

(2012) 08 CAL CK 0016
In the Calcutta High Court
Case No : A.P.O. No. 324 of 2011

Union of India

APPELLANT

Vs

Binod Kumar Agarwal

RESPONDENT

Date of Decision : 16-08-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 30, 34
Contract Act, 1872 — Section 51
Sales of Goods Act, 1930 — Section 19(3), 2(14), 20, 20, 21

Citation : AIR 2013 Cal 52

Hon'ble Judges : Soumen Sen, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : P.S. Bose and Mintu Goswami, for the Appellant; M.C. Ghosh and A. Chowdhury, for the Respondent

Final Decision : Dismissed

Judgement

Soumen Sen, J.—The present appeal is arising out of an order passed by the learned single Judge in rejecting an application filed u/s 34 of the Arbitration and Conciliation Act, 1996 for setting aside of an award passed by a departmental Arbitrator appointed by the appellant. The disputes relate to non-delivery of certain quantities of scrap rails by the appellant to the respondent. The appellant invited a tender for sale by auction of 192.673 MT of scrap rails under lot no BESY/1/98/R/UDL/5 lying in the Andal (Yard) of the Railways to be held on 27th January. 1998. the particulars whereof has been specifically mentioned in the concerned auction sales catalogue. The respondent participated in the tender which was conducted by the auctioneer, namely, Indian Auction Mart, a Government and Railway auctioneer. The respondent became the highest bidder and thereby a successful tenderer in respect of the aforesaid lot for 192.673 MT of scrap rails and after being declared to be the highest bidder, signed the bid sheet agreement in order to purchase and lift the material from Andal Yard of the Railways subject to fulfilment of conditions as laid down in the special and general conditions of sale by auction in Eastern Railway. In consideration of the

appellant in accepting the respondent as highest bidder and having agreed to sell the said contracted quantities to the successful bidder, the said respondent deposited the earnest money of Rs. 1,59,000/- on the date of auction and agreed to deposit the balance consideration in two installments and. accordingly, executed the bid sheet agreement in January, 1998.

2. The grievance of the respondent was that the respondent was prevented from depositing the balance consideration in installments in view of the failure of the Railway authorities to allow the petitioner to make available the quantities in terms of the auction sales catalogue. The respondent on reaching the site found that the lot that was agreed to be sold were disturbed after the auction and scattered all over the area. The lot that was agreed to be sold has undergone a change subsequent to the auction as to the physical status and character of the lot. In fact, the respondent complained that the lot that had been agreed to be sold had been completely changed and the Railway authorities were seeking to sell a completely different lot. The respondent noticing such discrepancy and hearing regard to the fact that he would be required to take delivery within twenty days against payment of entire consideration money and sixty days time for lifting the materials without interest and ground rent, immediately on February 9, 1998 ventilated its grievance and requested the appellant to restore the lot so as to enable the respondent to make payment and lift the contracted materials within the stipulated time. The said letter was followed by several representations. Since the appellant had failed to make available the required lots within the stipulated time, a request was also made for refixing payment and delivery time without interest and ground rent. The Railway authorities instead of remedying the breach in purported exercise of its power under Clause 23 of the special conditions read with Clause 4(b) of the general conditions sold the said lot to a third party giving rise to a reference being made to the departmental arbitrator who was the then Deputy General Manager, Eastern Railway praying, inter alia, for specific performance and other reliefs. The claimant, inter alia, prayed for specific performance of a contract with a direction upon the appellant for restoration, refixation and arrangement of materials from same or alternate location, damage and interest.

