

(1991) 02 MAD CK 0096

In the Madras High Court

Case No : O.P. No's. 540 of 1989 and 351 of 1990

N.N. Malhotra

APPELLANT

Vs

M/s. Indira Engineering Enterprises and Oil and Natural Gas
Commission, Southern Regional Business Centre, Madras-17

RESPONDENT

Date of Decision : 12-02-1991

Acts Referred:

Arbitration Act, 1940 — Section 14(2), 30

Citation : (1991) 02 MAD CK 0096

Hon'ble Judges : Lakshmanan, J

Bench : Single Bench

Advocate : R. Balasubramaniam O.P. 540 of 1989, for the Appellant; G.M. Nathan for 1st Respondent (O.P. 540 of 1989) and Sri. B. Rajagopalan for 2nd Respondent (O.P. 540 of 1989), for the Respondent

Judgement

Lakshmanan, J.—O.P. No. 540 of 1989 was filed by the sole arbitrator (N.N. Malhotra) under S. 14(2) of the Arbitration Act (hereinafter referred to as "the Act") to file the award dated 23.5.1989 into this Court. The first respondent, M/s. Indira Engineering Enterprises is a partnership firm having business at Door No. 35-1-20, Kanchumarthivari Street, Rajahmundry, Andhra Pradesh. The second respondent, Oil and Natural Gas Commission (O.N.G.C.) constituted under the Oil & Natural Gas Commission Act, 1959 is having its office at T. Nagar, Madras-17. The first respondent raised a dispute which it had against the second respondent arising under the contract of handling and transportation dated 9.1.1984 and the same was referred to arbitration by the sole arbitrator as per the agreement between the parties vide: Office Order of Oil & Natural Gas Commission No.MAS/Tpt/CP/016/Vol.I/2648 dated 15.10.1984. The arbitrator entered upon the reference on 15.10.1988 and issued notices to both parties calling upon them to file their respective statements. Respondents filed their statements and the arbitration proceedings commenced. Several sittings have taken place before the arbitrator. The arbitrator passed an award on 23.5.1989 and the copies of the award were sent to the respondents.

2. O.P. No. 351 of 1990 was filed by the respondent in O.P. No. 540 of 1989 under S. 30 of the Act to set aside the award dated 23.5.1989 and allow the claim that may be deemed fit in the circumstances of the case.

3. The work of handling and transporting certain materials was entrusted to the first respondent Indira Engineering Enterprises by O.N.G.C. under a contract dated 9.1.1984. One of the terms of the said contract reads as follows:-

Clause 1.6: Bank guarantee from a scheduled bank for Rs. 7 lakhs will be given by the contractor within 3 months from the commencement of the contract. Till such time of giving Bank guarantee, the contractor will be paid only 50% of their bills amount of every month upto third month bill. In case the contractor fails to provide the Bank guarantee within the period of three months, O.N.G.C. will deduct the total amount of subsequent bills to make up Rs. 7 lakhs together with the unpaid amount already withheld by the Oil and Natural Gas Commission. This withheld amount of outstanding bills will be released within seven days of production of Bank guarantee (The Commission will pay Rs. 2.50 lakhs for providing the Bank guarantee of Rs. 7 lakhs to the Contractor in addition to lumpsum charges of Rs. 26.50 lakhs).

The first respondent commenced execution of the contract right from January, 1984, but did not give the bank guarantee. Hence as provided under the abovesaid clause, the O.N.G.C. withheld 50% of the bills amount, out of every monthly bill upto the third month, and thereafter the respondent deducted the total amount of the bills due for subsequent months till the total amount was accumulated to the tune of Rs. 7 lakhs in order to hold and keep the same as security deposit for the due performance of the work under the contract. According to the first respondent, the work was completed satisfactorily and the security deposit of seven lakhs of rupees was also returned, but the additional sum of Rs. 2.5 lakhs agreed to be paid was not paid, despite repeated requests which pulled the first respondent to refer the dispute to the arbitrator who passed the award rejecting the claim of the first respondent. It is against the award, the first respondent has filed O.P. No. 351 of 1990 under S. 30 of the Act for setting aside the same.

