

(2006) 02 DEL CK 0061

In the Delhi High Court

Case No : IA No. 4915 of 1990 and CS (OS) No. 1651 of 1989

Survir Enterprises Pvt. Ltd.

APPELLANT

Vs

Maharashtra State Cooperative Marketing Federation Ltd. and
Others

RESPONDENT

Date of Decision : 17-02-2006

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 33
Contract Act, 1872 — Section 73

Citation : (2006) 1 ARBLR 435 : (2006) 128 DLT 289 : (2006) 87 DRJ 547

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Sushil Bajaj and Viren B. Saharaya, for the Appellant; Sandeep Sethi and Shalabh Gupta, for the Respondent

Judgement

Sanjay Kishan Kaul, J.

IA No. 4915/1990 (under Section 30 and 33 of Arbitration Act, 1940)

1. The petitioner, a limited company, stated to be engaged inter alias in the business of supplying rice to various State Governments by procuring it from surplus States like Punjab and Haryana. The petitioner is also a member of the Punjab Rice Millers Association. Respondent No. 1, a State Cooperative Marketing Federation, is an instrumentality of the Government of Maharashtra, respondent No. 2, and acted at the relevant time as the agency of the State Government for purchase of food grains and other commodities and their distribution to consumers through fair price shops.

2. In 1982-83 there was stated to be acute shortage of rice in State of Maharashtra and on 19.01.1983, the petitioner entered into an agreement with the Federation for supply of 50,000 metric tonnes of Parimal rice of the 1982-83 crop season. The terms and conditions agreed to between the parties were reduced into writing which contained Arbitration Clause. The terms and

conditions as extracted in the award itself in Para 3 are as under:

3. During the year 1982-83, there was acute shortage of rice in the State of Maharashtra. On 19th January, 1983 the claimants entered into an agreement with the Federation for supplying to it 50,000 metric tonnes of "Parimal" raw rice of the 1982-83 crop season. The principal terms and conditions of the said agreement, in so far they are relevant for the purpose of the present proceedings, are as under:-

a) Supplier: The claimants, acting as the exclusive nominees of the Punjab Rice Millers' Association.

b) Buyer: The Federation, acting on behalf of the Govt. of Maharashtra.

c) Quantity: 50,000 metric tonnes.

d) Quality: 1982-83 Parimal Raw Rice (P.R.106) Fair Average Quality (FAQ) according to the specifications set out in the Schedule to the Agreement.

e) Delivery Schedule: Within 120 banking days from the receipt of the Letter of Credit by the Supplier at New Delhi, not less than 5,000 metric tonnes to be delivered per month

f) Price: Rs 334/- per quintal, inclusive cost of B.T. gunny, sales tax, other levies, administrative expenses and other expenses up to and including loading of rice into railway wagons at the stations of dispatch in Punjab Haryana, UP and Delhi

g) Payment: i) the supplier to deposit Rs two lakh as performance guarantee with the Federation for the due performance of the contract.

ii) Federation to open an irrevocable Letter of Credit in favor of the supplier for 100% value of the cost of rice, payable site at Delhi. The Letter of Credit to be opened -

a) after the receipt of permission of the Govt. of India, Ministry of Agriculture, allowing the purchase of levy free rice by the Govt. of Maharashtra; and

b) within one week of the receipt of the deposit of Rs 2 lakh made by the supplier as performance guarantee.

h) Membership: Supplier to become a nominal member of the Federation.

i) Arbitration: Any dispute under the agreement or in relation thereto, other than under clause 6 of the agreement (which provides for rejection of samples of rice by the representatives of the Federation and the State Govt.), to be referred to a Sole Arbitration or to two joint arbitrators approved by the parties. Such reference to be governed by the provisions of the Arbitration Act, 1940, and the decision of the arbitrator(s) to be final and binding on the parties.

