
(2007) 03 DEL CK 0222
In the Delhi High Court
Case No : FAO No. 712 of 2003

Union of India (UOI)

APPELLANT

Vs

Hind Wire Industries Limited

RESPONDENT

Date of Decision : 07-03-2007

Acts Referred:

Arbitration Act, 1940 — Section 13, 15, 30

Citation : (2007) 2 ARBLR 418 : (2007) 95 DRJ 307

Hon'ble Judges : J.M. Malik, J

Bench : Single Bench

Advocate : Anjana Gosain and Digvijay Rai, for the Appellant; Sanjeev Ralli, for the Respondent

Final Decision : Dismissed

Judgement

J.M. Malik, J.—The whole crux of the instant legal jangle lies in the question, whether the Court is armed with the powers to amend or modify the Arbitrator's award? Both the parties to this suit filed cross objections before the trial court. Northern Railway filed objections on the point of interest for pre- reference period awarded by the Arbitrator in favor of the claimant M/s Hind Wire Industries Limited. On the other hand, the claimant called it into question, on the ground that its claim of Rs. 2,91,517/- was illegally disallowed by the Arbitrator on account of its 95% price variation claim bills.

2. The indisputable facts of this case are these. The parties to this appeal entered into contract, wherein it was stipulated that the claimant/respondent would supply 500 metric tonne high tensile wire to the Northern Railway/appellant within six months commencing from 28.9.1988, but subsequently the delivery period of the material was re-scheduled and as per revised delivery schedule, the supply was to be made by the claimant within six months commencing from 5.12.1988. Remaining terms and conditions of the parties remained the same. As per price variation clause contained in para 7 of the respondent's letter dated 28.7.1988, the decrease/increase in the price of the

steel wire was admissible/payable to the claimant in respect of such quantity of steel wire which was offered by it for inspection 30 days or more after the day of price increase/decrease of the raw material required for steel wire.

3. The price of the raw material for the steel wire i.e. carbon wire rods was increased twice after the purchase order dated 21.9.1988. The first increase took place w.e.f 1.11.1988 and the second increase took place w.e.f. 1.4.1989 as certified by I.S.W.P. Ltd. The claimant had offered 10 metric tonne of steel wires for inspection to the respondent on 13.10.1988 and 390 m.t. of steel wire was offered during the period between 8.12.1988 and 24.3.1989 and the balance 100 m.t. was offered for inspection on 2.5.1989.

4. The claimant's grouse is that it is entitled to have the benefit of price increase of raw material announced on 01.11.1988 in respect of 390 m.t. of steel wire offered for inspection during the period between 08.12.1988 and 24.03.1989 and the claimant is entitled to get both the price increase announced on 01.11.1988 and 01.04.1989 in respect of balance 100 m.t. of steel wire offered for inspection to respondent on 02.05.1989.

5. The Arbitrator awarded claims of the claimant/respondent for Rs. 28,378.48 and Rs. 60,673/- along with interest @ 12 per cent per annum but he rejected the following claims of the respondent:

(i) Rs. 2,91,517.86p. being the outstanding dues of 95% cent price variation claims on account of price increase of carbon wire rods

(ii) Rs. 2,05,561.62p. on account of interest @ 18% on the principle claim amount claimed under different heads of claim and

(iii) Rs. 10,000/- being the costs of the arbitration proceedings.? The Arbitrator rejected 95% of claim on account of price variation claim by the claimant mainly on the ground that the supply of material was not made by it within the delivery schedule fixed under the purchase order dated 21.9.1988, which, according to the Arbitrator, expired on 27.3.1989.

6. The learned ADJ found that Arbitrator had committed gross error in overlooking the admitted facts because appellant's/Union of India's own letter dated 24.2.1989 revealed that the time for completion of supply was re-scheduled from 28.3.1989 to 4.6.1989 This is an admitted fact that the claimant had supplied the entire quantity of 500 m.t. steel wire to the appellant (UOI) within the delivery schedule fixed in appellant's letter dated 24.2.1989 at page 93 of the arbitrator's file. The learned ADJ also noted that arbitrator had allowed 5 per cent price variation bills in respect of some quantity of steel wire by giving benefit of both the price increases in the wire rods and Arbitrator could not have rejected the claim of 95% price variation bills. The learned ADJ held that it was an error in the award on account of price variation and he accordingly granted 95% price variation bills in the sum of Rs. 2,31,175.94 with interest @ 12% p.a. payable one month after the receipt of bills till the date of payment. The award

was accordingly modified, u/s 30(iii) of the old Arbitration Act, 1940.