3. The principal grievance raised before the learned Arbitrator as it appears from the statement of claim is that in spite of repeated approach and request being made to the stock holder, railway for fixing an advance date for taking delivery of the subject materials so that on payment of the installments, the balance quantities could be lifted, the Railway authorities did not pay any heed to such request and failed, neglected and refused to deliver the entire identifiable and ascertained quantity which they had agreed to sell in terms of the said public tender. On the contrary. on a specious plea that the purchaser had failed to pay the balance consideration within the stipulated period in purported exercise of their power in terms of the clauses alluded to above sold the contracted quantities to a third party. Since the claimant was all throughout ready and willing to pay the balance consideration, the Railway authorities without

discharging their obligation could not have by exercising their superior bargaining power compelled the respondent to pay the installment amounts without making the lot in a deliverable state in terms of Clause 22 of the general conditions of sale by auction. The respondent found, the quantities allotted in favour of the respondent were in a disturbed condition and the Railway authorities were unable to deliver the goods in terms of the bid sheet dated 27th January, 1998 and, accordingly, the Railway authorities acted illegally and in, breach of the bid agreement in selling the said lot in favour of a third party.

4. The Railway Authorities contested the said proceeding in which primarily it was contended that the claimant was not entitled to the supply of the said lot in view of the fact that the claimant had failed, neglected and/or refused to pay the consideration price within the time stipulated and by reason of such failure, the railway authority by invoking clause 3 of the General Conditions of Sale sold the said quantities, after giving several opportunities to the respondent to deposit the money, to a third party. In view thereof, the appellant by its letter dated 30th September, 1999 terminated/cancelled the sale and forfeited the earnest money.

5. On the basis of the pleadings and the evidence adduced on behalf of the parties, the learned Arbitrator found that the railway authority had failed to prove to the satisfaction of the Tribunal, the quantity which the claimant had agreed to purchase and the railway authority had agreed to deliver upon payment of consideration, was in a deliverable state at the time when the claimant raised an objection with regard to the disturbance in the lot position inasmuch as the Tribunal found that the materials were not in a deliverable state at the loading point. The Tribunal also came to a finding on the basis of the evidence and materials on record that different standards had been adopted by the railway authorities in dealing with such situation since it would appear from record that similar things had happened with the other bidders and the railway authorities realizing their default and inability to deliver the materials not only had granted extension of time but also had made arrangement to deliver same or similar quantities from other sources to other bidders. The case of discrimination as made out by the respondent was accepted by the learned Arbitrator. The Arbitrator also found that there had been no lack of readiness and willingness on the part of the respondent to perform its obligation in terms of Section 32 of the Sales and Goods Act which would provide for reciprocal obligation and promises. The railway authority was unable to deliver the lots in terms of their promise and, accordingly, there was no corresponding obligation on the part of the claimant to pay the balance consideration amount which they were all throughout ready and willing to deposit. On such facts and evidence, the learned Arbitrator published an award in favour of the claimant.

6. Being aggrieved by the said award an application was filed u/s 34 of the Arbitration and Conciliation Act, 1996 of the Arbitration and Conciliation Act, 1996. The learned single Judge upon consideration of Clause 1 of the Special Conditions of Contract and Clauses 19 and 4(e) of the General Conditions

concurred with the view expressed by the learned Arbitrator. In dismissing the said application, the learned single Judge held that the Arbitrator did not ignore and/or overlook any of the relevant clauses and terms of the Contract nor could it be said that he had travelled beyond the contract and, accordingly, the award published by the Arbitrator did not suffer from any infirmity.

7. Mr. P.S. Bose, learned Senior Counsel appearing on behalf of the appellant submitted that the Arbitrator had exceeded his jurisdiction. In fact, he had travelled beyond his jurisdiction in directing the appellant to arrange for delivery of the balance lots in favour of the claimant in view of Clause 1 of the Special Conditions of Sale which was to be read along with Clause 1(d), Clause 4(b), Clause 7 and Clause 23 of the General Conditions of Sale by auction.

8. It was submitted, the goods were sold on "as is where is basis" and the claimant was fully aware that they would be required to take delivery of the goods on the same condition as they existed at the time when such auction took place.