3. The Ministry of Agriculture, Government of India, on 14.02.1983, granted permission to the Government of Maharashtra to purchase 40,000 metric tonnes

of levy free rice and by the telegram dated 18.02.1983 the petitioner offered to furnish performance bond and security deposit of Rs 2 lakh to respondent No. 1. The petitioner is stated to have followed this up with the letter dated 02.03.1983 informing respondent No. 1 that the demand draft for rupees two lakh was ready with the petitioner.

4. A telegram was sent by respondent No. 1 to the petitioner dated 19.03.1983 calling the representatives of the petitioner to Bombay for some discussions and during the meeting it was proposed to the petitioner as to whether they were agreeable to the possibility of reducing the price. Such a possibility was declined by the representatives of the petitioner as the price was stated to be firm. The petitioner is stated to have offered to deposit a sum of Rs 2 lakh by demand draft. Simultaneously the petitioner addressed a letter dated 21.03.1983 calling upon the respondent to refer the matter to arbitration in terms of Clause 12 of the agreement. This was followed up by a petition being filed by the petitioner on 04.04.1983 u/s 20 of the Arbitration Act, 1940 (hereinafter referred to as the "said Act") before this Court and by the order dated 17.04.1985 it was decided that the matter was liable to be referred to arbitration.

5. Initially, by consent of the parties, Sh. S.B.Bhasme, was appointed as the sole arbitrator and subsequently Justice Y.V. Chandrachud, retired Chief Justice of India was appointed as the sole arbitrator. The arbitrator made and published his award dated 29.04.1989. The claim of the petitioner was found to be not sustainable and was rejected. The petitioner thereafter filed the present objections.

6. Learned counsel for the petitioner has broadly confined his submissions to two aspects. Firstly that the arbitrator exceeded his jurisdiction and secondly that there was error apparent on the face of the record as the award was contrary to law. There was some suggestion of personal misconduct on account of the fact that the arbitrator was a member of a society where allotment of land was made and the society was engaged in a negotiation with respondent No. 2. This argument could not be advanced beyond a certain stage and I do not find any merit in such a plea, which is only an endeavor to cast a doubt on the award. I thus, at the threshold, reject the said plea.

7. The finding of the arbitrator that there was a breach of the contract on the part of the petitioner by reason of the invocation of arbitration has been strongly challenged by learned counsel for the petitioner as being contrary to law. The arbitrator has found that there was nothing wrong with the respondent asking the claimant whether the contracted price was final or there was a possibility of reducing the price. To this extent, there can be no dispute. The petitioner deemed it proper to reject the same. Once again, there can be no dispute with this aspect. The finding against the petitioner arises from what transpired after that in the meeting held on 21.03.1983. The representative of the petitioner handed over a previously prepared ready-made typed letter bearing the same date calling upon the respondents to refer the disputes to arbitration. The

arbitrator found that this pre-prepared letter had no reference to any prior discussions about reduction in price and thus the arbitrator concluded that the petitioner had already made up its mind to put an end to the contract.

8. The aforesaid, in my considered view, is a question of law as to whether the invocation of arbitration itself can be said to imply intent or breach of contract by a party. It has to be kept in mind that the letter dated 21.03.1983 addressed by the petitioner set forth the prior facts including the petitioner calling upon the respondents to accept the amount of Rs 2 lakh as security. It appears that due to lack of responsibility or silence of the respondent No. 1, the petitioner apprehended intention on the part of the respondent No. 1 to breach the contract.

9. The petitioner thus called upon the respondent No. 1 by the said letter to open the letter of credit. It is only in the alternative it was observed If however you have any reservations in opening the letter of credit, you may inform us accordingly and as per Clause 12 of the agreement between us, you may refer the matter for settlement to arbitration and we will be at liberty to decide our course of action as may be advised.