4. According to the first respondent in O.P. No. 540 of 1989 (Petitioner in O.P. No. 351 of 1990) the award of the arbitrator suffers from manifest error apparent on the face of the record and so the award is liable to be set aside on the following grounds:-a) The award is vitiated by illegalities apparent on the face of the record since the learned arbitrator failed to appreciate that the object in insisting upon a bank guarantee is to have necessary and sufficient security and the solatium of 2 1/2 lakhs was offered if such security was made; and so cash, security is a stronger and better security than a bank guarantee and hence the object of insisting upon the security was served. The absence of a clause for payment of 2 1/2 lakhs if withheld from the bills of the petitioner is no ground for rejecting the claim since it is an implied term of the contract.

b) Failure of the learned arbitrator in not taking into consideration the other clauses in the contract while interpreting a particular clause amounts to misconduct on the part of the learned arbitrator. Clause 9.12 speaks about two securities, viz., earnest money deposit or Bank guarantee and the choice is given to the petitioner in clause 1.6 of the contract.

c) In ascertaining the meaning of the contract and its application to the actual occurrence the court or the arbitrator is expected to decide not what the parties actually intended but what as reasonable men, they should have intended.

d) The award is not valid as the interpretation of the terms of the contract by the arbitrator is not in accordance with law.

e) The award has become vitiated by errors apparent on the face of the record on account of the failure of the learned arbitrator to construe the terms of the contract in proper perspective.

f) The error of law apparent on the face of the award relates or pertains to a legal proposition which is the basis of the award, and in the instant case the interpretation of the clause is erroneous and as such the award has to be set aside.

5. O.P. No. 351 of 1990 was resisted by O.N.G.C. by filing a counter statement. I have heard the elaborate arguments of Mr. G.M. Nathan, on behalf of the first respondent in O.P. No. 540 of 1989 and the petitioner in O.P. No. 351 of 1990 and Mr. B. Rajagopalan, on behalf of the only contesting respondent in O.P. No. 351 of 1990. Both the counsel reiterated the stand taken by them in the petition and the counter statement respectively.

6. According to Mr. G.M. Nathan, though the first respondent did not give bank guarantee, the respondent withheld 50% of the bills amount out of every month bill upto the third month as provided under the clause extracted above till the total amount was accumulated to the tune of Rs. 7 lakhs in order to hold and keep the same as security for the due performance of the work under the contract. According to the learned counsel the work was completed satisfactorily and the security deposit of seven lakhs of rupees was also returned but the additional sum of Rs. 2.5 lakhs agreed to be paid was not paid, despite repeated demands. Learned counsel then contended that the object in insisting upon a bank guarantee is to have necessary and sufficient security and the solatium of 2 1/2 lakhs was offered if such security was made and as cash security is a stronger and better security than a bank guarantee and hence the object of the insisting upon the security was fully met. The absence of a clause for payment of 2 1/2 lakhs rupees if withheld from the bills of the petitioner is no ground for rejecting the claim since it is an implied term of the contract. According to the learned counsel the arbitrator has committed a misconduct in not taking into consideration the other clauses in the contract while interpreting a particular clause. The arbitrator has not properly interpreted the clause 9.12 which speaks about the earnest money deposit or bank guarantee. The choice is given to the

contractor in clause 1.6 of the contract. The arbitrator has failed in properly looking at the text of Clause 1.6 of the contract which resulted in miscarriage of justice. Thus the, learned counsel contended that the arbitrator's award in not properly interpreting the terms of the contract in proper perspective is not valid since the interpretation of the terms of the contract is not in accordance with law.

