

(1989) 03 DEL CK 0016

In the Delhi High Court

Case No : Suit No. 2271 of 1985 and I.A. No. 2270 of 1986

M/s. Nagori and Company

APPELLANT

Vs

Indian Sugar Industries Export Corporation Ltd.

RESPONDENT

Date of Decision : 17-03-1989

Acts Referred:

Citation : AIR 1990 Delhi 125

Hon'ble Judges : Sunanda Bhandare, J

Bench : Single Bench

Advocate : V.B. Joshi, Ad, for the Appellant; R.K.P. Shankardass M.G. Ramachandran and P. Nagesh, for the Respondent

Judgement

1. The Indian Sugar Industries Export Corporation Limited (hereinafter referred as the Corporation) was required to arrange transport of 6260 metric tons of sugar as handling agents for State Trading Corporation for five different factories situated in the State of Gujarat. The Corporation entered into a contract to execute the job with M/ s. Nagori and Company, Shivaji Cross Road, Shrirampur, District Ahmednagar, Maharashtra (hereinafter referred to as the Company). It was agreed that a consideration of Rs. 89/ - per metric ton will be paid to the Company. Under the said agreement, the transportation had to be completed by 20th of February, 1981. The Company lifted 1668.6 M.T. of sugar from the factories and delivered 1558.6 M.T. at the Bombay Port by the stipulated date. Other 1100 bags though removed from Chalthan Factory were not carried to the destination but were stored at the godowns of the transporters engaged by the Company. Though the stipulated time expired, the company failed to fulfill its commitment. The Corporation, Therefore, extended the time up to 29th March, 1981 and urged the Company to complete the job by that time. The Company failed to complete the transportation even before the extended time. The Corporation, Therefore, terminated the contract with the Company on 2nd April, 1981 and employed another transporter to carry the remaining quantity of sugar @ Rs. 145/- per M.T. at the risk and cost of the Company.

2. A dispute arose between the parties which was referred to arbitration. Shri M. S. Joshi, Ex-Judge of Delhi High Court was appointed as sole arbitrator by the Indian Council of Arbitration to consider and decide the dispute between the parties under the rules of the Arbitration of the Council. A claim was lodged by the Company against the Corporation for recovery of Rs. 2,57,118.40. According to the Company Rs. 1,49,705.40 was due to it for transporting the sugar; Rs. 50,000/- by way of refund of the security deposit and Rs. 40,000/- as damages for the loss suffered in consequence of the termination of the contract. The Company claimed interest on this amount @ 18% per annum from 7th April, 1981 till realisation of the amount. The Corporation did not deny the claim of the company for transportation charges @ Rs. 89/ - per M.T. for 1558.6 M.T. of sugar actually carried i.e. Rs. 1,48,540.40; Rs. 1,200/ - paid by it as octroi duty on behalf of the Corporation and Rs. 50,000/- on account of refund of the security deposit. However, the claim of the Company for Rs. 36,000/ - stated to have been spent by the Company for storage, loading, unloading etc. in connection with 1100 bags of sugar and the alleged loss of Rs. 40,000/ - suffered by the Company was controverted by the Corporation. In addition, the Corporation made a counter-claim for Rs. 2,57,180.40 on account of the default of the Company for arranging transport of 4591.4 M.T. of sugar at Rs. 145 / - per M.T. as against Rs. 89 / - per M.T. payable to the Company i.e. damages of Rs. 56 / - per M.T. paid in excess by the Corporation. A further counter-claim was made in respect of 24 bags which were received in stained condition which had to be re-packed in new bags costing Rs. 240/ -. Thus, a claim was made for Rs. 2,57,358.40 with interest after adjusting a sum of Rs. 1,99,705.40 claimed by the company.

