

(1974) 06 DEL CK 0003
In the Delhi High Court
Case No : Suit No. 61A of 1972

Union of India

APPELLANT

Vs

India Hard Metals Private Limited etc.

RESPONDENT

Date of Decision : 06-06-1974

Acts Referred:

Citation : (1975) ILR Delhi 737

Hon'ble Judges : A.B. Rohtagi, J

Bench : Single Bench

Advocate : S.S. Chadha, P.N. Sethi, R.M. Mehta and S.K. Dholakia, for the Appellant;

Judgement

Avadh Behari, J.

(1) In 1965 the Director General, Ordnance Factories, Calcutta was in need of Tungsten Carbide Core. Tungsten Carbide Core is used in shells which are fired from anti-tank guns. The shell core pierces the armour of the tank and explodes inside.

(2) Tungsten is a hard, heavy, steel grey, ductile, very infusible metal. The metal Tungsten is obtained from Wolfram. Wolfram or Wolf Amite is a brownish or blackish monoclinic mineral. It is the principal ore of Tungsten.

(3) Tungsten Carbide is a compound of Tungsten and Carbon. It is used in modern warfare in anti-tank guns to attack the enemy tanks. It has also peaceful uses. It is used for cutting tools, abrasives and dies.

(4) The Director General on behalf of the petitioner. Union of India, invited tenders for Tungsten Carbide Core for their defense stores. India Hard Metals submitted their tender which was accepted on December 27, 1965. By this contract India Hard Metals Private Limited (hereinafter referred to as "Hard Metals") agreed to supply 5000 Tungsten Carbide Core. The price was agreed at Rs. 360.00 per core. The total cost came to Rs. 18,00,000.00 .

(5) Hard Metals agreed to supply the agreed quantity from February 11, 1965 to March 31, 1967. This was the delivery period. Much before the agreed period they completed the supply. The Union made the payment but Hard Metals were not satisfied. They claimed more. Disputes arose between the parties.

(6) In the Acceptance of Tender dated December 27, 1965, there are four clauses of importance. I reproduce them here:

"18(D)1. The above prices are based on the average current L.M.E. price of Wolfram Ore. The prices are also inclusive of current rate of 66 per cent as import duty on the Wolfram Ore. The quantity of Wolfram Ore required for the production of one core is 6.250 kgs. II. The prices are subject to revision in case of any change in the rate of import duty and L.M.E. price of Wolfram Ore at the time of delivery of the stores.

"(1)It is understood from the Director General, Technical Development that they have already issued you the import license for the import of Ore required for the manufacture of Tungsten Carbide Core. (m) The price of Rs. 360.00 per core is subject to variation as per clause 18(d) (1) and (II). You will, however, maintain separate accounts for this stores duly audited by your auditor which will be subject to examination by Govt. Cost Accounts Officer."

(7) Hard Metals made a claim for Rs. 4,19,863.80 on account of the difference of "the London Metal Exchange price of Wolfram ore and the rate of customs duty. They based their claim on the price variation clause contained in clause 18(d) II. Hard Metals said that at the time of the delivery of the stores the price of Wolfram Ore rose in the London Metal Exchange and that the contract price was linked to the London Metal Exchange price. The Union of India denied the claim. The matter went to the arbitrator. The arbitrator made his award on December 31, 1971. He rejected the claim of Hard Metals. It is a brief award. I set out the award here:

"WHEREASI, the sole-arbitrator, above named appointed herein, have perused the pleadings and the documents filed by the parties in the case ; And Whereas I have heard the counsel of both the parties in great detail ; And Whereas I have duly deliberated and considered the arguments and contentions of both the sides in the light of the materials on record; And Whereas the time for making and publishing the award having expired, the parties have "filed a joint memo dated 6-11-1971, empowering the arbitrator to extend the time for making and publishing his award; And Whereas time has accordingly been extended for the said purpose up to 31-12-1971;

