

(1994) 12 DEL CK 0006
In the Delhi High Court
Case No : S.A.O. (OS) , 34 of 1983

Union of India

APPELLANT

Vs

M/s. Rattan Lal Brij Mohan and another

RESPONDENT

Date of Decision : 08-12-1994

Acts Referred:

Citation : (1995) 32 DRJ 23

Hon'ble Judges : K. Shivshankar Bhat, J;D.K. Jain, J

Bench : Division Bench

Advocate : Shri Raman Kapoor, for the Appellant; Shri Rajesh Lakhanpal, for the Respondent

Judgement

K. Shivshankar Bhat, J.—In this appeal by the Union of India, the validity of the award made by the Umpire, who entered the reference on the ground of belatedness of make the award by the two arbitrator, is challenged on three grounds; Viz. (1) the umpire could have entered the reference only if the two arbitrators had disagreed and that there was no occasion for the umpire to intervene as per the terms of the agreement; (2) the parties to the dispute let the time to expire and even thereafter participated in the proceedings by the two arbitrators and Therefore, none of them can seek the intervention of the umpire on the ground of belatedness in making the award by the arbitrators; and (3) a lump sum award by the umpire, without giving the award under different beads of claim, is illegal,

2. The 1st respondent M/s. Rattan Lal Brij Mohan entered into a contract with the Railways (appellant) to carry out certain works. The contract was governed by the "General Conditions of the Contract" governing the Civil Engineering Works. The 1st respondent raised a dispute in connection with the contract, and the matter with referred to arbitration by two arbitrators ,they entered upon the reference on 5th September, 1979. When one of the arbitrators retired from service, another was appointed in his place, but the appointee requested to replace him, resulting in the appointment of another officer. The first beating was

fixed on 7th January, 1981, which was changed to 2nd February, which was again adjourned to several dates in February, ultimately the date of hearing was fixed as 2nd May, 1981. The 1st respondent on the said date, invoked the appointment of the umpire, on the ground that the extended period for making the award expire on 1st January, 1981. On 8th May, the Umpire entered upon the reference. Both sets of parties participated in the proceedings and the award came to be passed on 9th July, 1981, whereby, a sum of Rs. 94,900/-, with interest thereon at 8% per annum from 19.8.1981 came to be awarded against the appellant. The 1st respondent filed a petition in this court for a direction to the Umpire to file the award and for making it a decree of the Court.

3. In the proceedings before this court, the appellant questioned the competence of the Umpire to enter upon the reference and also raised other two grounds, all of which were rejected by the learned Single Judge. Hence this appeal.

4. The first question is whether the Umpire could have entered upon the reference, in the absence of any difference of opinion by the two arbitrators. The appellant relies on clause 64 of the Conditions governing the Contract, relevant part of which reads thus :

"3(a) Arbitration - matters in question dispute or difference to be arbitrated upon shall be referred for decision to :

(i) xxx xxx xxx (ii) Two Arbitrators, who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid down in clause 64(3)(b) for all claims of Rs. 3,00,000 and above and for all claims irrespective of the amount or value such claims of the issues involved are of a complicated nature. The General Manager shall be the sole judge to decide whether the issues are of a complicated nature or not. In the event of the two arbitrators being divided in their opinions the matter under dispute will be referred to an Umpire to be, appointed in the manner laid down in sub-clause 3(b) for his decision."

According to the appellant, this clause envisages the reference of the dispute to the Umpire only in the case of divided opinions amongst the two arbitrators.

5. We cannot agree. The contention overlooks Section 3 of the Arbitration Act, which provides that "an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the first schedule in so far as they are applicable to the reference"

6. Para 4 of the First Schedule says that, "if the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the Umpire a notice in writing stating they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.

7. The clause para provides for more than one situation when the Umpire could enter on the reference. One such situation is if the arbitrators have allowed their time to expire without making an award. As per Section 3 of the Act, the above provision shall be deemed to be included in the contract between the parties,

"unless a different intention is expressed" in the contract. In other words, only if the terms of the contract provide for those terms to govern exclusively and those terms exhibit a different intention altogether, the provisions of the First Schedule got excluded and these provisions cannot be read into the contract.

8. The terms of the contract between the parties, here, nowhere, states that these terms are exclusive : the term relied upon by the appellant does not say only when the two arbitrators differ, the Umpire could enter on the reference. The term of the contract expresses no intention, contrary to the relevant para in the First Schedule to the Act.

9. In *Keshavsingh v. Indian Engineering Co.* (AIR 1972 SC 1535), the Supreme Court dealt with this aspect, at page 1544.

