the second respondent to put the appellant to hardship. It is further contended that a close reading of the pleadings would disclose that the appellant was meeting the plea of invocation of the Bank guarantee. It is also pointed out that there was no plea or claim for liquidated or unliquidated damages. It is also argued that a plea has been raised before the Arbitrator that the counter-claim of the first respondent was not covered by the terms of the reference.

7. On the basis of the pleading, the Court below framed the following issue for decision :

"Whether there is any sufficient ground for setting aside award dated 15-7-1987 or to modify or correct the award deleting or dispensing with the provisions in the award directing the petitioner to pay liquidated damages of Rs. 2,00,000/- to the first respondent?"

This issue was examined by the Court below and found that in Ext. A2 written statement filed by the first respondent in O.S. (Arb.) 224/85 it was clearly stated that due to the breach of contract committed by the appellant huge loss has been caused to the first respondent and the magnitude of the loss can be known only after the balance work is completed. Ext. A2 would clearly show that there was a definite pleading before the Court below with respect to the loss sustained by the first respondent and its right to recover the same. The disputes referred to arbitration are the disputes as disclosed by the pleadings in O.S. No. 824 of 1985 and also the relevant correspondence between the parties. Therefore, the argument of the appellant that the arbitrator had committed misconduct was not countenanced by the Court below. It is further observed by the Court below that since the award is a non-speaking award the Court cannot sit in appeal over the conclusions of the arbitrator and re-examine or reappraise the evidence which had been considered by the arbitrator.

8. The appellant has reiterated the aforesaid contentions in the present appeal filed u/s 39(1)(vi) which provides that an appeal shall lie from the order of the Court setting aside or refusing to set aside an award. It cannot be said that the appeal in the present case is not maintainable for the reasons that certain claims of the appellant as well as certain counter-claims of the first respondent had been allowed by the arbitrator. The appeal u/s 39 is against the orders passed by the Court and not by the arbitrator. By the impugned judgment the Court below refused to set aside the award and a decree has been passed in accordance with the award. The expression "setting aside or refusing to set aside" occurring in Clause (vi) of Sub-section (1) of Section 39 includes the setting aside or refusing to set aside the award in part as well. When the Court accepts the award in part

and in effect refuses to set aside in its entirety, the appeal is covered by this clause. At any rate, the present appeal is maintainable u/s 39(1)(vi) of the Act.

9. Now let us examine the ambit and scope of the power of the Court below or the appellate Court to interfere with a non-speaking award. Section 30 of the Act is as follows :

"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 u/s 35;

(c) that an award has been improperly procured or is otherwise invalid.

In the present case, we are concerned with the question whether a non-speaking award can be set aside on the ground that the arbitrator has "misconducted" himself or the proceedings as envisaged in Clause (a) of Section 30. This clause deals with two cases, namely (i) where an arbitrator has misconducted himself and (ii) where an arbitrator has misconducted the proceedings. In both the cases the word "misconducted" is common. What is "misconduct" It is a generic term and ordinarily means to conduct amiss, to mismanage, wrong or improper conduct, bad behaviour, unlawful behaviour or conduct. It is arduous to capture the concept of misconduct in the strait-jacket of a definition. Donaldson, J. in *Thomas Borthwick (Glasgow) Ltd. v. Faure Fairclough Ltd.*, (1968) 1 Lloyd's Rep 16 said :

"Lawyers are well aware the arbitrators take it ill if they are accused of misconduct, perhaps because the word has acquired a technical meaning in a quite different realm which occupies so much of the time of the Probate, Divorce and Admiralty Division of the High Court. It is therefore customary to add, in an apologetic parenthesis, that what is meant is technical misconduct. Whether or not "misconduct" is an appropriate term, "technical" is certainly inappropriate."

"Misconducted himself or the proceedings" envisages cases of misconduct which may be personal or regarding the proceedings. Personal misconduct involves moral turpitude while misconduct regarding the proceedings involves judicial improprieties.

10. For either of the above reasons can a "non-speaking" award as distinct from "a reasoned award" be set aside? It is well settled that a Court cannot set aside a non-speaking award unless the error of law is apparent on the face of the award or in a document incorporated therein. (See : *Hodgkinson v. Fernie*, (1857) 3 CB. (N.S.) 838 RR 614, *Chamsey Bhare v. Jivaraj Balloo Shipping & Weaving Co. Ltd.* AIR 1923 PC. A Full Bench of this Court in *State v. Jolly* (1992) 1 KLT 240 observed :

"But in the case of a non-speaking award, one has to be confined to the award itself or to any document incorporated therein. If the contract is not incorporated in the award, it is not permissible for the Court to look outside the award and refer to the terms of the contract. Therefore, the attack cannot succeed on the ground of error of law apparent on the face of the award, u/s 16(1)(c)."

