

(2006) 03 DEL CK 0027

In the Delhi High Court

Case No : OMP 27 of 2003 and CS (OS) 281A of 2003

R.G. Desai and Associates (P)

APPELLANT

Vs

Sh. Sunil Dev
 Sh. Sunil Dev Vs R.G. Desai and
Associates Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 10-03-2006

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 31(3), 33, 35
Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2006) 2 ARBLR 463 : (2006) 89 DRJ 463 : (2006) 144 PLR 43

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : Sandeep Sharma, in OMP 27/2003 and Viplav Sharma, in CSOS 281A/200, for the Appellant; Viplav Sharma in OMP 27/2003 and Sandeep Sharma in CS(OS) 281A/2003, for the Respondent

Judgement

Badar Durrez Ahmed, J.—Disputes had arisen between the parties which constituted the subject matter of a petition filed u/s 20 of the Arbitration Act, 1940 (hereinafter referred to as 'The 1940 Act') in the year 1990. That petition (Suit No. 370/1990) was disposed of on 06.02.1996 and the disputes were referred to the sole arbitrator for resolution. The sole arbitrator made the award on 20.12.2002. By virtue of this award the arbitrator has awarded a sum of Rs.5,00,151/- in respect of the respondent's Claims No. 1 to 4. The arbitrator has also awarded a sum of Rs.5,60,000/- in favor of the respondent under Claim No.10. Claim No.11 and the remaining claims do not constitute the subject matter of the present objections and, Therefore, need not be referred. The two counter claims submitted by the petitioner herein were rejected by the learned arbitrator.

2. The present petition was filed, initially, u/s 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the 1996 Act'). However, by virtue of an order dated 30.11.2004, it was conceded by the learned counsel for the petitioner that the arbitration proceedings in the present case having

commenced prior to the enforcement of the 1996 Act, the arbitral proceedings, the award and the proceedings regarding its enforcement are to be governed by the provisions of the Arbitration Act, 1940 (hereinafter referred to as 'the 1940 Act'). Accordingly, by the said order dated 30.11.2004, this court directed that the petition filed by the petitioner u/s 34 of the 1996 Act be treated as objections under Sections 30 and 33 of the 1940 Act dealt. It is in this context that the petition u/s 34 filed by the petitioner is being treated as objections to the award u/s 30 of the 1940 Act. Insofar as Section 33 is concerned, that clearly has no application in the present case and the entire examination is confined to one under the provisions of Section 30 of the 1940 Act.

3. As indicated in the impugned award, the petitioner had entered into an agreement with 'Arunodaya Group Housing Society Limited' (hereinafter referred to as 'the Society') for construction of 300 flats for the Society at Bodella, Delhi. The petitioner, in turn, awarded a sub-contract to the respondent for the construction of 90 'C' type flats in the said colony by virtue of an agreement dated 15.04.1986. This construction was to be carried out by the respondent as per the specifications and drawings and with the construction material to be supplied by the petitioner. The work apparently was carried out in stages by the respondent and payments were made by the petitioner to the respondent up to the 11th running bill dated 27.12.1988 except of a small amount of Rs.1,972/-. Thus, there is no dispute with regard to the stage up to the 11th running bill. As regards the running bills subsequent thereto i.e., the 12th to 15th running bills, pertaining to the period 22.03.1988 to 23.05.1988, the respondent alleged before the arbitrator that the petitioner had only made some part payments in respect thereof. To be precise, the respondent had submitted four claims in respect of these running bills. The first claim was with respect to running Bill No.12 which was for an amount of approximately Rs.1.35 lacs. It was alleged by the respondent that an amount of Rs.90,000/- was received, leaving a balance of about Rs.45,000/- recoverable from the petitioner. As regards claim No.2 which pertained to the 13th running bill for an amount of approximately Rs.1.56 lacs, the respondent alleged that it received an amount of about Rs.75,000/- leaving a balance of approximately Rs.81,000/- due and recoverable from the petitioner. As regards claim Nos. 3 and 4 which pertained to the 14th and 15th running bills for amounts of Rs.6,50,92/- and Rs.3,53,639/-, the respondent alleged that no amount whatsoever had been received and the entire amount was due from and payable by the petitioner. Therefore, the respondent made claims 1 to 4 in respect of these bills which were to be decided by the arbitrator. On the other hand, the petitioner had set up the case before the Arbitrator that the payments under these bills had been made.