"The other contention on behalf of the appellants that paragraph 4 of the First Schedule to the Arbitration Act, 1940 was excluded by clause (6) of the arbitration agreement in the present case is unsound. Section 3 of the Arbitration Act provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference. Paragraph 4 of the First Schedule provides that if the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the Umpire a notice in writing stating that they cannot agree, the Umpire shall forthwith enter on the reference in lieu of the arbitrators. Clause (6) of the arbitration agreement does not state that only in the event of a difference arising between the arbitrators shall there be a reference to the Umpire. There is no intention in the agreement to exclude the operation of paragraph 4 of the First Schedule to the Arbitration Act. In the present case the agreement provided for appointment of Umpire. The agreement also provided for making of the award by the arbitrators. It is, Therefore, apparent that the intention of the parties was that when the arbitrators would allow their times to expire, without making the award the Umpire would enter on the reference in lieu of the arbitrators."

The principle was reiterated again in *N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another*, . The Union of India should have gracefully restrained from raising a plea which runs counter to the principle laid down by the Supreme Court.

10. The next ground involves the application of the doctrine of estoppel or acquiescence in the belatedness in making the award by the two arbitrators.

11. The right of the party to the agreement seeking the intervention of the umpire on the ground of belatedness in making the award by the two arbitrators, is a term of the contract by virtue of Section 3 of the Act. This term of the agreement shall have to be withdrawn or superseded by another agreement. This is not the case here. The appellant contends that the 1st respondent participated in the proceedings before the arbitrators even after the expiry of the period for

making the award. A perusal of the proceedings shows that date of hearing was fixed from time to time and actually, no real proceedings took place before the arbitrators. Even otherwise none of the parties can be held to be responsible for the belatedness on the part of the arbitrators. The conduct of the parties shall have to be such so as to unequivocal inference that the conduct reflected in the participation before the arbitrators, resulted in a fresh agreement which would express an intention which is different from the terms of para 4 of the First Schedule. That is not the case bore at all.

12. Under the third contention, the learned counsel for the appellant urged that there were 22 items of claims involved in the dispute and Therefore the umpire should have made the award with reference to each item.

13. This condition overlooks the nature of the dispute. The dispute is a single dispute of a claim in damages arising out of a contract for works. There may be several components of the damages, but it cannot be said that each component is an independent dispute. The learned counsel relied on G.S. Atwal and Co. (GUA) Vs. Union of India and Others, . The learned Judge held :

"It is a great pity that an arbitration of this type, should be decided without caring to mention the exact differences or disputes which have been decided by the arbitrator. It is true that an arbitrator need not give any reasons while giving his award, but this lack of detail or lack of reasoning need not be carried to the stage of unintelligibility so as to debar the court from determining what exactly were the disputes and differences decided by the arbitrator. The objector had submitted several disputes to the arbitrator and in the counter statement of facts two matters were submitted by the respondent. The arbitrator could easily have said which of the disputes or claims were being decided by him and to what extent he was Allowing the individual claims. By giving a lump sum award, he has deprived court of an opportunity of finding out which of the claims had been allowed, and which of the claims had been disallowed, and whether any claim outside the scope of the reference to arbitration had been omitted from the decision for that reason. A complete lack of detail makes me come to the conclusion that the award cannot be upheld as it appears that the arbitrator has apparently decided matters outside the scope of the reference."

14. If an arbitrator can make an unspeaking award, there is no reason why he should consider every item of claim separately, with utmost respect to the learned judge. It is not possible for us to agree with the proposition found in the above passage. The award by an arbitrator in this regard, cannot be required to comply with the requirements of a speaking order to be made by judicial or quasi-judicial authorities. Arbitrator is the chosen forum of the parties, in whom the disputants have reposed great faith and confidence. While making the award, several factors of equity, law and facts, would go into his consideration.

15. In AIR 1990 1426 (SC) , the Supreme Court pointed out that only when the parties to the dispute insist upon reasons being given, the arbitrator is, under an

obligation to give reasons. The court also pointed out that giving reasons in support of a decision was not considered to be a rule of natural justice either under the law of arbitration or under the administrative law. (Vide para 23 to 38 of the report),

16. In Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, , a similar argument advanced by the appellant was negated by the Supreme Court. At page 1031, the court held.

"The arbitrator could give a lump sum award. He was not bound to give a separate award for each claim."

17. It was also contended that the umpire should have entered on the reference immediately on the expiry of the time before which the arbitrators had to make the award; the requirement as per para 4 of the First Schedule is that, the umpire shall enter on the reference forthwith. According to the appellant, the umpire should have entered on the reference in January, 1981 itself.

18. The term forthwith in para 4 of the First Schedule cannot be read in a restricted manner, It enables the umpire to enter the reference under certain circumstances stated in para 4. It is not a mandate. It does not require the umpire to be ready awaiting to enter on the reference, as and when the arbitrators fail to make the award within the stipulated period. Umpire is not expected to keep a watch even the proceedings of the arbitrators, so that he can seize the proceedings on the expiry of the stipulated period. He have to be informed by one of the parties or he may require an order of the court to enter on the reference; he may need some time to get himself ready to take over.

No other contention was advanced.

Appeal, Therefore, fails and it is accordingly dismissed with costs.

19. Appeal dismissed.