The Supreme Court in *Food Corporation of India Vs. Jagdish Chandra Saha*, observed that an award cannot be set aside merely on the ground that the arbitrator has not given reasons for the award made by him. In *Raipur Development Authority v. Chokhamal Contractors* AIR 1990 SC 1426 the Supreme Court observed (Para 19):

"It is now well-settled that an award can neither be remitted nor set aside merely on the ground that it does not contain reasons in support of the conclusion or decisions reached in it except where the arbitration agreement or the deed of submission requires him to give reasons."

11. Counsel for the appellant pleads that the non-speaking award can be set aside if the arbitrator has exceeded his jurisdiction. In support of his contention he pointed out the following observation contained in the Full Bench decision of this Court in *Jolly's case*(1992) I KLT240 (*supra*).

"Further, in cases where the ground of attack is that the non-speaking award is bad on its face (as distinct from an attack based on jurisdiction) it is not permissible for the Court even to look into the agreement unless the same is incorporated in the award. In our view and obviously, the attack itself, as per the appellant's contention, being based on the arbitrator's alleged violation of the terms of the contract, or his alleged action in excess of his authority, such an attack cannot obviously be proved unless one is permitted to resort to the terms of the main contract, relating to the award of extra compensation or extra rate."

12. Lord Parmoor said in *Attorney General for Manitoba v. Kelly* (1922) 1 AC 268 :

"It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties."

Devlin, J. in *Christopher Brown Ltd. v. Genossenschaft Oesterreichischer* (1954) 1 QB 8 said :

"There is no presumption that merely because an award has been made it is a valid award. It has to be proved by the party who sues upon it that it was made by the arbitrators within the terms of their authority, that is, with jurisdiction. Jurisdiction has to be proved affirmatively."

Russell said :

"An award may be remitted or set aside on the ground that the arbitrator in

making it exceeded his jurisdiction; and evidence of matters not appearing upon the face of the award will be admitted in order to establish whether the jurisdiction has been exceeded or not, because the nature of the dispute is something which has to be determined outside the award whatever might be said about it in the award or whatever may be said about it by the arbitrator."

(See : *Dalmia v. National Bank of Pakistan* (1978) 2 LR 223

He further observed:

"Where there is jurisdiction to make an award, the award is not bad because the possibility that matters not within the jurisdiction of the arbitrator may have been taken into account, is not in terms excluded on the face of the award. In such a case the award can be impeached only by showing that the arbitrator did in fact exceed his jurisdiction."

In *Porter v. Porter* (1921) 55 ILT 206 it was held that the umpire is bound by the terms of the submission and he cannot make an award not within its scope.

13. What is urged is the above decisions supply a sufficient indication that a non-speaking award can be challenged on the grounds based on jurisdiction. The following observation of the Full Bench in *Jolly's case* 1992 (1) K LT 240, *supra*, is relevant.

"The arbitration clause determines the scope of the jurisdiction of the arbitrator u/s 16(1)(a) while the main contract determines the rights and obligations of the parties. The arbitrator cannot determine matters not referred to him nor can he omit to decide questions falling within its scope as stated in Section 16(1)(a). It is settled law that while dealing with the question of jurisdiction of the arbitrator u/s 16(1)(a) as arising from the scope of the arbitration clause, it is permissible for the Court to look into the arbitration clause, in order to establish whether the jurisdiction has been exceeded or not because the nature of the dispute is something which has to be determined outside the award, whatever might be said about it in the award or by the arbitrator."

14. The Supreme Court in *Associated Engineering Co. Vs. Government of Andhra Pradesh* and another, after analysing large number of decisions on the question held (Para 28):

"A dispute as to the jurisdiction of the arbitrator is not a dispute within the award, but one which has to be decided outside the award. An umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties or by deciding a question otherwise than in accordance with the contract. He cannot say that he does not care what the contract says. He is bound by it. It must bear his decision. He cannot travel outside its bounds. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside."