(8) Now, Therefore, I hereby make and publish my award as follows:-

(1)After carefully considering the facts of this case in the light of Clause 18(d)(I) & (II) read with Clauses 18(1) and 18(m), I am of the view that the claimant's claim of Rs. 4,19,863.80 P. (Rupees Four lakhs, Nineteen Thousand, Eight Hundred and Sixty three & Paise Eighty) based on the difference of Lme price of

Wolfram Ore and the rate of customs duty, is legally not tenable. The claimant's claim of Rs. 4,19,863/80 P. (Rupees Four Lakhs, Nineteen Thousand, Eight-Hundred and Sixty-three and Paise Eighty) is, Therefore, rejected. The claimant's claim for interest is also rejected. (2) The parties shall bear their own costs of the arbitration proceedings. (3) The stamp duty charges payable in respect of this award shall be borne by the Union of India."

(9) On January 24, 1972, the Union of India made an application Under Ss. 14 and 17 of "the Arbitration Act for making the award a rule of the court. Hard Metals filed objections to the award under Ss. 30 and 33 of the Arbitration Act. In their objections they submitted that the award disclosed an error on its face and was liable to be set aside.

(10) On August 28, 1972, the following issues were framed :

1.Has the Arbitrator failed to decide the matters in controversy between the parties which were referred to arbitration ? 2. Does the award contain an apparent error of law with regard to the interpretation of Clause 18(d) I and Ii read with Clauses 18(1) & (m) in the schedule to the acceptance of tender ? 3. Is the award liable to be set aside for misconduct on the grounds alleged in the application ? 4. Is the award otherwise invalid for the reasons stated in the pleadings ? 5. Relief.

(11) Mr. R. M. Mehta, counsel for Hard Metals, has argued only issue No. 2 before me. He did not argue any other point or issue.

(12) The counsel for Hard Metals submits that there is an error apparent on the face of the award and, Therefore, the award should be set aside. The error of law, according to the counsel, is this. He says that in the operative portion of the award the arbitrator has specifically said that in the light of clauses 18(d) I and Ii read with clause 18(1) and 18(m) the claim of Hard Metals for Rs. 4,19,863.80 based on the difference of Lme price of Wolfram ore and the rate of customs duty is "legally not tenable". He says that in rejecting the claim of Hard Metals the arbitrator committed an error of law and the error is disclosed on the face of the award.

(13) Firstly, it was said that clauses 18(d) I and Ii and 18(1) and 18(m) have been incorporated in the award as these clauses are specifically referred to by the arbitrator. Then it is said that the arbitrator invites the reading of these clauses. If, it was urged, clauses 18(d) I and Ii are read together the only conclusion which the arbitrator could have arrived at was that the prices are subject to revision and if at the time of delivery prices of Wolfram Ore at the London Metal Exchange rise then Hard Metals are entitled to those higher prices. The counsel says that clause (m) leaves this matter in no doubt. The agreed price of Rs. 360.00 per core was arrived at on the basis of the average current Lme price of Wolfram ore and the current rate of import duty on it. The price was subject to revision in case there was variation in the duty or in the prevailing price of Wolfram ore at the London Metal Exchange. It was said that Hard Metals

were able to establish before the arbitrator that the price of Wolfram ore had gone up at the London Metal Exchange and that this was not disputed by the Union of India. The counsel argued that if higher price was prevailing at the London Metal Exchange at the relevant time Hard Metals are entitled to be paid the higher price. The counsel said that the arbitrator was in error in holding otherwise. He construed clauses 18(d) I and II read with (m) wrongly and construction of the clause of a contract, it was submitted, was a question of law. He invited me to read the clauses. He said that clauses 18(d) I and II and 18 (m) admit of no other construction than this: that Hard Metals are entitled to the revised price in view of the rise in price of Wolfram ore at the London Metal Exchange.