10. I find force in the contention of the learned counsel for the petitioner that as mere conditional invocation of arbitration can hardly be accepted as an intent on the part of the petitioner to resile or breach the contract. Such contracts are to be performed within stipulated periods of time and on an emergent basis. The petitioner in turn was required to make arrangements for procuring of the particular rice after having obtained the requisite sanction from the Central Government. Thus the petitioner would like to know the fate of the purchase order placed. The petitioner cannot be faulted on this account. It was the intention of the respondent No. 1 to seek variation of the terms of the contract insofar as the price element was concerned and this was obvious from the meeting held on 21.03.1983. It appears that the respondent No. 1 did not want to proceed at the price stipulated and wanted the price to be reduced which was not acceptable to the petitioner. The petitioner inter alias sought invocation of arbitration.

11. The respondent No. 1 led evidence before the arbitrator and took up a plea that at the stage of fixation of the price, the respondent was not possibly properly advised. The learned arbitrator has rightly rejected such pleas as the contract was negotiated at the ministerial level and the concerned minister is expected to be properly advised by bureaucrats to deal with such matters. This also indicates the intention of the respondent No. 1 who felt that possibly the price was higher than what ought to have been fixed. Be that as it may, the intention was on the part of the respondent No. 1 and not on the part of the petitioner to breach the contract. A specific query was posed to learned senior counsel for the respondent No. 1 to justify as to on what bases or on what settled position of law such a plea be accepted that an conditional invocation of arbitration asking the other party to perform its obligations or refer the matter to arbitration, could be said to be intent on the part of the party to breach the

contract. Learned counsel took some time but fairly reported back to the court that he could not find any case law or material to substantiate such a proposition. In fact it cannot even be seriously contended beyond some extent that such a proposition would hold good.

12. I am thus of the considered view that the conclusion reached by the learned arbitrator would be contrary to law and the intent was on the part of the respondent to breach the contract. The claim of the petitioner could not have been thrown out on this account.

13. Learned senior counsel for the respondent No. 1 further contended that even if the aforesaid finding is arrived at, the said respondent was entitled to succeed for the reason that the petitioner had led no evidence to substantiate the damages. Learned counsel for the petitioner could not dispute as a point of fact the findings arrived at by the arbitrator to the extent that there was no evidence on record to substantiate or quantify any claim of damages. This is also so as this court does not sit as a court of appeal to re-appreciate the evidence or the findings arrived at by the arbitrator as proceedings of the present nature are not appellate proceedings. Reference in this behalf may be made to the judgment of the apex court in Food Corporation of India Vs. Joginderpal Mohinderpal, and Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, .

14. Learned counsel for the petitioner thus confined his submissions to the plea that it may be assumed that the said finding is correct, but yet the petitioner would be entitled to the claim. Learned counsel in this behalf has referred to the provisions of Section 73 of the Indian Contract Act, 1872 and more specifically illustration (h) which is as under:

A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.

15. Learned counsel for the petitioner in this behalf referred to the judgment of the apex court in A.T. Brij Paul Singh and Others Vs. State of Gujarat, . The Supreme Court held that where in a works contract the party entrusting the work itself commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the work contract. However what must be the measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under the head was certainly admissible.

16. Learned counsel also referred to the Judgment of the Supreme Court in Dwaraka Das Vs. State of Madhya Pradesh and Another, . The claim of petitioner for payment of damages on account of breach of contract committed by the State was disallowed by the High Court as it was found that the petitioner had

not placed material on record to show that he had actually suffered any loss on account of breach of contract. Such a finding was found to be based on wrong assumption. The observations in A.T.Brij Paul Singh Case (Supra) were quoted with approval while interpreting the provisions of Section 73 of the Contract Act that damages can be claimed where there is a breach and the court should make a broad evaluation instead of going into minute details.