The result that primarily follows from the discussion herein above is a non-speaking award by an arbitrator either passed without jurisdiction or in excess of

it, can be challenged before a Court u/s 30(a). Such awards are liable to be set aside on the ground that the arbitrator has "misconducted" himself or of the proceeding.

15. The plea raised by the appellant is that the award of Rs. 2 lakhs towards liquidated damages to the first respondent by the arbitrator is in excess of powers conferred on him. The operative portion of the letter of appointment of the arbitrator as contained in the impugned judgment is ecotyped hereunder:

"Now therefore, I. N. B. Chandran, Chairman and Managing Director, FACT, as provided under the terms of agreement do hereby refer the dispute for arbitration viz. the dispute between Sri Joseph Vilangadan Contractor, Cochin and the FACT as disclosed by the pleadings in O.S. (Arbitration) No. 224/85 on the file of the Subordinate Judge's Court, Parur and also relevant correspondence between the parties to Sri S. Thanickachalam, Chief Engineer (Civil), Cochin Shipyard, Cochin as sole Arbitrator. Since the matter is now pending before the Hon"ble Subordinate Judge's Court, Parur, the appointment hereby made of the arbitrator is without prejudice to the rights of the parties as contended in the above said suit and will be effective only on appropriate order being passed by the Hon"ble Court."

From the above reference it can be seen that what is primarily referred for arbitration is the dispute between the appellant and the first respondent as disclosed by the pleadings in O.S. (Arbitration) No. 224 of 1985 on the file of the Subordinate Judge's Court, Parur and also relevant correspondence between the parties. This reference presupposes the existence of difference and dispute between the parties. Such dispute is disclosed from the pleading in the suit and correspondence between the parties. It cannot therefore be said that the arbitrator has passed the award without any authority or power. Therefore, the only question before us is whether the arbitrator has exceeded his jurisdiction.

16. The plea of exceeding jurisdiction by the arbitrator is made on the basis that the counterclaim urged by the first respondent had been allowed in this case. It is pointed out that the award of liquidated damage of Rs. 2 lakhs to the first respondent is totally outside the purview of reference. We find it difficult to countenance the said contention of the first respondent. First of all, at the time when the suit O.S. (Arb.) No. 224 of 1985 was filed there was only allegations contained in the plaint filed by the appellant and the written statement filed by the first respondent. It cannot be said that the allegations and counter-allegations between the appellant and first respondent did not bring forth a dispute to be settled by an arbitrator in view of the provisions contained in the agreement. No doubt, dispute and difference arose between the parties and that is directed to be settled by the arbitrator. The question of filing claims and counter-claim arises at a later stage before the arbitrator. When a dispute is referred, it necessarily involves all the dispute existing between the parties at the relevant time unless the claims and counter-claims are specifically stated in the terms of reference. This Court cannot restrict the scope of the dispute only

because it is stated as a dispute "as disclosed by the pleadings". The counterclaim no doubt comes within the purview of the written statement.

17. Russell says :

"It is the wording of the submission that limits the extent of the arbitrator's jurisdiction, and not the way in which the case is argued."

He places reliance on the decision in *Mediterranean and Eastern Export Co. v. Fortress Fabrics Ltd.* (1948) 2 All ER 186 for the proposition and adds further :

"A dispute between a buyer and seller of goods was submitted to arbitration. The seller calimed the price of the goods. The property in the goods not having passed to the buyer, the arbitrator awarded to the seller damages for non-acceptance. The buyer moved to set the award aside as in excess of jurisdiction. Held that, the whole dispute having been submitted, the arbitrator had jurisdiction to make the award he did."

In *Baker v. Townsend* (1817) 129 ER 169 it is held :

"Under a submission to arbitration of two assaults, (for one of the which the defendant had been indicted, and convicted at the quarter sessions), and of all costs incident to the indictment and subsequent proceedings thereon, the arbitrator awarded a payment in satisfaction of all costs incident to the indictment and previous and subsequent proceedings thereon: Held, I. That the indictment and assaults might legally be referred. 2. That the arbitrator did not thereby exceed his authority." (Head Note)

The Privy Counsel in *Falkingham v. Victorian Railways Commissioner* (1900) AC 452 was considering a contention that the award was bad because the arbitrator had considered the claims which they were not authorised to consider as well as claims which they were authorised to consider. Lord Davey, delivering the advice of the Judicial Committee, said :

"Their Lordships are not aware of any authority for this position, and they think it would be contrary to principle to hold an award bad because the possibility that matters not within the jurisdiction of the arbitrators may have been taken into account is not in terms excluded on the face of the award."