7. The trial court disallowed the objection raised by Northern Railway in view of authorities reported in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa, Vs. N.C. Budharaj (Dead) by Lrs. etc. etc., and State of Orissa v. S.C. Roy(dead) by LRs. JT 2001 (5) SC 267 . Again, the court came to the conclusion that there was no stipulation in the arbitration agreement between the parties preventing the Arbitrator from awarding interest for pre-reference period. Consequently, he found no illegality in the award.

8. I have heard counsel for the parties. Learned Counsel for the appellant vehemently argued that the Trial Court had no power to amend or review the award. The above said correction made by learned ADJ cannot be termed as inadvertent error of clerical or arithmetical nature which could be corrected u/s 15. It was submitted that order modifying award by allowing claim of the claimant was not justified. In support of her case, she has cited few authorities. In The Hindustan Vidyut Products Ltd. Vs. State of Rajasthan and Others, , it was held:

When the claim either for return of the raw material or for its price had been rejected, we fail to see as to how the respondent becomes entitled for adjustment of the amount regarding raw material supplied and it cannot be termed as an inadvertent error of a clerical or arithmetical nature which can be corrected u/s 15 of the Arbitration Act. The High Court has exceeded its jurisdiction in interfering with the award particularly when the award was a non-speaking award and the claims made by the parties have been borne in mind by the arbitrator in passing the award and the arbitrator had not omitted any claim made by any of the parties. Therefore, we think the High Court was not justified in interfering with the award which was made the rule of the Court by the District Judge, Jaipur city.

9. She also drew my attention towards another authority reported in M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, , wherein it was observed:

35. Be it noted that by reason of a long catena of cases, it is now a well settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the Court to reappraise the evidence is unknown to a proceeding u/s 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the Court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law: In the event however two views are possible on a question of law as well, the Court would not be justified in interfering with the award.

The common phraseology "error apparent on the face of the record" does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record: The court as a matter of fact, cannot substitute its

evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined. In this context, reference may be made to one of the recent decision of this Court in the case of State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, wherein this Court relied upon the decision of Sudarsan Trading Co. Vs. Government of Kerala and Another,

10. Learned Counsel for the appellant also cited another authority reported in State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, , wherein it was held:

A court of competent jurisdiction has both right and duty to decide the lis presented before it for adjudication according to the best understanding of law and facts involved in the lis by the judge presiding over the court. Such decision even if erroneous either in factual determination or application of law correctly, is a valid one and binding inter parties. It does not, Therefore, stand to reason that the arbitrator's award will be per se invalid and inoperative for the simple reason that the arbitrator has failed to appreciate the facts and has committed error in appreciating correct legal principle in basing the award. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. Since the arbitrator is a judge by choice of the parties and more often than not, a person with little or no legal background the adjudication of disputes by an arbitrator by way of an award can be challenged only within the limited scope of several provisions of the Arbitration Act and the legislature in its wisdom has limited the scope and ambit of challenge to an award in the Arbitration Act. In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. In the anxiety to render justice to the party to arbitration, the court should not reappraise the evidences intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act.

11. This is the broad view taken by the courts. The court has to be empirical and practical in confronting reality. The court cannot wink at patently erroneous finding easily demonstrable from the materials on record. An erroneous decision of a court of law is open to judicial review by way of appeal or revision in accordance with provisions of law. Similarly, an award rendered by an arbitrator is open to challenge within the parameters of several provisions of the Arbitration Act. It must be borne in mind that Arbitrator is a Judge selected by both the parties, Therefore the legislature rightly limited the scope and ambit of challenge

to an award in the Arbitration. However, by no stretch of imagination it can be said that the court is powerless. It can exercise its powers in respect of patently erroneous finding.

12. In *State of Rajasthan v. Puri Construction Co. Ltd.* (supra), the authority cited by the learned Counsel for the appellant herself, the court has also laid down:

Where the error of finding of facts having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible viewpoints, the interference with award based on erroneous finding of fact is permissible. Similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator. In ultimate analysis it is a question of delicate balancing between the permissible limit of error of law and fact and patently erroneous finding easily demonstrable from the materials on record and application of principle of law forming the basis of the award which is patently erroneous. It may be indicated here that however objectively the problem may be viewed, the subjective element inherent in the judge deciding the problem, is bound to creep in and influence the decision. By long training in the art of dispassionate analysis, such subjective element is, however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned order is to be considered with reference to judicial decisions on the subject.

13. In *The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board*, it was held:

25. We are not disposed to hold, as contended by the respondent that if a part of the award be found to be invalid, the entire award should be set aside and remitted back for a fresh decision. The error which has occurred in the award of the umpire relates to a matter which is distinct and separate from rest of the award. The part which is invalid being severable from that which is valid, there is no justification for setting aside the entire award.

