

(1989) 05 DEL CK 0047

In the Delhi High Court

Case No : Suit No. 2618-A of 1987 and Interim Application No. 766 of 1988

K.C. Bhatia and Associate

APPELLANT

Vs

Urban Improvements Co. (P) Ltd.

RESPONDENT

Date of Decision : 24-05-1989

Acts Referred:

Citation : (1989) 2 ARBLR 308 : (1989) 2 Crimes 512 : (1989) 39 DLT 1 :
(1989) ILR Delhi 349

Hon'ble Judges : Y.K. Sabharwal, J

Bench : Single Bench

Advocate : V.N. Kalra and M. Wadhvani, for the Appellant;

Judgement

Y.K. Sabharwal, J.

(1) The sewerage work: in Sector "C" of Green Fields Colony, Faridabad (Haryana) was awarded by the respondent/to the petitioner. Disputes and differences between the parties were objector referred to the sole arbitration of Brig. Harish Chandra (Retired) in accordance with the arbitration agreement. The arbitrator has filed the award and the proceedings in this Court The respondent has challenged the validity of award and has filed objections thereto (I.A.766/88). On pleadings of the Parties, following issues are framed :

(1)Whether there is any error apparent on the face of the award ?(2) Whether the award has been improperly procured ?(3) Whether the arbitrator is guilty of misconduct as alleged in the objection petition ?(4) Whether the award is liable to be set aside ?(5) Relief.

(2) Parties have filed evidence in the form of affidavits. As all the issues are inter-connected, it will be convenient to take them up together.

(3) The main objection raised by the respondent is that the arbitrator had made and signed his award on 6th August, 7987 but it was typed on anon-judicial stamp paper purchased on 22/08/1987 which is an inconceivable proposition.

The inference drawn by the objector is that the award which was made and written on 6/08/1987 was changed later on by the arbitrator who had become functus officio after making and signing the award on 6/08/1987. The objector contends that only award dated 6/08/1987 is the original award and the award filed in the Court is apparently that which was written on or after 22/08/1987. It has also been contended that facts show that the arbitrator has changed the first page of the award. On the basis of these facts, it is contended that there is an error apparent on the fact of the award which has been improperly procured and the arbitrator is guilty of misconduct.

(4) In order to appreciate the objection I may notice that the date given on the award as filed in Court is 6/08/1987. The award consists of two pages. The date 6/08/1987 is typed on the second page of the award. The second page is signed by the arbitrator and by one Avinash Bhasin as a witness to the award. The first page is on non-judicial stamp paper of Rs75.00. The first page also bears the initials of the arbitrator under the date 6th August. A small correction has also been made on the first page under the initials of the arbitrator. The date given there also is 6th August. The first page does not bear signatures or initials of the witness Avinash Bhasin.

(5) Mr. Wadhwani, learned counsel for the objector, contends that after making and signing of the award on 6/08/1987, the arbitrator had become functus officio and thereafter had no authority to change or re-write the award. As the stamp paper was purchased on 22/08/1987, learned counsel contends, it is apparent that at least the first page of the award was written on or after 22/08/1987.

(6) It is common case of the parties that the arbitrator had sent to the objector a notice dated 6/08/1987 which reads as under :

"BE it known that I have this sixth day of August, 1987 finalised the award in above matter. You are required to remit an amount of Rupees ten thousand only towards cost of award to enable the arbitrator to publish the award. The costs shall be shared by both parties equally."

(7) A copy of the aforesaid notice was also sent by the arbitrator to the petitioner M/s. K.C. Bhatia and Associates. The contention of the objector is that this notice shows that the arbitrator had made and signed the award as required by section 14(1) of the Arbitration Act on 6/08/1987. Section 14(1) provides that when the arbitrators or Umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and the award. Three stages are contemplated by section 14(1) of the Act. The first stage is making of the award. The second stage is of signing it and the third stage is of giving notice in writing to the parties intimating them of making and signing of the award and the amount of fees and charges payable in respect of arbitration and award. The making and signing of the award has to precede the intimation to the parties. The objector contends that after making and signing of the award,

as required by section 14(1) of the Act, the aforesaid notice dated 6/08/1987 was sent to it and thereafter the arbitrator had no competence or authority to change the award in any manner whatsoever .