4. The other claim that has been agitated before this Court is claim No.10. This was the claim made by the respondent for recovery of a sum of Rs.5,60,000/- towards hire charges for goods, shuttering material and equipment. The other claims being Claim Nos. 5 to 9, 11 and 12 to 16 were also considered by the Arbitrator but we need not elaborate on them inasmuch as no objections with

regard to the findings thereon have been raised by the petitioner. Two counter claims were raised by the respondent the first being for an amount of Rs.2,56,731/- which, of course, does not constitute the subject matter of the objections herein and, Therefore, no further discussion on that is necessary. The second counter-claim was in respect of alleged defective work carried out by the respondent in respect of the 90 flats which were awarded to the respondent by the petitioner. Apparently, there was a dispute between the Society and the petitioner with regard to the entire contract which also included the construction of these 90 flats which had been sub-contracted to the respondent and apparently those disputes were referred to arbitration and an award had been passed against the petitioner qua these 90 flats also, whereby, the Society was awarded an amount of approximately Rs.25 lacs along with interest thereon for the defective construction insofar as these flats were concerned. By the time, the present arbitration came to be disposed of, the petitioner herein is said to have placed the award between the petitioner and the Society before the arbitrator in support of the second counter claim.

5. The first objection raised by the petitioner in these proceedings is that the learned Arbitrator has awarded a sum of Rs.5,00,151/- in respect of claims No. 1 to 4 made by the respondent without any reasons, without any evidence and without any basis. Another objection with regard to these very claims is that since the payments under the 12th to 15th running bills were accepted by the respondent without demur or protest, there was no dispute whatsoever with regard to these bills and, Therefore, there was no question of the arbitrator entering into this field of discussion as it was beyond the scope of his jurisdiction. In support of this contention, the learned counsel for the petitioner relied upon the decision in the case of *Union of India v. Popular Builders, Calcutta 2000 (3) Arb LR 522 (SC)*. He referred to paragraph 5 of the said decision which reads as under:-

5. Having considered the rival submissions at the Bar and on careful scrutiny of the objections filed by the Union Government under Sections 30 and 33 of the Arbitration Act, though we find sufficient force in the contention of Mr Nageswara Rao, but the existence of a dispute being the condition precedent for appointment of an Arbitrator under Clause 25 and in view of the two decisions of this Court and that the respondent-claimant did receive the final bill without any protest, we are not persuaded to outrightly reject the contention of Mr Subba Rao, appearing for the Union Government. It transpires from the award itself that only as against claim item No. 2, the Union of India had pleaded that the said claim cannot be entertained in view of the receipt of the final bill by the contractor without any protest, though the Arbitrator had rejected the said plea of the Union of India. It is no doubt true as contended by Mr Nageswara Rao that neither the judgment of the learned Single Judge nor the judgment of the Division Bench, which is under challenge in this appeal before this court, did indicate the fact that the Union of India had raised this contention before the aforesaid two forums below but notwithstanding the same, when the existence of

an arbitrable dispute is the condition precedent for exercise of power for appointment of an Arbitrator under Clause 25 and since the final bill that was prepared by the appropriate authority was accepted by the respondent without any protest as is apparent from the letter of the claimant-contractor and the question had been raised before the Arbitrator in respect of the claim item No. 2 by the Union of India, we think it appropriate to hold that so far as claim item No.2 is concerned, the same could not have been a matter of reference of an Arbitrable dispute and as such, the award of the Arbitrator to that extent, must be set aside. So far as the other claim items are concerned, the Union of India not having taken any objection to the same on the aforesaid score and that even the objection filed under Sections 30 and 33 of the Arbitration `Act not being specific on that issue, we do not think it appropriate to allow the Union Government to raise that objection, so far as the other items of claim are concerned. Accordingly, the impugned award in respect of claim item No. 2 is set aside and the rest of the award amount, stand affirmed. The appeal is allowed in part.

