

(1996) 07 MAD CK 0134

In the Madras High Court

Case No : O.S.A. No. 156 and 157 of 1993

M/s. Gounder and Co.

APPELLANT

Vs

B.S. Hegde

RESPONDENT

Date of Decision : 17-07-1996

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (1998) 3 CTC 219 : (1998) 1 LW 204

Hon'ble Judges : Srinivasan, J;S.S. Subramani, J

Bench : Division Bench

Advocate : Mr. A. Shanmugam, for the Appellant; Mr. P.A. Deivasigamani Associates, for the Respondent

Judgement

Judgement Pronounced by Srinivasan, J.—In these two appeals, three matters are in dispute. The appellant entered into contracts with the 2nd respondent for the purpose of handling and transporting goods at the Coimbatore Main Depot of the 2nd respondent and the Sub-depots around Coimbatore City for the period 16.11.1978 to 15.11.1980. As some disputes arose between the Parties regarding the claims made by the appellant the matter was referred to arbitrator.

2. The arbitrator accepted the claims made by the appellant to some extent and passed an award. The appellant filed Original Petition for filing the award into court and for passing a decree in terms of the award, while the 2nd respondent filed a petition for setting aside the award. Both the petitions were heard together by a learned judge of this Court, who set aside the award of the Arbitrator with reference to three matters and confirmed the same in other respects. The three claims, with regard to which, the award has been set aside, are referred to, for the sake of convenience, as claim Nos.3, 8 and 14. We will deal with claim No.3 at the end as it relates to a large amount.

3. Claim No.8 is a claim made by the appellant for additional remuneration for stocks handled at M.G.7 and M.G.8 godowns. He has made a claim for a sum of Rs.21,195.50. According to the appellant it was stated in the contract that the

two godowns M.G.7 and M.G.8 were served by Railway siding; but it was found that the same were situated at a distance of 24 feet from the Railway Siding and the Contractor had to remove the goods on head-loads. The appellant claimed that the charges incurred by it for removing the goods on head-loads to the said Godowns, are to be paid by the 2nd respondent. The contention of the 2nd respondent is that as per the contract, the appellant is bound to take the goods to M.G.7 and M.G.8 godowns and the appellant must have taken note of the location before it entered into a contract and it is not open to the appellant to make a separate claim for removing the goods on head-loads from the Railway Siding to the said godowns. The Arbitrator negated the contention of the 2nd respondent and observed that the 2nd respondent was not justified in resorting to pedantic interpretation of the terms of the agreement. The Arbitrator awarded the claim made by the appellant in a sum of Rs.21,195.50.

4. The learned single Judge has aside that part of the award on the ground that it was the duty of the contractor to have acquainted itself with the location of the Railway Siding and the said godowns of the 2nd respondent and if it had desired that separate charges should be paid for removing the goods from the Railway Siding to those godowns, it should have made such a demand before entering into the contract. The learned judge found that according to the contract, the contractor was bound to take the goods to those godowns of the 2nd respondent and therefore, it cannot claim a separate charge for removing the goods from the Railway Siding to the said godowns. The learned judge has discussed the said question in Paragraph 6 of his judgment. On a perusal of the said reasoning of the learned judge, we find that he is justified in holding that the Contractor must have acquainted itself with the location of the Railway Siding and the two godowns and the distance thereto before entering into the contract. It is not open to contractor to make a separate claim therefore after entering into the contract. Hence, the award in that regard, of the Arbitrator would tantamount to bringing into existence a new agreement, in as much as there was no provision in the contract for the payment of separate charges for transporting the goods between the Railway Siding to the said godowns. Hence, the learned judge is perfectly justified in setting aside that part of the award.

5. The second claim, which is now in dispute is claim No. 14 under this clause, the contractor is claiming a sum of Rs.75,219.35, which was deducted by the 2nd respondent as demurrage charges from out of the amount payable to the contractor under the various bills. According to the appellant, the quantum of demurrage charges should have been decided by the Senior Regional Manager of the 2nd respondent and such decision would be final and binding on it. But, according to it in this case, no such decision was taken by the Senior Regional Manager and communicated to it before the amounts were deducted by the 2nd respondent. In this regard, the Arbitrator found that the appellant was also negligent in the matter of transport and delivery of goods and it was liable for demurrage charges.

6. But the Arbitrator thought that out of a total sum of Rs.1,34,989.20 the appellant would be liable only for one half thereof viz., a sum of Rs.67,494.60. On that basis, the Arbitrator proceeded to say that the 2nd respondent having recovered already a sum of Rs.75,219.35 was bound to pay a sum of Rs.7,725.75, which is in excess of Rs.67,494.60.