3. The arbitrator on the claim and counter-claim put forward by the parties framed the following issues:

1. Whether the claimant committed breach of agreement by failing to transport the goods in dispute in time? - OR
2. In case Issue No. 1 is proved, to what amount of damages is the respondent entitled? - OR
3. Whether a sum of Rs. 36,000/ - still remains to be paid by the respondent against the claimant's bill dated 7-4-1981 ? of
4. Whether the respondent terminated the agreement on 2-4-1981 unlawfully and is, Therefore, liable to pay damages to the tune of Rs. 40,000/- to the claimant ? of
5. Whether the respondent is entitled to recover interest and cost of these proceedings as claimed ? OR
6. Whether the claimant is entitled to recover interest from the respondent on the sum of Rs. 2,36,305.40 from 7-4-1981 as alleged?

The parties were given opportunity to adduce evidence in support of their respective claims and on hearing them the arbitrator gave his award on 30th

April, 1985. The arbitrator held that the Corporation was entirely justified in terminating the contract and thus there was no question of the Corporation paying any damages to the Company for rescinding the agreement. The arbitrator also rejected the claim of the Company for Rs. 36,000/- allegedly spent by the Company for storage, loading, unloading and freight charges in connection with 1100 bags of sugar which could not be unloaded at Bombay Port on 20th February, 1981 due to strike. The arbitrator however held that since the Corporation had failed to satisfactorily prove that all the necessary steps were taken by it to find another transporter ready and willing to accomplish the unfinished job at the same or nearabout the same cost it could not be awarded the amount of damages of Rs. 2,57,358.40 claimed by the Corporation. However, the claim of the Corporation for R. 240/- for repacking of 24 bags was upheld. The arbitrator filed the award in Court in December, 1985.

4. Notices of the filing of the award were sent to the parties and thereafter the respondent-Corporation filed the present application under Ss. 30 and 33 read with Ss. 15 and 16 of the Arbitration Act, 1940.

5. The main contention of the learned counsel appearing for the Corporation i.e. the respondent / objector herein was that the arbitrator had committed an error of law which is apparent on the face of the record in deciding issue No. 2 i.e. the claim of the Corporation regarding damages. It was submitted that the plea of mitigation of damages has to be specifically taken and proved by the person alleging the said plea. No issue had been framed in regard to that plea by the arbitrator. Neither the statement of claim nor any other proceedings filed by the petitioner Company contained any plea of mitigation of damages. It was contended that while deciding this issue, the arbitrator wrongly put the burden on the respondent / Corporation to prove that all the necessary steps were taken by it to find another transporter ready and willing to complete the unfinished job at or nearabout the same cost. It was submitted that since the Company did not challenge that in fact the Corporation had engaged another transporter and further did not challenge the rate at which the new transporter was paid, the question of the Corporation proving that it tried to mitigate the damages did not arise. Learned counsel referred to a passage at page 552 from Law of Contract by Cheshire and Fifoot, 10th Edition in support of his contention that the burden of proving rests upon the person who asserts that damages could have been mitigated. Learned counsel relied on K.G. Hiranandani Vs. Bharat Barrel and Drum Mfg. Co. Pvt. Ltd., Sagarmull Agarwala Vs. Union of India (UOI) and Others, and M. Lachia Setty and Sons Ltd. Vs. Coffee Board, Bangalore, .

6. On the other hand, it was contended by the learned counsel appearing for the petitioner/Company that since it was the case of the petitioner Company that it was willing to perform as per the contract and it had offered to do it at the same rate there was no question of the Company further proving that the Corporation could have transported the sugar at a lesser rate than Rs. 145/- per M.T. Learned counsel submitted that since the Corporation had failed to prove that they had

taken steps to mitigate the damages, the arbitrator rightly disallowed the claim of the Corporation. Learned counsel further submitted that this Court while deciding an application under Ss. 30 and 31 read with Ss. 15 and 16 of the Arbitration Act exercises very limited jurisdiction and even if there is an error of law, this Court cannot correct the error. Learned counsel referred to The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board, and latest judgment of the Supreme Court in Puri Construction Pvt. Ltd. Vs. Union of India (UOI), and submitted that while considering the objections to the award, the High Court does not sit in appeal over the views of the arbitrator by re-examining and reassessing the material and scope for setting aside an award is limited to the grounds available under the Arbitration Act.