7. Mr. B. Rajagopalan, learned counsel for O.N.G.C. in answer to the submissions made by the learned counsel for the contractor submits that the claim for payment of Rs. 2 1/2 lakhs by the contractor apart from the lump sum payment of Rs. 26.50 lakhs is not based on any contract by the parties. When admittedly the claimant has not furnished the bank guarantee for a sum of 7 lakhs within the stipulated time he is not entitled to the payment of Rs. 2.5 lakhs as claimed. According to the learned counsel for O.N.G.C. clause 1.6 of the contract has to be read strictly and as per the terms thereof, the payment of Rs. 2.5 lakhs is provided only in case the claimant furnished bank guarantee for Rs. 7 lakhs. It was further contended that the clause 1.6 of the contract with Clause 1.1, making provision for the O.N.G.C. to deduct upto Rs. 7 lakhs from out of the bills of the contractor is a separate and distinct clause. Learned counsel next contended that the award was passed by the arbitrator chosen by the parties and hence this court cannot exercise appellate powers over the decision and that the decision was reached fairly after giving adequate opportunities to both parties. In dealing with S.30 of the Act to set aside the award, this court is not to speculate in general and the Arbitrator's decision is binding on both the parties and only unexceptional cases set out in S. 30 of the Act, this court can set aside the award. As the arbitrator in this case has given full and fair opportunity to both parties there is no reason for this court to interfere with the said findings on facts. Thus according to the learned counsel for the O.N.G.C., the petitioner in O.P. No. 351 of 1990 has not made out any case for interference with the award in question.

8. The arbitrator has framed two issues for consideration: (1) whether the claimant is entitled to a sum of Rs. 2.5 lakhs as claimed by him under Clause 1.6 of the contract agreement dated 9.1.1984, and

(2) whether interest may be allowed on the amount of Rs. 2.5 lakhs, w.e.f. 7.8.1985, i.e. the first letter claiming interest by the claimant. And if so, at what rate?

The arbitrator after considering the facts of the case and the evidence adduced by the respective parties passed the following award:-

NOW THEREFORE after considering all the facts of the case, the evidence adduced by the respective parties and carefully examining all the written statements and other documents produced during hearings of the case, 1, N. Malhotra, sole Arbitrator appointed under clause 13 of the contract agreement, do hereby award and direct as follows:-

Issue No. 1 - MAIN CLAIM OF Rs. 2.50 LAKHS - In view of the clear stipulation in

clause 1.6 of the contract, the additional payment of Rs. 2.5 lakhs was required to be made for providing the bank guarantee. There is no provision for payment of Rs. 2.5 lakhs in case the amount of Rs. 7.00 lakhs is withheld from the bills of the claimant. The claimant having failed to provide the bank guarantee. I do not find any legal justification for the additional payment of Rs. 2.5 lakhs to the claimant. I, therefore, reject the claim of Rs. 2.5 lakhs as made out by the claimant.

Issue No. 2 - Payment of interest on Rs. 2.5 lakhs:- Since I have rejected and not awarded the main claim of Rs. 2.5 lakhs, I do not grant any relief for the interest.

COST - I determine the cost of Rs. 15,000/- towards the expenses on arbitration to be shared equally by the two parties.

Pronounced at DEHRADUN today the 23rd day of May, 1989.

Sd. (N.N. MALHOTRA), SOLE ARBITRATOR, 17/1, Street No. 9, Rajender Nagar, Dehradun - 248 001.

9. The above award was challenged by the claimant in O.P. No. 351 of 1990 on the grounds mentioned supra. Likewise the impugned award was supported by the O.N.G.C. on the contentions referred to supra

10. In support of his contention Mr. G.M. Nathan cited the following decisions:-

(a) In Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, the Supreme Court held as under:

Governments are not run on mere bank guarantees. Very often some courts act as if furnishing a bank guarantee would meet the ends of justice. No governmental business or for that matter, no business of any kind can be run on mere bank guarantees. Liquid cash is necessary for the running of a Government as indeed any other enterprise.