7. The learned judge dealing with this aspect of the matter of the claim, in paras 9 and 10 of his judgment, found that the Arbitrator had himself categorically held that the recovery of demurrage charges by the District Manager was in accordance with the terms of the contract and therefore, the matter was beyond dispute because of the provisions in Clause 12(a) and (b). The learned judge has referred to sub-clause (b), which enables the 2nd respondent to reimburse itself of any damages, loss, charges, etc. incurred by them due to the Contractors negligence or default. The learned judge has expressed the view that the Arbitrator having found that the Contractor was liable for negligence, ought not to have directed the 2nd respondent to refund any amount, which had already been deducted by way of demurrage charges on the footing that it was in excess of one half of the total demurrage. We do not find any error whatever in the reasoning adopted by the learned judge. He was perfectly justified in interfering with the award passed by the Arbitrator in this regard.

8. The Supreme Court has held in *Union of India (UOI) Vs. Jain Associates and Another*, that the expression "misconduct" in section 30(a) of the Arbitration Act does not necessarily comprehend or include misconduct or fraudulent or improper conduct or moral lapse, but does comprehend and include actions on the part of the Arbitrator, which, on the face of the award, and opposed to all rational and reasonable principles resulting in excessive award. Regarding this claim, the principle laid down by the Supreme Court in the above decision will apply and the Arbitrator's award suffers from inconsistency on the face of it, in that, he having found that the Contractor was negligent and liable to pay demurrage charges, ought not to have apportioned it between the contractor, and the 2nd respondent in equal halves. Hence, this contention of the Appellant fails.

9. The last claim with regard to which arguments were advanced before, us, is claim No.3. It pertains to additional transport charges to the tune of Rs.3,62,613.50. The contractor has claimed that under the terms and conditions of the agreement, specific rates have been fixed for transport of foodgrains from F.C.I. main depot to the sub-depots at Vedapatti and Vanniampalayam. According to it, it had to transport goods from F.C.I. main godown to the sub-depots at Vedapatti and Vanniampalayam known as Bishops godown and KRP Godown, respectively. It is contended by the contractor that there is no specific clause relating to the said transport and therefore, no specific rate has been fixed therefor. According to it, the residuary provision under clause 5(b) will apply and it is entitled to the rate mentioned in the said residuary clause. The Arbitrator has accepted the claim of the appellant and awarded a sum of Rs.3,62,613.50,

as claimed by it. For doing so, the Arbitrator negated the contention put forward by the 2nd respondent that Coimbatore North Rail Head is the same as the F.C.I., main godown and they are not two different places. The 2nd respondent contended that clause 2(b) would only apply, as, according to them, the contractor was bound to transport the goods from Coimbatore main godown to the sub-depots. It is also their contention that the Coimbatore North Railway siding would mean and include the main godown of the F.C.I. and they are not two different places. That contention was negated by the Arbitrator, as he found, as matter of fact that the two places are different and the distance between the two is one kilometre.

10. The learned judge set aside the said award. While discussing the matter the learned judge practically accepted the contention of the 2nd respondent that the Coimbatore North Rail Head is the same as F.C.I. main godown. The learned Judge, while discussing this aspect of the matter, has observed that he had already referred to the said aspect while dealing with Claim No.8 relating to godowns M.G.7 and M.G.8 and therefore, it was ideal for the 2nd respondent to contend that Coimbatore North Rail Head and the Railway siding where F.C.I. main godown is located, are two distinct locations and the contractor is entitled to be paid at the rate provided in the residuary clause. The learned Judge has referred to clause 2(b) and clause 5(b) in the first contract between the parties, overlooking the terms of the second contract as between them. In the first contract, clause 2(b) refers to the transport from Coimbatore North Rail Head to F.C.I., main godown while in the second contract, clause 2(b) refers to the transport from Coimbatore North Rail Head to Bishops Godown at Vedapatty. Obviously, the entire discussion in the judgment of the learned Judge proceeded as if the clause in the first contract would apply in this case. Obviously, it was not brought to the notice of the learned judge that the clause on which reliance is placed by the 2nd respondent is clause 2(b) in the Second contract, which refers to transport of goods from Coimbatore North Rail Head to Bishops Godown at Vedapatty. That clause will not apply as it speaks only of Coimbatore North Rail Head and not F.C.I. main godown.