9. It was contended, the petitioner should have raised contemporaneous objection with regard to the qualities and quantities agreed to be sold before signing bid sheet agreement and no complaint could be entertained thereafter in view of Clause 1 of the Special Conditions of Sale. The appellant was compelled to cancel the auction sale with forfeiture of earnest money of a letter dated 30th September, 1999 in accordance with all the terms of the General Conditions of Sale and thereafter they were compelled to sell the same materials in an auction held in 2001 due to non-payment of the balance consideration money. The said claim of the respondent was covered by "excepted matters" which was not arbitrable and, therefore, the claims submitted by the respondent could not have been decided by the arbitrator and as such the adjudication of the claims of the respondent by the learned Arbitrator was illegal, without jurisdiction, unjustified and suffers from legal misconduct.

10. Per contra, Mr. M.C. Ghosh, the learned Counsel appearing on behalf of the respondent submitted that Clause 1 of the Special Conditions could not have any manner of application in the instant case in view of the fact that the dispute arose at the stage of delivery. Procedures have been laid down in the bid agreement and in the General and Special Terms which are required to be followed before lifting the said material. The dispute was a post auction dispute and it arose when the petitioner found that the auction lots had been mishandled and the physical status of the materials were found to be completely different from the declared status of the materials as per the catalogue and the respondent could not be compelled to lift such disturbed materials which they had not agreed to purchase. In fact, the Railway Authorities, in exercising their superior bargaining power, wanted the respondent to lift such disturbed lot with change status which the respondent is not required to oblige. Moreover, no notice as contemplated under Clause 23 was served upon the respondent and even in the arbitration proceeding, no such notice was disclosed. The Clause 4(b) of the

General Conditions of Sale has to be read with Clause 23 and there is no unfettered discretion or right reserved in favour of the appellant in selling the said quantities without requiring to follow the procedure laid down in the said clauses.

11. The learned Arbitrator on the factual matrix and after analyzing the pleadings and evidence on record found that the respondent authorities have acted negligently. The Railway Authorities also could not satisfy the learned Arbitrator with regard to the contention of the claims that there has been a disturbance to the lot subsequent to the auction or that the agreed quantities were in a deliverable state on loading point. The Arbitrator on consideration of the materials made the following observation:

(a) The Railway has not submitted any evidence to show that the claimant's contentions with regard to disturbance of lot subsequent to auction was not true or correct or the claimant is not entitled to delivery of materials in a deliverable state on a loading point.

(b) The Railway had sought to maintain different standard in dealing with the claimant and other party similarly situated.

(c) The respondent had extended the time for payment and delivery in the case of other similarly situated party but in the case of the claimant the respondent never offered materials to the claimant on a loading point in a ready and deliverable state in a manner followed in the cases of other purchasers.

(d) The sale in question is by auction and the materials were ascertained goods in a deliverable state at the time of auction. Accordingly, it is the obligation on the part of respondent to keep the lot in same condition as at the time of auction after setting earnest money. The claimant is entitled to delivery of materials against payment; more particularly when the claimant has shown his readiness and willingness at all material time to perform his part of obligation. The respondent has not submitted any evidence to show that the respondent was ever ready and willing to perform his part of obligation.

(e) Section 32 of the Sale of Goods Act provides for reciprocal and concurrence obligation of the parties in payment and delivery. The claimant has shown that the claimant has always been and still is ready and willing to take delivery of materials against payment of balance sale value but the respondent has failed to show that the respondent was ever ready or willing or able to give delivery of materials to the purchaser against payment.

(f) The terms and conditions, inter alia. provide for payment of interest in the event of delay in deposit of balance sale value on the part of the purchaser. In the present case the Railway has not imposed any interest on the claimant/purchaser which shows that the respondent was in default and as such the Railway has decided not to take advantage of its own wrong.

12. It was argued that the respondent having agreed to purchase specific goods

in a deliverable state the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment of the price or the time of delivery of goods or both is postponed.