He also referred to paragraph 3 of the said decision wherein the contention raised by the counsel for the Union of India which was ultimately accepted by the court has been mentioned. The contention was that the final bill having been accepted by the respondent contractor in that case, without any objection, there did not subsist any arbitrable dispute to be referred to arbitration and, Therefore, the impugned award was liable to be set aside. This argument was accepted by the Supreme Court and the award was set aside insofar as that claim was concerned. The learned counsel for the respondent submitted that this case would not apply to the facts of the present case because in the case before the Supreme Court it was found as a question of fact that the payments were accepted without any protest, whereas, in the present case there is no question of acceptance of payments under the said 12th to 15th running bills without protest or demur. In fact, he pointed out that no payment whatsoever had been made against the 14th and 15th running bills and as regards the 12th and 13th running bills, whatever payments were made, were only part payments. This is exactly what they had submitted before the learned arbitrator as would be apparent from the following statement contained in the award which appears at page 2 of the award and reads as under:-

As regards 12th to 15th running bills, during the period from 22.3.1988 to 23.5.1988, the claim has alleged that the respondent made some part payments.

The learned counsel for the respondent also submitted that the payments were not made fully under the said bills inasmuch as the petitioner was not receiving payments from the Society and it was only as a part of cooperation with the petitioner that the respondent had accepted these part payments but the acceptance of part payments by no stretch of imagination can be construed as full and final payments and, Therefore, it was not a case, where, it could be construed that the respondent had accepted the part payments under the said

bills as final payments without protest or demur. The learned counsel for the respondent also submitted that in any event the work had been done by the respondent and the principles of quantum meruit would apply. Considering these submissions, I am of the view that the submissions made by the learned counsel for the respondent are well founded. The decision of the Supreme Court in the case of Union of India v. Popular Builders (supra) would not apply to the facts of the present case as here it cannot be construed as if the payments had been accepted without any dispute whatsoever.

6. As regards the contention of the learned counsel for the petitioner that there was no evidence, no basis and no reasons for arriving at the conclusions which the learned arbitrator did, I am of the view that these contentions cannot be raised in the present petition inasmuch as the award is a non-speaking award. Claim Nos.1 to 4 have been disposed of in the following terms:-

"These claims relate to the alleged outstanding payment totaling Rs.5,45,412.95 out of running bills No. 12th to 15th. The claim to the extent of Rs.5,00,152/- as originally sought by the claimant for recovery from the respondent against these bills as against the subsequent claim of Rs.5,45,412.95 is found justified and is held as such." Clearly, no reasons have been ascribed and this is a non-speaking award insofar as claims No. 1 to 4 are concerned. The learned counsel for the respondent submitted that in the case of a non-speaking award, it is well settled that the court exercising its jurisdiction u/s 30 of the 1940 Act can only interfere with the award if the arbitrator has misconducted himself or the proceeding or there existed an error apparent on the face of the award. In the context of Section 30 of the 1940 Act, the Court exercises a very limited jurisdiction. This is, particularly so, when the award is a non-speaking award and the arbitrator has not disclosed his mind indicating as to why he had done so. In such a situation, the Courts could not interfere with the award merely on ipse dixit. In support of this contention, he relied upon the decision of the Supreme Court in the case of Continental Construction Ltd. Vs. State of U.P., . Paragraphs 16, 18 and 19 are relevant for this purpose and the same are set out hereinbelow:-

16. The award is a non-speaking one. It is trite that the court while exercising its jurisdiction u/s 30 of the Arbitration Act, 1940 can interfere with the award only in the event the arbitrator has misconducted himself or the proceeding or there exists an error apparent on the face of the award.

18. The court exercises a very limited jurisdiction while adjudicating upon an objection to the award in terms of Section 30 of the Arbitration Act, 1940.

19. In the instant case, the umpire has merely set out the claims, given the history of the claims and awarded certain amount. He has not disclosed his mind indicating as to why he had done so or what was done. The courts, Therefore, could not interfere with the award merely on ipse dixit.