(14) The counsel for Hard Metals strongly relies on the following observations of Denning LJ in *D.S. Blaiber & Co. Ltd. v. Leopold Newborne (London) Ltd.* (1953) 2 Lloyd's Rep. 427. On Incorporation of contracts Denning LJ said this :

"I have a strong suspicion that the arbitrators went wrong in Law, but we are not able to say so without looking at the contract, because the terms of the contract may vary the ordinary legal rights and implications. The difficulty is that we are not at liberty to see this contract. It is not expressly incorporated into the award, nor can I see that it is impliedly incorporated. The "question whether a contract, or a clause in a contract, is incorporated into an award is a very difficult one. As I read the cases, if the arbitrator says : "On the wording of this clause I hold" so-and-so, then that clause is impliedly incorporated into the award because he invites the reading of it; but if an arbitrator simply says: "I hold that there was a breach of contract, "then there is no incorporation".

(15) The foundation of the argument of the counsel for Hard Metals is that the arbitrator has specifically referred to clauses 18(d) I and II and, Therefore, it was argued that the court can read these clauses of the contract and discover for itself whether there is an error of law.

(16) In my opinion the counsel for Hard Metals is not right in his contentions. The questions for consideration are: Are clauses 18 (d) I and II, 18(1) and 18(m) incorporated in the award ? Has the arbitrator given reasons ? Has the arbitrator enunciated a legal proposition which can be said to be erroneous ? Has the arbitrator tied himself down to a legal proposition which is unsound ? Did the arbitrator make an error of law or an error of fact ? These are the questions which arise and demand decision.

(17) What is an error apparent on the face of the award was laid down by Lord Dunedin in his classic judgment in AIR 1923 66 (Privy Council) He said :

"AN error of law on the face of the award means, in their Lordships' view, that you can find in the award, or a document actually 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 you can then say is erroneous. It does not mean that if in a narrative a reference is made to a

contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound."

(18) In that case the Privy Council upheld the award, as it was impossible to say from what was on its face what mistake the arbitrators had made, and they had not tied themselves down to some legal proposition which was unsound.

(19) The conclusion is this: in order to be a ground "for setting aside the award, an error in law on the face of the award must be such that can be found in the award or in a document actually incorporated with it some legal proposition which is the basis of the award and which is erroneous"-

(20) The first question, Therefore, is whether the clauses in question are incorporated in the award. The counsel for Hard Metals says that there is an express incorporation. The counsel for the Union of India submits that it is not so. The question whether a contract or a clause of it is incorporated in the award is a question of construction of the award. The test is: Does the arbitrator come to a finding on the wording of the contract? If he does he can be said to have impliedly incorporated the term of the contract or a clause of it whichever be the case. But a mere general reference to the contract in the award will not help in incorporating it.

(21) The principles applicable to incorporation of contract into the award are to be found in the judgment of Diplock L. J. in *Giacomo Costa S.p.A. v. British Italian Trading Co. Ltd.*, 1962 (2) All E.R. 53. Questions arose as to the possibility of looking at the contract itself, in the course of an illuminating judgment holding that it could not, Diplock L.J. observed :

"THE principle of reading contracts or other documents into the award is not -- one to be encouraged or extended, and -- we are not entitled in this court, on an award where there is a purely general reference to "the contract" -- and a reference only in that part of the award which deals with the consequences of the finding of fact -- to look at the contract and search it in order to see whether there is an error of law."

(22) The Supreme Court has followed this decision in *Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI)*, New Delhi, . Apply these principles to the award in this case. The arbitrator says : "after carefully considering the facts and in the light of clauses 18(d) I and II read with clauses 18(1) and 18(n) I reject the claim of Hard Metals". It is true that the arbitrator specifically refers to the specific clauses but in my view this is not incorporation. He nowhere says "on the wording of these clauses I hold". He does not give us his interpretation of the clauses. He does not append or set out the clauses in full. We do not know what weighed with the arbitrator, by what process of reasoning did he arrive at his conclusion. He has merely stated the conclusion of his finding that the claimant's claim is not legally tenable. He has not given us any indication of the mental process from which that conclusion has flowed. It is quite impossible to say that

he has incorporated those clauses of the contract in the award in the sense that he has invited those reading the award to read the contract. Diplock LJ has given the warning :

"THE principle of reading the contract or other document is not in my judgment one to be encouraged."