(8) Learned counsel for the petitioner, on the other hand, submits that writing of the award on stamp paper is merely a ministerial act and assuming that the arbitrator had made and signed the award on 6/08/1987, he was competent in law to have it typed on a stamp paper on any date thereafter but the said ministerial act had to be performed before the filing of the award in Court. Mr. Kaura learned counsel for the petitioner also contends that in the aforesaid notice the arbitrator has not stated that he has made and signed the award but has only stated that he finalised the award .The argument is that finalisation is not same thing as making and signing of the award. Another argument is that the finalisation may have been in mind of the arbitrator and it is possible that the arbitrator might not have even written the award on 6/08/1987. As the arbitrator had given notice dated 6/08/1987, he must have thought of putting the same date on the award as filed in the Court. The contention is that at best it is a case of wrong date on the award and as such is of no consequence .

(9) The meaning of word finalise" as per Webster's Third New International Dictionary is "to put in final and finish form, give final approval; to bring something to completion." In my opinion, it cannot be said that the award was put in final & finish form or that it was completed or finalisedonly finalised only in the mind of the arbitrator. The use of the word "finalise" instead of "made & signed" in notice dated 6/08/1987, will not make any difference The intention remains the same A reading of the notice as a whole makes it abundantly clear that the award must have been made on 6/08/1987. When the award says that it is dated 6/08/1987,it cannot be said that it bears any date other than that. The notice also requires the objector to remit an amount of Rupees ten thus and towards cost of award .to enable the arbitrator to publish it. That is also inconsonance with section 14(1) of the Act. u/s 14(1) of the Act IT is only after signing of the award that is, its execution, that the arbitrators are required to supply the information about the fees and charges (See: Rikhabdas Vs. Ballabhdas and Others,). Thus it is not possible to accept the contention of the petitioner that the award was finalised only in the mind of the arbitrator but may not have been written and signed on 6/08/1987.

(10) In support of the contention that the arbitrator was competent to have the award typed on stamp paper and that the act of getting it typed on a stamp paper is merely a ministerial act, reliance has been placed by counsel for the petitioner on judgment of D.K. Kapur, J. in Suit No.330-A/74 Johri Mal Gupta and Company v. M.C.D. and others decided on 9/04/1979 holding that once an award has been made, it can be written out on a stamp paper. In the said case there was an order on the copy of the award in the following words :

" IT be typed again on receipt of stamp paper."

(11) It appears from the said order that the award made on 30th April, 1974 was treated as a draft and that is why it was ordered to be typed again on receipt of stamp paper. In context of these facts, the learned Judge came to conclusion that after the award has been made the arbitrator has still got some powers such as writing it on a stamp paper or making certain corrections etc. The facts of Johri Mat Gupta's case further show that award dated 30/04/1974 had been partly typed out on stamp paper which was purchased on 8/05/1974. It is clear that the judgment in Johri Mat Gupta's case proceeded on the peculiar facts and circumstances of that case and as such the said judgment does not advance the case of the petitioner any further.

(12) The question whether the arbitrator becomes functus official after making the award stands concluded by judgment of Supreme Court in *Rikhabdass supra* holding that after making his award the arbitrator is functus officio. The Supreme Court cited with approval the observations of Mellish L. J. In *or due .v. Palmer*, (1870) 6 Ch.A22 at page 31, think The result of the cases at law is that when an arbitrator has signed a document and for his award, he is functus officio and he cannot of his own authority remedy any mistake" The appeal in Supreme Court was filed against the judgment of the Division Bench of High Court holding that copying of the award on a stamped paper was purely ministerial and making of the award did not deprive the arbitrator of the authority to copy an award on the requisite stamp paper. Reversing the decision of the Division Bench of the High Court, the Supreme Court held that award could not have been remitted to arbitration for being re-written on stamp paper and u/s 16 an award can be remitted to the arbitrators only for re- consideration and when it remitted for re-writing on a stamped paper, it is not remitted for reconsideration. The arbitrators re-consider nothing when they re- write the award on stamp paper. The Supreme Court did not approve the judgment of High Court holding that re-writing of award on stamp paper was a ministerial act. Justice Sarkar, speaking for the Supreme Court, held that after making the award, the arbitrator becomes functus officio.