Omnia praesumuntur rite esse acta does not apply to give jurisdiction as laid down by the Court of Queen's Bench in *Rex v. All Saints, Southampton*, (1828) 7 B C 785 and by Willes J. in *Mayor of London v. Cox* (1867) LR 2 HL 239.

18. No doubt the jurisdiction of the arbitrator is depended on the wording of the submission or the reference order. The award as such is not bad when there is jurisdiction but when the arbitrator exceeds it the award becomes bad *proprio vigore*. Evidence does not confer jurisdiction but legal authority does. In the case of an award it is the terms of reference under the Act that confer jurisdiction. That necessarily means each sentence in the reference order requires to be examined with utmost care and caution, for it concerns the jurisdiction. No doubt

it is not an attempt by this Court to create jurisdiction which is not there but only an attempt to find out the width of the jurisdiction which is already there from the terms of reference. We are fully aware of what the Supreme Court said in *Sudarsan Trading Co. Vs. Government of Kerala and Another*, (Para 29):

"The arbitrator is the sole Judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a Judge on the evidence before the arbitrator."

We refrain from looking into the evidence for the determination of jurisdiction and we cannot do it legally. In view of the renowned position of an arbitrator in settling the dispute, this Court can only disfavour any attempt to attenuate it in any manner, if it is actually in existence. In order to determine the ambit of the jurisdiction conferred on the arbitrator it is necessary to examine the written statement filed by the first respondent in O.S. (Arb.) 40 of 1987. The following claim contained in para 30 of the written statement is very relevant in this context.

"Due to breach of contract committed by the plaintiff huge loss has been caused to the first defendant and the magnitude of the loss can be known only after the balance work is completed in any event it is likely to be much more than the retention money comprising of the Bank guarantee towards security deposit, the Rs. 50,000/- paid in cash and the recoveries at 2 1/2% by recovery from bills."

It cannot be said this is not a counter-claim for liquidated damages. This is one of the disputes raised by the first respondent in the written statement. What is referred is the dispute between the parties as disclosed by the pleadings and hence the claim for damages is not outside the purview of the pleadings. After the dispute has been referred to the arbitrator the appellant submitted his claims and the first respondent has also submitted his counter claims. It cannot be argued that since counter claims were submitted before the arbitrator only after the reference, he has no jurisdiction to deal with this question. What is specifically referred is not the claim or counter-claim but the dispute as disclosed by the pleadings of the parties. We therefore conclude that the arbitrator has sufficient jurisdiction to deal with the counter claim filed by the first respondent and hence the award of Rs. 2 lakhs cannot be said to be ordered in excess of jurisdiction.

19. The counsel for the first respondent has brought to our notice the decision of the Supreme Court in *Indian Oil Corpn. Ltd. v. Amritsar Gas Service* (1991) 1 SCC 533. That was a case where reference to arbitration was made by the Supreme Court in an appeal arising out of refusal to stay suit u/s 34. The reference has covered all disputes between the parties in the suit. A counter-claim was made by a party in the written statement subsequently and the arbitrator declined to consider the counter claim on the ground that only the dispute under reference was required to be determined. The Court found that refusal to consider the counter claim was an error apparent on the face of the

record, for the reason that occasion to make a counter claim in the written statement could arise only after the order of reference. In the aforesaid situation the Court said :

"The appellant's grievance regarding non-consideration of its counter claim for the reason given in the award does appear to have some merit. In view of the fact that reference to arbitrator was made by this Court in an appeal arising out of refusal to stay the suit u/s 34 of the Arbitration Act and the reference was made of all disputes between the parties in the suit, the occasion to make a counter claim in the written statement could arise only after the order of reference. The pleadings of the parties were filed before the arbitrator and the reference covered all disputes between the parties in the suit. Accordingly the counter claim could not be made at any earlier stage. Refusal to consider the counter-claim for the only reason given in the award does, therefore, disclose an error of law apparent on the face of the award."

No doubt the reference was at the instance of the Supreme Court in the case. What is observed by the Supreme Court is that the counter claim in the written statement could arise only after the order of reference. Be that as it may, in the present case, pleading of the first respondent in the written statement would suffice for deciding the ambit of the jurisdiction of the arbitrator.

20. In view of the discussion herein above, we do not find any merit in the contentions advanced by the appellant in this appeal. The judgment and decree under appeal are confirmed. The appeal is dismissed. No order as to costs.