The Supreme Court in the case of Continental Construction Ltd. (supra) also referred to Sudarsan Trading Co. Vs. Government of Kerala and Another, wherein

the Supreme Court observed that a distinction has to be drawn between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised. The Supreme Court had further observed that the Court had no jurisdiction to substitute its own evaluation of the conclusion of law or fact to arrive at the conclusion that the arbitrator had acted contrary to the bargain between the parties.

7. It may be pointed out that in the case of *Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission*, , the Supreme Court observed in paragraph 41 thereof that the jurisdiction of the court in interfering with the non-speaking award is limited. It further observed in paragraph 42 that if the claim of the claimant is not arbitrable having regard to the bar / prohibition created under the contract, the court can set aside the award but unless such a prohibition / bar is found out, the court cannot exercise its jurisdiction u/s 30 of the Act. In other words, if there is no such bar to enter upon arbitration then in the case of a non-speaking award the decision of the arbitrator cannot be interfered with and the scope of interference is extremely limited. In the very same decision, the Supreme Court relying upon its earlier decision in the case of *Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another*, observed, inter alia, that it is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. It, however, observed that it is not open to the Court to probe the mental process by which the arbitrator has reached his conclusion. A similar observation has been made by the Supreme Court in the case of *National Fertilizers v. Puran Chand Nangia* AIR 2001 SC 53 in paragraph 35 wherein the Supreme Court observed as under:-

In law also, the appellant has no case. In the case of a non-speaking award, it is not permissible for Court to probe into the mental process of the arbitrator...." These decisions of the Supreme Court make it clear when there is a non-speaking award, it is not open to the Court exercising jurisdiction u/s 30 of the 1940 Act to examine what might have gone through the arbitrator's mind and to probe the mental process of the reasoning that may have been adopted by the arbitrator in arriving at the conclusion. That being the case, the contention of the learned counsel for the petitioner that no reasons have been given and that there is no basis to support such conclusion arrived at by the arbitrator insofar as claims No. 1 to 4 are concerned, does not hold good. Accordingly, this contention is rejected.

8. Insofar as claim No. 10 is concerned the objection raised by the learned counsel for the petitioner is that the respondent had claimed a sum of, approximately, Rs.5.60 lacs towards hire charges for goods, shuttering material and equipments. However, the arbitrator while dealing with this claim has also dealt with another claim of the respondent to the extent of Rs. 7,15,360/- towards the value of the plant and machinery and shuttering material which was hired by the respondents as well as interest thereon. It is the contention of the

learned counsel for the petitioner that both these claims were considered under claim No.10 and ultimately an amount of Rs.5,60,000/- was held in favor of the respondent. He submits that it is not clear as to how much of this awarded amount pertains to the claim under hire charges and how much of it pertains to the claim towards the value of the plant and machinery. According to him, the claim for value of plant and machinery was not referred to arbitration and, Therefore, did not fall within the scope of arbitration before the learned arbitrator. He proceeds with the reasoning further and states that arbitral and non-arbitral were mixed up and a composite sum has been awarded for the same and, Therefore, the entire amount awarded under the claim is liable to be set aside. In support of this contention, he referred to the case of Punjab State Electricity Board v. Punjab Pre-Stressed Concrete Works: 2001 VI AD (sc) 33. He referred to paragraphs 8, 9 and 11 of the said decision. The said paragraphs read as under :-

8. In this appeal, we have heard learned counsel for the parties. Learned counsel for the appellant contended that Claim No.1 which consisted of two parts in respect of which the respondent made a claim of Rs.16.50 lacs and Rs.2.25 lacs, related the increase in the price of the poles and that in view of the definite clause in the contract the arbitrator had no jurisdiction to go into the question of increase of the price or award for any excess amount. So far as Claim No. II relating to excise duty is concerned, he contended that the difference in a sum of Rs.0.95 lacs alone was payable. So far as Claim No. III for Rs. 12.00 lacs and Claim No. IV for Rs.4.00 lacs are concerned, counsel contended that no case is made out for grant of damages. So far as Claim No. V is concerned, counsel contended that respondent is not entitled to any relief. Claim No. VI is relating to interest.