This decision was cited by the learned counsel to show that the cash security withheld by the O.N.G.C. is a better substitute than a bank guarantee and that the cash security was retained by the O.N.G.C. as a substitute for the bank guarantee. In fact and in my considered opinion the cash security is the only better form of security than the Bank guarantee.

11. My attention was invited by Mr. G.M. Nathan to a passage which was extracted by the division bench of our High Court reported in Muthusamy T. v. K. Govindammal 1989 2 L.W. 151. The bench has extracted a passage reported in Joseph Constantine Steamship Line, Ltd v. Imperial Smelting Corporation, Ltd. 1942 A.C. 154 which is reproduced here under:-

In short, in ascertaining the meaning of the contract and its application to the actual occurrences, the Court has to decide, not what the parties actually intended, but what as reasonable men they should have intended.

The Court personifies for this purpose the reasonable man.

In *Bungo Steel Furniture Pvt. Ltd. Vs. Union of India (UOI)*, the Supreme Court held as follows:-

It is now a well-settled principle that if an arbitrator, in deciding a dispute before him, does not record his reasons and does not indicate the principles of law on which he has proceeded, the award is not on that account vitiated. It is only when the arbitrator proceeds to give his reasons or to lay down principles on which he has arrived at his decisions that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error in law is apparent on the face of the award itself.

The above judgment was referred to by the learned counsel to show that this court is competent to examine whether the arbitrator has proceeded contrary to law and is entitled to interfere, if such error in law is apparent on the face of the award itself. In my opinion, the arbitrator has not properly examined and construed the contract in question in a proper perspective. He has proceeded contrary to law and hence in my opinion I am entitled to interfere if such an error is apparent on the face of the award itself. The reason for my interference will be discussed at the later part of this order.

12. In *Ram Lal Jagan Nath Vs. Punjab State and Another*, Full Bench the Punjab High Court held as under:

There is nothing peculiar or extraordinary about arbitration agreements and the same rules of construction and interpretation apply to such agreements as apply to agreements generally. The Court has to seek to give effect to the intention of the parties as evidenced by the agreement itself, without being over-technical in its interpretation. Such intention must be gathered from the whole context, even though the immediate object of the enquiry be the meaning of an isolated clause. The aspect that an arbitration agreement has the effect of ousting the jurisdiction of the established Courts of law should not be given undue weight in view of the other aspect that the settlement of disputes by arbitration is not deemed to be contrary to our public policy, but is a recognised method for settling disputes in which the parties create their own forums, pick their own judges, waive all but limited rights of control by courts, dispense with the unnecessary technicalities of rules of evidence and procedure and leave the issues to be determined in accordance with the sense of justice and equity they believe their self-chosen judges possess.

In *Kamala Sugar Mills v. Ganga Bishen Bhajan Singh* AIR 1978 Mad 178, the division bench of our High Court held as follows:-

While interpreting a commercial contract, a broader outlook has to be adopted and care should be taken to avoid an artificial and unrealistic approach in the matter of the understanding the meaning and purpose of such documents. In such cases, the Courts should occupy the chair of the contracting parties and

reasonably understand their minds and intents. If after such an approach the instrument still presents circumstances which the conscience of a reasonable and prudent person cannot accept and if ex facie the terms are so unconscionable, illegal and designed to avoid or evade law, then only the doctrine of public policy will intervene, and will not implement such bargains.

13. Per contra, Mr. B. Rajagopalan cited the following decisions:-

- (a) Food Corporation of India Vs. Joginderpal Mohinderpal,
- (b) Puri Construction Pvt. Ltd v. Union, of India 1989 1 S.S.C. 411;
- (c) P.K. Chinnasamy Vs. The Superintending Engineer, Execution Circle, TWAD Board (now redesignated as Superintending Engineer, TWAD Board and Another,
- (d) Raipur Development Authority Vs. M/s. Chokhamal Contractors etc. etc.,