7. It is well settled that "if parties constitute an arbitrator as a sole and final judge of the disputes arising between them, they bind themselves as a rule to accept the award as final and conclusive. Thus an award is ordinarily not liable to be set aside on the ground that either on facts or in law it is erroneous". Thus, an application for setting aside an award can succeed only if there is an error of law on the face of the award.

8. Now, in the present case can it be said that there is an error of law on the face of the award ?

9. It is well settled that the law does not require a party to prove the negative. The onus is always on the person who asserts a fact. Thus, the person who claims damages has to prove that the loss has occurred to him and it is for the person who asserts that loss or damages could have been mitigated to prove that the loss could have been reduced. It is only thereafter that the onus shifts on the person claiming damages to prove that he took all reasonable steps to mitigate the damages.

10. From the facts it appears that the Company did not challenge the statement of the Corporation that it paid Rs. 145/- per M.T. for transportation of the sugar after the contract was terminated. The only plea of the Company was that the Company was itself willing to transport it at Rs. 89 / - per M.T. It however did not prove that the Corporation could have transported the sugar through other transporters at a lesser rate. Now, once the Corporation had proved that it had paid Rs. 145/- per M.T. for transportation it was for the Company to show that the Corporation could have transported the sugar at a lesser rate. Only thereafter the burden would have shifted on the Corporation to show that it took all reasonable steps to mitigate the damages. I find that the question of mitigation of damages was never raised before the arbitrator and in fact there was no issue framed in that regard.

11. In my view, Therefore, the learned arbitrator erred in dismissing the claim of the Corporation for damages by putting the burden on the Corporation to prove that it took necessary steps to mitigate the damages.

12. The next question that arises for determination is whether the award can be

set aside on this ground.

13. Section 30 of the Arbitration Act provides that an award shall not be set aside except on one or more of the grounds mentioned therein. Section 30 of the Arbitration Act reads as follows:

"30. An award shall not be set aside except on one or more of the following grounds; namely:--

- (a) that an arbitrator or umpire has miss-conducted 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 proceedings have become invalid under S. 35;
- (c) that an award has been improperly procured or is otherwise invalid.

14. The Supreme Court in *The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board*, has observed that "if it is transparent from the award that a legal proposition which forms its basis is erroneous, the award would be liable to be set aside." In this case the arbitrator has given a speaking award. In my view, since the very basis on which the claim of the Corporation for damages was rejected is erroneous it has to be held that there is an error of law on the face of the record.

15. Now the next question is whether the whole award should be set aside the remitted back for fresh decision or whether it should be partially modified. Learned counsel for the Corporation contended that the dispute relates to a contract entered into between the parties on 12th February, 1981 and a reference was made to arbitration as early as in the year 1983 and if the entire award is set aside and remitted back for a fresh decision, further delay will be caused which shall cause undue hardship to the parties. He further submitted that one of the terms of the contract between the parties provides that in case the Company fails to transport, It will be liable to pay the additional amount which the Corporation may have to pay to another transporter. Furthermore, the only case of the Company was that they were themselves willing to transport the sugar at Rs. 89/- per M.T. and they have not pleaded in their reply to the counter-claim made before the arbitrator that other transporters would have transported the sugar at a lesser rate. He submitted that in fact that is the reason why no specific issue in that regard was framed. In my view, no useful purpose will be served in remitting the case back to the arbitrator for fresh decision. The error which has occurred in the award relates only to issue No. 2 which deals with the claim of the Corporation. It is distinct and separate from the rest of the award. Since the finding of the arbitrator is severable I do not see any reason why the entire award should be set aside.

There is nothing on record to indicate that the Company at any stage disputed that the Corporation transported the sugar at Rs. 145 /- per M. T. and that it actually spent the amount it has claimed. Therefore, the counter-claim for Rs. 2, 57, 268.40 raised by the Corporation/ respondent herein has to be allowed. The

objections are allowed and the award is modified to that extent. The award dated 30th April, 1985 as modified today is made a rule of the Court. A decree is passed in terms of the modified award. The respondent will be entitled to interest @ 18% per annum from the date of the decree till realisation. No costs.

16. Order accordingly.