(13) Learned counsel for the petitioner has placed reliance on *Harbhajan Singh and others v. Meva Singh and others* Air 1928 Lah 753, *Parshottamdas Narottamdas Patel and others v. Kekhushru Bapuji and others* AIR 1934 Bombay 6, *Chatti Lal v. Ram Chanter Sahu and others*, Air 1919 Pat 215, *Banwarilal Garodia Vs. Joylal Hargulal*, and *R. Dasratha Rao and others v. K. Ramaswamy Iyenger and others* AIR 1956 Mad 134 holding that the arbitrators cannot be deemed to have become functus officio with regard to carrying out of ministerial acts such as engrossing of the award on stamp paper. In view of judgment of Supreme Court in *Rikhabdass* case it is not necessary to elaborately deal with the aforesaid cases relied upon by the counsel for the petitioner but I may notice that the aforesaid cases proceeded on their peculiar facts. In *Calcutta* case the award was dated 31/03/1954 but the stamp paper on which the award was written had been purchased on 1/04/1954. On these facts, P.B. Mukharji, J. came to the conclusion that the error was not such as can at all make the award had

and illegal and noticed that the arbitrator may have dictated the award on 31/03/1954 to a stenographer and the stenographer might have finally transcribed it on a stamp paper on the following day, 1/04/1954. In Madras case reliance was placed on judgments of Bombay and Patna High Courts. The judgment of the Madras High Court in R Dasartha Rao's case was considered by the Andhra Pradesh High Court in Ariyur Mohammad Habeer Rahman and others v. Ansuri Varamma (died) and another, 1974 Andhra Pradesh 113 and it was held that the decision of the Madras High Court runs contrary to the decision of the Supreme Court in Rikhabdas Vs. Ballabhdas and Others, and it cannot Therefore, be said that the decision in Air 1956 Madras 134 lays down good law. A division Bench of Calcutta High Court in Nalini Ranjan Guha Vs. Union of India (UOI), expressed doubts about the correctness of law laid down by Lahore High Court in Harbhajan Singh's case and also noticed that judgment of Lahore High Court was based on admission of the parties.

(14) In view of the above discussion, the arbitrator had become functus officio on making and signing of the award on 6/08/1987 and he could not re-write it thereafter.

(15) I may also notice another somewhat peculiar aspect of this case. Unlike some other documents there is no legal requirement that an award should be witnessed by some other person. Generally the awards are not witnessed by other persons. In this case, however, the award is witnessed and besides the arbitrator the witness Avinash Bhasin has also signed it. The date typed on the page signed by Mr. Bhasin is 6/08/1987. There is nothing on the record to suggest that Mr. Bhasin signed the award on any date other than 6/08/1987. If the award was made known to Mr. Bhasin on 6/08/1987, it could not be changed, or substituted, altered or transcribed on stamp paper after 6/08/1987 and the arbitrator became functus officio after the said date. I am inclined to agree with the contention of the objector that the first page of the award appears to have been changed on or after 22/08/1987. How could the first page be signed on 6/08/1987 when the stamp paper itself was purchased on 22nd August, 1987. The date 6th August on that page has been written by the arbitrator himself. It is not possible on the facts & circumstances of the case to accept the contention of the petitioner that it is a case of wrong date on the award. The law that the Court should lean in favor of upholding the award does not mean that on such glaring infirmities being found still the award should be upheld.

(16) Mr. Wadhwani has also contended that the award is typed on two pages but the said pages have been typed on different type-writers. I have carefully perused both the pages of the award but find myself unable to come to final opinion whether two pages have been typed on the same type-writer or on different type-writers, though the type of first page is in single-space and second page has been typed in double spacing. In any case this is not a very material fact.

(17) I may also notice the contention of the objector that the award under claim

No. 2 is very abnormally excessive The arbitrator is the final authority both on facts and law and it is not open to me to go into the merits of the case and evidence on record to find out whether the amount is abnormally excessive or not. There is nothing on the face of the award to suggest that amount awarded under claim No. 2 is abnormally excessive. IT is a non-speaking award. I cannot delve into the mental process of the arbitrator to find out alleged excessiveness. On this aspect there is no error apparent on the face of the award.

(18) In view of the above discussions, I answer the issues in favor of the objector and hold that after 6/08/1987 the arbitrator had become functus officio. The objections (I.A. 766/88) are allowed and the award dated 6/08/1987 made by Brig. Harish Chandra (Retired) is set-aside leaving the parties to bear their own costs.