(23) The Supreme Court in *Alien Berry & Co. (supra)* following the above observations has said the same thing. Therefore, the jurisdiction which the court exercises in setting aside the award for error of law appearing on the face of it is not lightly to be exercised. (Halsbury Laws of England, 4th Halsbury's edition page 334).

(24) I cannot read the clauses and search them in order to see whether there is an error of law. This will mean that I must probe into the mental processes of the arbitrator. *Shah J. in Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others*, , said:-

"AN award may be set aside by the court on the ground of error on the face of the award but an award is not invalid merely because by the process of inference and argument it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion."

(25) No one knows the mind of the arbitrator. Unsearchable and untraceable are his reasons. *Shah J.* went on to say:

"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. On the assumption that the arbitrator must have arrived at his conclusion by a certain process of reasoning, the Court cannot proceed to determine whether the conclusion is right or wrong. It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award."

(26) If the arbitrator expressly states some reasons or grounds for his conclusion and an error is patently found in the reasons or grounds so stated it would be an error on the face of the award. But if the arbitrator merely states his conclusion without expressly stating any reasons or ground Therefore, the fact that the arbitrator did not give reasons in the award cannot make his award open to attack. His award is impregnable. The arbitrator's decision is unassailable. He has given no reasons. Court can find fault with his reasoning if the arbitrator has given one. The court cannot start on a voyage of discovery to find out the reasons which weighed with the arbitrator. This will be an impossible thing nor does the law sanction it.

(27) *F. R. Absalom Limited v. Great Western (London) Garden Village Society, Limited*, (1933) A.C. 592 is a case in point where the award set out relevant words and clause 30 of the contract and also the conclusion of law on the meaning of those words. Lord Russell said that since the award recited the

contract and referred in terms to the provisions of clause 30 thereby incorporating it into the award and then stated the construction which the arbitrator placed upon that clause the court was entitled to look at that clause to ascertain if the construction placed by the arbitrator was erroneous.

(28) Another case to which reference can usefully be made is *S.B. Dutt Vs. University of Delhi*, In that case the arbitrator held that "Dr. Dutt continues to be in the service of the University of Delhi". Tills amounted to specific performance of the contract of personal service which no court of law had the power to order. The award was set aside by the High Court on the ground that it disclosed an error on the face of it. The Supreme Court upheld that decision.

(29) These two cases are one side of the line, *Champsey Bhara* (supra) on the other. The question then arises on which side of the dividing line indicated by the above decisions the present case falls. I have come to a clear conclusion that the present case falls squarely within the rule laid down in *Champsey Bhara*" (supra).

(30) In the case in hand neither reasons are given nor has any legal proposition been propounded to which exception can be taken. The reference to the clauses of the contract is introductory or preparatory to the arbitrator's decision. The arbitrator was merely saying that he had considered the particular clauses of the contract to which his attention appears to have been invited in the course of the arguments. But his actual decision is contained in the words : "The claimants' claim is not legally tenable and Therefore rejected." For this conclusion the arbitrator has not given any reasons or grounds. The clauses are referred to generally in the award or in matters introductory to the finding. I do not find here that the arbitrator on the face of his award based his decision on the construction of any particular term in the contract. The clauses are mentioned in what is in effect the conclusion or the order which the award makes. If you merely have in a recital or narrative to an award a reference in general terms to a document then the court is not entitled to look at the document itself upon an application to set aside the award as being bad in law on the face of it. Diplock LJ said in *Gracomo case*- " (supra) :-

"THE question whether a contract, or clause in a contract, is incorporated in the award is a question of construction of the award."

On the construction of the award, I think, it is not permissible to look at the clauses of the contract. I, Therefore, hold that there is no incorporation of the clauses of the contract and a mere reference to those clauses does not amount to incorporation.

(31) In the *The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board*, , it was said :

"IF it is transparent from the award that a legal proposition which forms its basis is erroneous, the award would be liable to be set aside."

(32) All that we know is that the arbitrator has rejected the claim of Hard Metals.