9. Learned counsel for the appellant contended that the award was not a reasoned award and that it was not possible to find out if the total amount of Rs.17.71 lacs as awarded by the arbitrator related to Claim No.1 which according to the appellant was not within the purview of the arbitrator. It is also not known on what basis any of the other claims were awarded for items for which arbitrator had no jurisdiction. Learned counsel in that connection relied upon Tamil Nadu Electricity Board Vs. M/s. Bridge Tunnel Constructions and others, and contended that such an award granting a lumpsum amount without reasons where some of the items are not arbitrable was liable to be set aside.

11. After hearing counsel on both sides, we are of the view that the award is liable to be set aside because when it is a non-speaking one, it is not known whether any part of the Award made by the arbitrator related to Claim No.1. In our view, the price of the poles was firm and not liable to be increased. The fact that the delivery schedule was changed cannot be a ground to get over the clause prohibiting increase in the price of the poles. Once Claim No.1 is not tenable, the award has to be set aside inasmuch as it is not possible to say that the award did not relate to Claim No.1. This is a sufficient reason for setting

aside the award and remitting the matter back to the arbitrator.

Reading the aforesaid extracts from the said decision of the Supreme Court in the case of Punjab State Electricity Board (supra), it becomes immediately apparent that, that decision is distinguishable. In that case, what had happened was that a lump sum amount had been granted by the arbitrator in respect of all the claims. Some of the claims were not within the purview of arbitration and the Supreme Court, relying upon its earlier decision in the case of Tamilnadu Electricity Board (supra), came to the conclusion that, because, the award was a non-speaking one, it was not known as to which part of it related to which claim and, Therefore, set aside the award and remitted the same to the arbitrator for reconsideration and for passing a reasoned award. The case before the Supreme Court is entirely different to the one that is before me. Here, a lump sum amount has not been awarded. In fact, what the learned arbitrator has done is to allow the Claim No.10 for Rs.5,60,000/- of hire charges and disallow the claim of the respondent towards the cost / value of the plant and machinery in its entirety. This would be apparent upon a reading of the discussion with regard to Claim No.10 in the award itself which reads as under :-

Claim No.10

This claim for the recovery of Rs.5,60,000/- as hire charges for goods, shuttering material and equipment etc. by the claimant is found justified and is allowed. It may be stated here that the claim of the claimant for the recovery of Rs.7,15,360/- as the value of the plant and machinery and shuttering material hired by the claimant and the claim of interest thereon under this very claim No. 10 has also been considered under this very claim. The claimant is, however, held entitled to recover a sum of Rs.5,60,000/- under claim No. 10.

In the above extract, both, the claim of Rs.5,60,000/- as well as the claim for Rs.7,15,360/- have been mentioned and the learned arbitrator has, ultimately, held that the respondent is only entitled to the said sum of Rs.5,60,000/- under Claim No.10. It is clear that the claim with regard to Rs.7,15,360/- has been rejected by the learned arbitrator in its entirety. Therefore, there is no question of there being any mixing up of the award under the two claims. One claim has been accepted and the other has been rejected in its entirety. Consequently, the decision relied upon by the learned counsel for the petitioner in the case of Punjab State Electricity Board (supra) will not be applicable to the facts of the present case.

9. The additional objection taken under Claim No.10 is that the arbitrator has come to the finding in favor of the respondent without there being any evidence of hire charges and without there being any consideration of whether there was any equipment lying at the site or not. It is apparent that the award is a non-speaking one and no reasons have been given for arriving at the conclusion which the arbitrator reached. This aspect of the matter has already been dealt with by me in respect of claims No. 1 to 4. It is reiterated that in a non-speaking

award, it is not open to the Court, in exercise of jurisdiction u/s 30 of the 1940 Act, to probe into the mental processes of the arbitrator. Therefore, this objection raised by the petitioner is also not tenable.