17. Learned counsel for the respondent however, opposed such a plea on the ground that the petitioner had not come with the case before the arbitrator on this assumption. It was thus the submission that the petitioner had to lead evidence that it was in a position to obtain the goods. The petitioner had pleaded before the arbitrator that he had already made arrangements to procure the goods. The goods were of a particular kind being rice of a particular quality. This plea was found to be false by the arbitrator. This was so since despite the finding arrived by the arbitrator that the breach was on the part of the petitioner, the question of damages was also considered by the arbitrator from Para 32 onwards. The petitioner pleaded that he had entered into firm commitments with millers and other suppliers for supply of 20,000 metric tonnes. For 30,000 metric tonnes a firm commitment from State of Punjab was stated to have been obtained. Learned arbitrator records a finding in Para 35 that the evidence produced by the plaintiff shows that the same was false, and to a major extent, fabricated only to substantiate its claim in respect of the claim alleged arrangements for procurement. The arbitrator proceeded to discuss the evidence produced and thereafter found that it was not easy to understand why the petitioner had committed itself to buying 50,000 metric tonnes of rice from three suppliers when the Government of Maharashtra was given permission by Government of India on 14.02.1983 to buy only 40,000 metric tonnes. The alleged transactions were found to be a make-a-believe and the petitioner had created evidence to prove the transaction to extract a profit of three crores. The evidence produced by the petitioner was found to be unreliable. Detailed reasoning for the same has in fact been set out in para 39 to para 44 of the award and it would not be the jurisdiction of this court to sit in appeal over the said finding.

18. Learned senior counsel for the respondent No. 1 referred to the judgment of the Supreme Court in U.P. Hotels and Others Vs. U.P. State Electricity Board, . It was observed in Paras 17, 19, 20, 21 and 23 as under:

17. It appears that the main question that arises is: whether the decision of this Court in Indian Aluminium Case was properly understood and appreciated by the learned Umpire and whether he properly applied the agreement between the parties in the light of the aforesaid decision. It was contended that the question was whether the sums payable under clause 9 included discounts. On the aforesaid basis it was contended that there was an error of law and such error was manifest on the fact of the award. Even assuming, however, that there was an error of construction of the agreement or even that there was an error of law

in arriving at a conclusion, such an error is not an error which is amenable to correction even in a reasoned award under the law. Reference may be made to the observations of this Court in *Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others*, ; where it was reiterated that an award can only be set aside if there is an error on its face. Further, it is an error of law and not mistake of fact committed by the arbitrator which is justiciable in the application before the court. Where the alleged mistakes, or errors, if any, of which grievances were made were mistakes of facts if at all, and did not amount to error of law apparent on the face of the record, the objections were not sustainable and the award could not be set aside. See also the observations of this Court in *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, ; where this Court reiterated that reasonableness of the reasons given by an arbitrator in making his award cannot be challenged. In that case before this Court, there was no evidence of violation of any principle of natural justice, and in this case also there is no violation of the principles of natural justice. It may be possible that on the same evidence some court might have arrived at some different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award of an arbitrator. Also see the observations in *Halsbury's Laws of England*, 4th edition, Volume 2, at pages 334 and 335, para 624, where it was reiterated that an arbitrator's award maybe set aside for error of law appearing on the face of it, though that jurisdiction is not lightly to be exercised. If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it being set aside ; and where the question referred for arbitration is a question of construction, which is generally speaking a question of law the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion ; but if it appears on the face of the award that the arbitrator had proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

19. In order to set aside an award, there must be a wrong proposition of law laid down in the award as the basis of the award. For this see the observations of this Court in *Kanpur Nagar Mahapalika v. Narain Das Haribansh*. In that case the appellant had entered into a contract with the respondent for certain construction work. The contract contained an arbitration agreement between the parties. The respondent filed a suit in 1946 claiming certain moneys due against its final bills but, at the instance of the appellant, the suit was stayed and the matter referred to arbitration. The arbitrator made an award in March 1960 in favor of the plaintiffs determining the amount payable by the appellant. Thereafter the appellant made an application for setting aside the award on the ground that the arbitrator had misconducted himself in not properly considering that the claim of the respondent was barred by limitation under Sections 326 of the U.P. Act 2 of 1916. Although the trial court set aside the award, the High Court, in appeal,

reversed this decision. In appeal to this Court it was contended for the appellant that the award was bad by reasons of an error apparent on its face.