The award is clear and comprehensible but the arbitrator's reasons are inscrutable. No one knows the reasons which appealed to the arbitrator. He has given none. The court cannot divine the reasons. It is very difficult for the court to fathom the thought processes of the arbitrator. Nor is there any legal proposition enunciated in the award which forms its basis and which you can then say is erroneous. The arbitrator has not tied himself down to any legal proposition.

(33) There is another aspect of the matter which demands attention. The counsel for Hard Metals wanted the court to confine its attention only to clauses 18 I and II and (m). On his submission clause 18(1) has nothing to do with the price variation clause on which the claim of Hard Metals was based. Shri S. S. Chadha, counsel for the Union of India submitted that it would be unfair to the arbitrator if these clauses are read in isolation. The counsel made a pointed reference to clause 18(1). He said that the price variation clause was to operate in case the arbitrator found as a fact that Wolfram Ore was imported by Hard Metals and that the Imported material was used in the manufacture of Tungsten Carbide Core. Both the parties agree that Wolfram Ore is not available in India. It is imported and that is why clause 18(1) speaks of the import license for the import of Ore. With this, the counsel said, is connected the latter part of clause (m), namely, that Hard Metals will "maintain separate accounts for these stores duly audited by your auditor which will be subject to examination by the Government cost accounts officer."

(34) The two clauses, he said, are interwoven and it may be that the arbitrator may have come to a finding—which is essentially a finding of fact—that Hard Metals did not import Wolfram Ore for the manufacture of the quantity to be delivered under the contract and that they merely used the stocks they had already with them.

(35) The counsel also said that it is possible that the arbitrator may have come to the conclusion that there was no variation of price of Wolfram Ore at the London Metal Exchange. This is also a question of fact. If the arbitrator committed errors of fact in coming to his conclusion the award cannot be set aside. It is only when there is an error of law and the reasons are given in the award that the court has the power to set aside the award on the ground of an apparent error.

(36) The principle that an award must be taken at its face value applies equally for the purpose of impeaching the award or of supporting it. It was said that there was indisputable evidence before the arbitrator that the prevailing prices at the London Metal Exchange at the time of delivery were higher than the contract rates. It is well settled that the court has no jurisdiction to investigate into the merits of the case and examine the oral or documentary evidence on the record for the purpose of finding out whether or not the arbitrator has committed an error of law : See *Union of India, v. Bungo Steel Furniture*. Air 1967 Sc 1932.

(37) It was then said that the Union of India on July 15, 1969, made an amendment in the Acceptance of Tender. This was done nearly after four years and unilaterally. In place of clauses 18(d) I and II and (m) the following clause was substituted :

"THE prices are firm and fixed."

(38) It was argued that this amendment showed that the Union of India knew about the weaknesses of their case and the strengths of the claim of Hard Metals which was founded on clause 18(d)II. I am not impressed by this argument. A subsequent amendment has no effect on the award. What the Union of India does later will not affect the arbitrator's award. The award remains unaltered and binding. For these reasons I hold that there is no error apparent on the face of the award. I decide issue No. 2 against the respondent Hard Metals. In the result I make the award a rule of the court and pronounce judgment and decree in terms of the award. The award will form part of the decree.

(39) The arbitrator made the award on plain paper. It was not stamped. An award is chargeable to stamp duty under Article 12 in Sch. I to the Stamp Act. The question whether an award such as this one requires to be stamped arose before Chawla J. in Suit No. 352-A of 1973 (Union of India v. M/s Delton Cables Ltd. decided on January 3, 1974),(10). It was held that the award is not exempt from stamp duty. I respectfully agree with the reasoning of that case.

(40) The Union of India has moved to have the award made a rule of the court. The arbitrator has said "the stamp duty charges payable in respect of this award shall be borne by the Union of India." The Union of India failed to pay the duty and the penalty. Hard Metals have paid the stamp duty amounting to Rs. 825.00 and they have filed a receipt of payment. Under S. 44 of the Stamp Act Hard Metals are entitled to recover this amount from the Union of India both under law as well as in terms of the award. I, Therefore order that the Union of India will pay Rs. 825.00 to the respondent Hard Metals. Otherwise the parties are left to bear their own costs.