13. In our view, Clause 1 or other clauses referred to by the learned Senior Counsel could not assist the appellant in any manner whatsoever since it is an obligation on the part of the railway authorities to deliver the same goods forming the subject matter of public tender upon payment of consideration. It is an admitted position that the claimant on numerous occasions requested the railway authorities to fix the date and time for taking delivery of the contracted quantity and to enable the claimant to deposit such balance consideration. The claimant also disclosed the reasons for not being able to take delivery of the materials since it was found that the entire lot was in a disturbed condition. There is no contemporaneous evidence on the basis of which it could be said that the railway authorities were not at fault and the claimant was in any way responsible for not lifting the material within the stipulated period. It is the obligation of the seller to ensure that the buyer could receive and lift the same materials which they have purchased and/or intended to buy. The railway authorities, however, for the reasons best known to them ignored the repeated demand of the respondent for enabling them to lift the required quantity from the loading point.

14. Under the Sale of Goods Act, where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intended it to be transferred and for ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. Section 19(3), however, provides that unless a different intention appears, the rules contained in Sections 20 to 24 for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. In order to attract the presumption in Section 20 of the Sale of Goods Act, the goods must be in a deliverable state. The goods at the loading point must be ascertainable and in a deliverable state. In fact, by reason of failure on the Railway Authorities to make the said lot to a deliverable state at the loading point, there is a failure of consideration. The contract for sale is an example of a contract consists of reciprocal promises to be simultaneously performed. The general principle laid down in Section 51 of the Contract Act, envisages that the seller is not bound to deliver and commits no breach of contract in failing delivery, if the buyer is not ready and willing to pay the price on delivery and conversely the buyer is not bound to pay the price and is not liable to an action for failure to accept the goods, if the seller is not ready and willing to let the buyer have the goods on demand. The seller owes to the buyer an onerous duty to deliver the goods as the buyer owes to the seller a duty to accept and pay for them. One of the essential conditions of Section 20 of the Sale of Goods Act, 1930 is that the

goods must be specific and in a deliverable state. The term "specific goods" has been defined u/s 2(14) and it means goods identified and agreed upon at the time of making of the contract, accordingly, the goods must not only be specific but they must also be in a deliverable state. (*Sujanmal Vs. Radhey Shyam Agarwal and Others*,

15. The capacity of the buyer to purchase the lot is not in doubt. It is a duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the promise of the contract of sale.

16. The learned Arbitrator on the basis of the materials arrived at a positive finding in favour of the respondent and against the appellant. This Court is not sitting in appeal over the award passed by the learned Arbitrator.

17. The scope of enquiry u/s 34 of the Arbitration and Conciliation Act, 1996 is very limited. The 1996 Act was enacted keeping in mind that the 1940 Act outlived its object and challenge to an award under the new Act has been narrowed down to a large extent. The 1996 Act while replacing the 1940 Act amongst others have given more sanctity to an award and award can be challenged only on limited grounds. The scope and power of Court in considering an application to set aside of an award passed under 1996 Act came up for consideration on a number of decisions.

18. The principle that that could be culled out from the decision are as follows:-

i) The award of the arbitrator is ordinarily final and the courts hearing applications u/s 30 of the Arbitration Act, 1940 do not exercise any appellate jurisdiction. Reappraisal of evidence by the court is impermissible. Interpretation of a contract is a matter for the arbitrator to determine. Even in a case where the award contained reasons, the interference therewith would still be not available within the jurisdiction of the court unless the reasons are totally perverse or award is based on wrong proposition of law. Errors of law as such are not to be presumed. *M.P. Housing Board Vs. Progressive Writers and Publishers*,

ii) The Arbitrator is the sole Judge of the quality as well as the quantity of evidence. It may be possible that on the same evidence, the Court might have arrived at a different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award of the arbitrator. *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*,

iii) It is well-settled that when the parties choose their own arbitrator to be the Judge in dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon law or on facts. Therefore, when arbitrator commits a mistake either in law or in fact in determining the matters referred to him, where such mistake does not appear on the face of the award and the documents appended to or incorporated so as to form part of it, the award will neither be remitted nor set aside. (*State of Orissa Vs. Dandasi Sahu*,

iv) The award would not be open to challenge on the ground that the arbitrator

has reached a wrong conclusion or failed to appreciate facts, as under the law, the arbitrator is made the final arbitrator of the disputes between the parties. The Court will not sit in appeal over the award nor re-appreciate the evidence for the purpose of finding whether on the facts and circumstances, the award in question could have been made. Unless there is any allegation of moral misconduct against the arbitrator with reference to the award and where the arbitrator has not been superseded.

v) There are only two grounds of attacks. namely, the legal misconduct on the part of the arbitrator in making the award and secondly if there was an error apparent on the face of the award.