11. It is not in dispute that in this case, the claim is made for transport from the main depot of the 2nd respondent to the sub-depots. When the claim was made prior to the reference to the Arbitrator, the Senior Regional Manager of the 2nd respondent sent a letter to the District Manager on 12.11.1989. In that letter, he has stated as follows:-

"The contractor's contention is that in the contract the stocks meant for Bishops godown are to be handled at Coimbatore North Rail Head, whereas they are actually handled at the main depot premises and hence, they demand that the rate of 463% ASOR applicable to main depot to be paid to them as against 410% ASOR applicable to the sub-depots. In as much as the handling of wagons is undertaken inside the main depot and the stocks are moved to the sub-depot for which lower rate is applicable, the Contractor's contention seems to be correct

since he is called upon to handle the stocks inside the main depot. It is not understood as to what difficulties are experienced in receiving and handing the stocks at the Coimbatore North Rail Head when the stocks are meant to be moved to the sub-depots instead of bringing the wagons inside the main depot. This aspect has to be examined by you and ensure that wagons are not placed inside the depot when the stocks to be unloaded/loaded are meant to be moved from to the sub-depots. This letter was also not brought to the notice of the learned Judge.

12. Even assuming that the letter may not conclude the issue, the reasoning given by the Arbitrator that Coimbatore North Rail Head is entirely different from the F.C.I. main godown, is unassailable. Learned counsel for the 2nd respondent contended before us that the said finding of the Arbitrator is perverse. According to learned counsel, both are one and the same. We are unable to appreciate the said argument, as there is no dispute that the distance between the Coimbatore North Rail Head and the F.C.I. main godown is one K.M., as found by the Arbitrator. When that is so, there is no substance whatever in the contention that the two places are the same and they have to be treated as one and the same. It follows, therefore, that neither clause 1(b) in the first contract, nor clause 2(b) in the second contract, will apply to the claim made under this head by the contractor. The specific claim is that it transported the goods from the main godown to the sub-depots and the rates therefore, have not been fixed in the two contracts. Thus it claims that the matter will fall under the residuary clause 5(b). That contention has to be accepted and the Arbitrator has rightly accepted the same. The reasoning of the learned judge in setting aside the award of the Arbitrator in that regard, proceeds on a wrong understanding of the contract and because the learned judge has overlooked the relevant and material evidence in this regard. Consequently, the judgment of the learned Judge under that head, cannot be sustained.

13. Learned counsel for the 2nd respondent invited our attention to the judgment of the Supreme Court in State of U.P. Vs. M/s. Ram Nath International Const. Pvt. Ltd., . The Court held that the jurisdiction of the court to interfere with the award of the Arbitrator is a limited one, as the adjudication of the Arbitrator is generally binding between the parties and it is not open to the Court to attempt to probe the mental process by which the Arbitrator has reached his conclusion. Learned counsel placed reliance on the passage in the judgment that the Arbitrator is a creature of the agreement itself and therefore, is duty bound to enforce the terms of the agreement and cannot adjudicate a matter beyond the agreement itself. We are of opinion that the passage has no relevance in the present case. The Arbitrator in this case has not travelled beyond the scope of the two agreements. He has only considered the terms of the agreements and the contentions of the parties based on such terms. He has correctly interpreted the terms of the two contracts and found that the claim would fall under the residuary clause 5(b) in the contract. Therefore, there is no misconduct whatever on the part of the Arbitrator to bring the matter within Section 30(a) of the

Arbitration Act.

14. Consequently, the judgment of the learned judge is set aside in so far as it relates to claim No.3 and the award of the Arbitrator in that regard is restored.

15. The appeals are partly allowed to the extent of claim No.3 and dismissed with regard to claim Nos.8 and 14 as indicated above. There will be no order as to costs.

16. It is stated before us by learned counsel for the appellant that the decree drafted by this court pursuant to the judgment of the learned single judge is not correctly drafted, as the calculation made therein is erroneous. It is not necessary for us to set aside separately that decree, as we have now set aside the judgment with regard to claim No.3 and the Registry is bound to draft the decree entirely afresh in accordance with our judgment. The Registry is directed to give an opportunity to both counsel to scrutinise the calculation made by the Registry as and when it is completed and the decree must be finally drafted only after both counsel had occasion to look into the calculation and approve the same.

17. Before we part with this case, we must place on record our appreciation of the manner in which the junior Counsel Mr. P.C. Adikesavalu, appearing for the 2nd respondent, argued this matter in an able manner and helped the Court.