26. Normally, we would have remitted the award for a decision in the light of our judgment but that is likely to involve undue delay and expense in a dispute which is pending since 1959. Learned Counsel for the appellant was agreeable that we should ourselves amend the award. Learned Counsel for the respondent demurred but he was unable to indicate any cogent reason why we should not adopt a course which, far from causing any prejudice to the parties, was clearly in the interests of justice.? It was further held:

Accordingly, we direct that the award of the umpire will stand amended to the extent that the fair market value of the appellant's undertaking shall be Rs. 23,81,670/- plus Rs. 2,38,255/- that is to say Rs. 26,19,925/-. We have not allowed solarium on the additional amount, so as to offset reasonable

depreciation in the value of the service lines after they were laid.

14. In *Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another*, it was held:

There it was observed that a contract is not frustrated merely because the circumstances in which the contract was made, altered. The Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of event which they did not at all anticipate, a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract merely because on account of an unanticipated turn of events, the performance of the contract may become onerous.

(i) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract. A deliberate departure or conscious disregard of the contract not only manifests the disregard of his authority or misconduct on his part but it may tantamount to mala fide action.

15. In *Electronic Enterprises Vs. Union of India*, it was held:

13. As stated above the delivery of the goods, which are the subject matter of these disputes, was accepted by the Union of India without demur. Reliance has been incorrectly and unfairly placed on the letter of the claimant dated 21.11.1989, totally out of context, and in my view and with mala fides to unfairly deny the claimant payment of the price of goods received by the Union of India. The goods were supplied in November, 1989, almost a decade ago, and there is no complaint whatsoever in respect of quality thereof. The principles of quantum meruit and unjust enrichment must apply with full rigour against the Union of India and in favor of its citizens.

14. Mr. B.P. Aggarwal, learned Counsel for the respondent has submitted that if the Court is of the opinion that the award is invalid on the ground that there is an error apparent on the face of the award, it could only set it aside. The consequence of traversing this path would result in a denial of justice, after a decade of litigation. The same consequence would follow if u/s 16, the award is remitted. It is likely that the Arbitrator would not be available after this long passage of time. With considerable trepidation I would consider it my duty to draw upon the powers adumbrated in Section 15(b) of the Act and modify the award. This was what was done by the Supreme Court in the case of *The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board*, albeit with expressed caution.

16. In *Nagori and Company v. Indian Sugar Industries Export Corporation Ltd.*

39(1989) DLT 9, it was held:

Now the next question is whether the whole award should be set aside and remitted back for fresh decision or whether it should be partially modified. Learned Counsel for the Corporation contended that the dispute relates to a contract entered into between the parties on 12th February 1981 and a reference was made to arbitration as early as in the year 1983 and if the entire award is set aside and remitted back for a fresh decision, further delay will be caused which shall cause undue hardship to the parties. He further submitted that one of the terms of the contract between the parties provides that in case the Company fails to transport, it will be liable to pay the additional amount which the Corporation may have to pay to another transporter. Furthermore, the only case of the Company was that they were themselves willing to transport the sugar at Rs. 39/- per m.t. and they have not pleaded in their reply to the counter-claim made before the Arbitrator that other transporters would have transported the sugar at a lesser rate. He submitted that in fact that is the reason why no specific issue in that regard was framed. In my view, no useful purpose will be served in remitting the case back to the Arbitrator for fresh decision. The error which has occurred in the award relates only to issue No. 2 which deals with the claim of the Corporation. It is distinct and separate from the rest of the award. Since the finding of the Arbitrator is severable I do not see any reason why the entire award should be set aside.

17. There is nothing on record to indicate that the Company at any stage disputed that the Corporation transported the sugar at Rs. 145/- per M.T. and that it actually spent the amount it has claimed. Therefore, the counter-claim for Rs. 2,57,268.40 raised by the Corporation/respondent herein has to be allowed. The objections are allowed and the award is modified to that extent. The award dated 30th April 1985 as modified today is made a rule of the Court. A decree is passed in terms of the modified award. The respondents will be entitled to interest @ 18% per annum from the date of the decree till realization.

17. In *Indu Engineering and Textile Ltd. Vs. Delhi Development Authority*, it was held that misconduct u/s 13(a) of Arbitration Act includes the Arbitration arriving at a decision by ignoring very material documents which throw abundant light on the controversy to help a just and fair decision.

18. In view of this discussion, I find no infirmity or illegality in the order passed by Trial Court. The appeal is without merit and the same is, Therefore, dismissed.