(i) AIR 1923 66 (Privy Council)

(ii) Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another,

(iii) State of Rajasthan and Another Vs. Ferro Concrete Construction Pvt. Ltd.,

(iv) Bhagawati Oxygen Ltd. Vs. Hindustan Copper Ltd.,

vi) Intervention of the Court is envisaged and in few circumstances only to ensure fairness like in case of fraud or bias by the arbitrators, violation of natural justice etc., the Court cannot correct errors of the arbitrators. The scheme even aims at keeping the supervisory role of the Court at minimum level and this can be justified as parties to the agreement, make a conscience decision to exclude the Court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it. (McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, (Smt. Hem Lata Goel and Others Vs. Smt. Urmila Goel and Others

(vii) In a case where it is found that the Arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law then in that case there is no prohibition for the Courts to set things right Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd.,

(ix) If an award is based on erroneous legal proposition and in a case of reasoned award if it is, on the face of it, erroneous on the proposition of law or its application; the award can be set aside. However, if a specific question of law is submitted to the Arbitrator, erroneous decision on point of law does not make the award bad, so as to permit it to be set aside, unless the Court is satisfied that the Arbitrator had proceeded illegally. It has to be a patent illegality and in the sense that it must go to the root of the matter and if the illegality is on trivial nature, it cannot be held that award is against the public policy. An award could also be set aside for itself so unfair and unreasonable that it shocks the conscience of the Court since such an award would be opposed to public policy and is required to be adjudged void. (Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.,

(x) The interpretation of a contract may fall within the realm of the Arbitrator. An

award containing reasons also may not be interfered with unless they are found to be perverse or based on a wrong proposition of law and if two views are possible, it is trite that the Court shall refrain itself from interfering. (G. Ramachandra Reddy and Co. Vs. Union of India (UOI) and Another,

(xi) The distinction between an error within the jurisdiction and error in excess of jurisdiction has been recognized in a number of decisions and it has been held that the role of an arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract and accordingly he cannot travel beyond the contract; if he does so, then he would be traveling beyond the contract and an award passed would be without jurisdiction since in that case he would be acting without jurisdiction. (Rashtriya Chemicals and Fertilizers Ltd. Vs. Chowgule Brothers and Others,

19. It does not appear to us that the Arbitrator has acted without jurisdiction or travelled beyond the terms of the contract. The Arbitrator interpreted several clauses of the general terms and conditions as also the special conditions and arrived at a conclusion that the appellant had failed to deliver the lots in terms of the auction. The obligation of the railways to deliver the quantities cannot be doubted. The dispute has been decided in accordance with the terms of the contract. The Arbitrator upon interpretation of various clauses as put forward before him by the claimant and the respondent and on an interpretation given to such clauses arrived at such a finding in favour of the claimant. The arbitrator did not allow the entire claim.

20. We have considered the said award as also the judgment delivered by the learned single Judge in affirming the said award. We do not find any jurisdictional error in the said award nor it can be said that the award suffers from any error on the face of it. We are not sitting in appeal over the said award.

21. We feel that the award suffers from no infirmity. We accordingly agree with the judgment delivered by the learned single Judge in affirming the said award.

22. The appeal, accordingly, fails and is hereby dismissed without any order as to costs.

23. Urgent certified copy of this order be supplied to the parties, if applied for, upon compliance of all requisite formalities.

Ashim Kumar Banerjee, J.

I agree