20. Dismissing the appeal, it was held that there could not be predicated of the award that there was any proposition of law forming the basis of the award, and Therefore, it could not be said that there was any error apparent on the face of the award.

21. The Judicial Committee in the famous decision of *Champsey Bhara and Co. v. Jioray Ballao Spinning and Weaving Co. Ltd.* held that the error of law on the fact of the award means that one can find in the award or in document incorporated thereto as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which is erroneous. The same view was reiterated by this Court in *Dr S.B. Dutt v. University of Delhi*.

23. Our attention was drawn to the observations of this Court in *Tarapore and Company Vs. Cochin Shipyard Ltd., Cochin and Another*, where Desai, J. Spoke for the court and Justice Chinnappa Reddy agreed with him. It was stated that a question of law might figure before an arbitrator in two ways. It may arise as in incidental point while deciding the main dispute referred to the arbitrator for his decision. This Court reiterated that arbitration has been considered a civilised way of resolving disputes avoiding court proceedings. There was no reason why the parties should be precluded from referring a specific question of law to an arbitrator for his decision and agree to be bound by the same. This approach manifests faith of parties in the capacity of the tribunal of their choice to decide even a pure question of law. If they do so, with eyes wide open, there is nothing to preclude the parties from doing so. If a question of law is specifically referred and it becomes evident that the parties desired to have a decision on the specific question from the arbitrator rather than one from the court, then the court will not interfere with the award of the arbitrator on the ground that there was an error of law apparent on the face of the award even if the view of law taken by the arbitrator did not accord with the view of the court. A long line of decisions was relied upon by this Court for that proposition.

19. Learned counsel also referred to the judgment of the apex court in *Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd., .* The Supreme Court while dealing with the jurisdiction of this Court u/s 30 of the Act observed as:

24. This Court has considered the provisions of Section 30 of the Act in several cases and has held that the court while exercising the power u/s 30 cannot re-appreciate the evidence or examine correctness of the conclusions arrived at by the Arbitrator. The jurisdiction is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, other view is equally possible. It is only when the court is satisfied that the Arbitrator had misconducted himself or the proceedings or the award had

been improperly procured or is "otherwise" invalid that the court may set aside such award.

25. In the leading decision of *Hodgkinson v. Fernile*, Williams, J. stated:

The law has for many years been settled and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position where awards have been attempted to be set aside on the ground of the admission of incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, "You have constituted your own tribunal; you are bound by its decision.

26. In *Union of India v. Rallia Ram* this court said;

An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenged on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary courts. The court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or willful deception. But the court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the civil courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievance in the manner provided by the arbitration agreement.

20. The judgment in *U.P. Hotels Case* (Supra) was also referred to with approval.

21. Insofar as the aforesaid plea is concerned, I am in agreement with the submission of the learned counsel for the respondent No. 1. The arbitrator has found that the evidence produced by the petitioner was false and led to substantiate the plea of quantum which the petitioner was entitled to for damages. It was not the plea of the petitioner that there was a breach of the contract on the part of the respondent No. 1 and the petitioner should be held entitled to profits irrespective of the fact that whether the petitioner had made any arrangements for supply since the obligation on the petitioner to make such

arrangements would only arise on the letter of credit being opened.

22. The petitioner before the arbitrator took the plea of having made arrangements and that evidence was found to be false. In such a case it cannot be said that the petitioner would still be entitled to damages merely on the basis of breach of contract on the part of the respondent. In view of the aforesaid, the petitioner is not entitled to succeed in respect of claim made before the arbitrator.

23. The petition stands disposed of and thus conclusion arrived at in the award is sustained.

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1. The objections to the award have been disposed of and though some part of the objections filed by the petitioner are found to be sustainable, the conclusion arrived at by the learned arbitrator cannot be faulted and the petitioner is not entitled to any amount as claimed before the arbitrator. The award with the modifications aforesaid, is thus made rule of the court leaving parties to bear their own costs.