10. This leaves only the question of rejection of the counter claims of the petitioner for consideration. As noted above, the objection is only with regard to the second counter claim which the petitioner had placed before the learned arbitrator. It is the submission of the learned counsel for the petitioner that the learned arbitrator has, summarily, rejected this counter-claim and has not even considered the material on record. According to him, material documents were ignored by the learned arbitrator and this itself would amount to misconduct as contemplated u/s 30(a) of the 1940 Act. He made this submission in the context of the fact that the award between the petitioner and the Society whereby another arbitrator had found the petitioner liable for the poor quality of construction in respect of the very 90 flats Constituting the subject matter of the contract between the petitioner and the respondent was placed before the learned arbitrator in the present case and yet there is no reference of the same in the award. According to him, this amounts to the ignoring of material documents and which, in turn, amounts to misconduct entitling the petitioner to seek setting aside the impugned award. In support of this proposition, the learned counsel for the petitioner relied upon the decision *K.P. Poulose Vs. State of Kerala and Another*, . This decision does make it clear that where material documents are ignored, it would amount to misconduct as contemplated u/s 30(a) of the 1940 Act. However, this decision has been rendered in the context of a speaking award whereas the present case is of a non-speaking award. In a speaking award where reasons are given and a material document is ignored from consideration, it would surely amount to the arbitrator misconducting himself or the proceeding. In the present case, the award is a non-speaking one and it cannot be said with any degree of certainty that the learned arbitrator did not consider the documents placed by the petitioner. All that the learned arbitrator has said is as follows:-

Neither of the two counter-claims of the respondent or the claim of interest is sustainable and the entire counter-claim of the respondent against the claimant is rejected.

Reading the aforesaid finding, it cannot be said that the learned arbitrator had ignored the material document. Accordingly, it cannot, Therefore, be concluded that the learned arbitrator had misconducted himself or the proceeding thereby rendering the impugned award liable to be set aside.

11. On the contrary, as rightly pointed out by the learned counsel for the respondent the arbitrator has, specifically, stated that he had heard arguments of the counsel for the parties at length. The parties had filed notes of arguments and that he had gone through the material as placed on the record as well as had considered the rival submissions made by the parties. There is, Therefore, no occasion to presume that the learned arbitrator had ignored any material

document as suggested by the learned counsel for the petitioner. Therefore, the decision of the Supreme Court relied upon by the learned counsel for the petitioner would not be applicable to the facts of the present case and the objection raised by him is not tenable.

12. It is also pertinent to note that by the Order dated 30.11.2004, it was made clear that the award would be impugned under the grounds available to the petitioner in terms of the provisions of Section 30 of the 1940 Act. Section 30 of the said Act reads as under :-

30. Grounds for setting aside award. 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 arbitration proceedings have become invalid u/s 35;

(c) that an award has been improperly procured or is otherwise invalid." The learned counsel for the respondent had pointed out that the award can be challenged only under the three grounds provided under the said Section. Insofar as the question of misconduct is concerned that has already been dealt with hereinabove and I have found that there is no misconduct. As regards the other grounds, namely, under Sections 30(b) and 30(c), no such grounds have even been pleaded in the application. In fact, if the contents of the present petition are seen, the entire challenge to the award is directed on the ground that the material was not considered and there was no evidence to arrive at the conclusion. It may be pointed out that these grounds may have been available if the same were being considered under the 1996 Act, particularly, in view of the provisions of Section 31(3) thereof. However, these grounds are not available under the 1940 Act and the only grounds available are those prescribed u/s 30. In fact, the Supreme Court in the case of State of U.P. Vs. Allied Constructions, held that Section 30 of the 1940 Act providing for grounds for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. It also held that the arbitrator is a judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. It went further to hold that even in a case where the award contains reasons, the interference therewith would still not be available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law. The present case is of a non-speaking award and, Therefore, the conditions contained in Section 30 not having been satisfied, there is no question of interfering with the same.

13. In this view of the matter, the objections raised by the petitioner are rejected. The award is made a rule of the court. A decree in terms of the award be drawn up.

14. Accordingly, OMP No. 27/2003 as well as CS(OS) No.281A/2003 stand disposed of.