

(1989) 03 DEL CK 0045

In the Delhi High Court

Case No : Suit No. 2271 of 1985 and Interim Application No. 2270 of 1986

Nagori and Company

APPELLANT

Vs

Indian Sugar Industries Export Corporation Ltd.

RESPONDENT

Date of Decision : 17-03-1989

Acts Referred:

Citation : (1989) ILR Delhi 402

Hon'ble Judges : Sunanda Bhandare, J

Bench : Single Bench

Advocate : V.B. Joshi, R.K.P. Shankar Das, M.G. Ramachandran and P. Nagesh, for the Appellant;

Judgement

Sunanda Bhandare, J.

(1) 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 decode 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 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. 1200 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. with interest after adjusting a sum of Rs. 1,99,705.40 claimed by the company.

(2) 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? OR

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? OR

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 of the sum of Rs. 2,36,305.40 from 7-4-1981 as alleged?

(3) 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.

(4) 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 near about 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 turn Rs. 240 for re-packing of 24 bags was upheld. The Arbitrator filed the award in court in December, 1985.

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

(6) 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 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 Sections 30 and 31 read with Sections 15 & 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 Co. Ltd. v. The U.P. Electricity Board*, Air 1973 Sc 83(1) and latest judgment of the Supreme Court in *Puri Construction Pvt. Ltd. Vs. Union of India (UOI)*, (2) 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 re-assessing 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 damage 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 and 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 pulling 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 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 proceedings have become invalid u/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 Co. Ltd. case (supra) 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 and 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 transporters 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.

(16) 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 cent per annum from the date of the decree till realisation. No costs.