(sic) in support of his contention to say that this court cannot sit in appeal over the views of the arbitrator by re-examining and reassessing the materials. I am unable to agree. In my opinion the award in question is not fair and is open to challenge. In my opinion the erroneous interpretation of the contract which is the basis of the award is found expressed in the award itself. Under these circumstances there is scope for this court to invoke the aid of Section 30 of the Act for setting aside the award. I see cause to set aside the award, for the reasons stated infra. In my opinion, the court has to seek to give effect to the intention of the parties as evidenced by the agreement itself without being over-technical in its interpretation. Such intention must be gathered from the whole context of the contract in question. While interpreting a contract, in my opinion, a broader outlook has to be adopted and care should be taken to avoid an artificial and unrealistic approach in the matter of understanding the meaning and purpose of such documents.

14. Under paragraph 1.6 of the Contract agreement, the O.N.G.C. has agreed to pay Rs. 2.50 lakhs for providing bank guarantee of Rs. 7 lakhs to the contractor in addition to the lump sum charges of Rs. 26.50 lakhs. Under the above clause the O.N.G.C. has given the right to deduct the amount from the bills of the contractors to make up Rs. 7 lakhs in the event of the contractor failing to provide the bank guarantee within the period of three months. The cash security withheld by O.N.G.C. is a better substitute than a bank guarantee. No doubt, the contract stipulates that the sum of Rs. 2.5 lakhs would be paid to the contractor for providing bank guarantee. If this clause is literally construed as claimed by the claimant, the payment of Rs. 2.5 lakhs is only on furnishing the bank guarantee. But in my opinion, the arbitrator committed a legal misconduct in literally construing this clause without having regard to the object and purpose of the said clause. On the contractor fulfilling his obligation under the contract he would be entitled not only to release of the bank guarantee but also the payment of Rs. 2.5 lakhs. The payment of Rs. 2.50 lakhs is not for the mere provision of the bank guarantee without regard to the fulfillment of the contract. In other

words, the contractor cannot claim this 2.5 lakhs rupees on the only ground of furnishing bank guarantee without performing his obligation under the contract. The payment of Rs. 2.5 lakhs is therefore inter- linked with the performance of the transportation of the contract for a period of 12 months and the contractor earning the sum of Rs. 26.5 lakhs. Hence in my view the payment of Rs. 2.50 lakhs is interlinked with the fulfillment of the obligation under the contract and the contractor earning the lump sum charges. This intention is very clear from the following words employed in paragraph 1.6 (The last 4 lines in brackets):-

(The Commission will pay Rs. 2.50 lakhs for providing the Bank guarantee of Rs. 7 lakhs to the contractor in addition to lump sum charges of Rs. 26.50 lakhs.)

(underlining is mine)

15. Therefore, a fair and reasonable construction is that the contractor would be entitled to Rs. 2.5 lakhs in addition to the lump sum charges on fulfillment of the contract whether the Bank guarantee is furnished or cash security is retained by the O.N.G.C. as a substitute for the Bank guarantee. In fact, the cash security is a better form of security than, bank guarantee

16. Further, by the deduction of amounts to the tune of Rs. 7 lakhs from the bills the contractor has been deprived of the use of the said amount and the Oil & Natural Gas Commission had the benefit and use of the said sum during the contract period in question. It is an admitted fact that the contractor has performed and fulfilled his obligations under the contract.

17. In the result O.P. No. 351 of 1990 is ordered as prayed for. The award of the arbitrator dated 23.5.1989 is set aside. The O.N.G.C. shall pay to the contractor - petitioner in O.P. No. 351 of 1990 a sum of Rs. 2.50 lakhs within one month from today (12.2.1991), failing which the O.N.G.C. shall pay interest at the rate of 18% p.a. on Rs. 2.50 lakhs from the date of expiry of one month period granted for payment. 18. In view of the order passed in O.P. No. 351 of 1990, no further orders are necessary in O.P. No. 540 of 1989 which is only a petition filed by the arbitrator u/s 14(2) of the Act to file his award in this proceeding. However, there will be no order as to costs in both petitions.