

(2001) 08 GAU CK 0036

In the Gauhati High Court

Case No : Arbitration Appeal No. 3 of 2000

Union of India (UOI)

APPELLANT

Vs

Sambra Construction and Agency and Another

RESPONDENT

Date of Decision : 24-08-2001

Acts Referred:

Arbitration Act, 1940 — Section 20, 30, 35, 39, 8
Constitution of India, 1950 — Article 14

Citation : (2001) 3 GLT 49

Hon'ble Judges : P.G. Agarwal, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : J. Singh, for the Appellant; S. Medhi and R. Upadhayay, for the Respondent

Judgement

P.G. Agarwal, J.—This appeal u/s 39 of the Arbitration Act, 1940 for short "Act" is directed against the common judgment and order passed on 31.3.2000 by the Civil Judge, Senior Division No. 1, Guwahati in T.S. Arb. 60/90; T.S. Arb. 46/94; and T.S. Arb. 202/90.

2. The facts leading to the present appeal, in brief, are that the Respondents - M/s. SMBRA Construction and Agency, herein after referred as the "Contractor" for convenience, entered into an agreement with the Appellant N.F. Railway, hereinafter referred as Railways, for execution of earth work in embankment between Kamakhya and Azara Section and construction of minor bridges and sub-structures of major bridges etc. The value of contract was at Rs. 2,29,37,405.00. The agreement was entered into on 28.3.89 and some work towards earth work was done by the Contractor. However, due to certain exigencies, i.e. declaration of Dipar Beel as a reserved forest, alignment was required to be diverted and the Contractor was asked to execute the work on the diverted alignment. However, the Contractor showed his unwillingness and thereafter, the contract was terminated. A dispute arose in between the Contractor and the Railways in the matter of the above contract and as per the terms of the contract, N. Biswas and

MK Dev Verma were appointed as joint Arbitrators to arbitrate over the dispute.

3. The Contractor made as many as 11 (eleven) numbers of claims for total sum of Rs. 76,98, 133.53p. There were other 7 (seven) claims towards interest, taxes, arbitration costs etc. The Arbitrators vide their joint award on 15.3.93, awarded sum of Rs. 9,87,257.00 to be received by the Contractor and also directed the Contractor to return back the mobilisation advance paid by the Railways to the Contractor amounting to Rs. 22,93,740/-.

4. Feeling aggrieved, the Contractor instituted T.S. No. 60/90 and Anr. T.S. Arb. 202/90 was disposed of earlier and the same was not covered by the impugned judgment (as seen from the order dated 31.3.2000). On perusal of the record, it is seen that the T.S. Arb. 60/90 and 202/90 were application u/s 20 read with Section 8 of the Arbitration Act, 1940, T.S. Arb. No. 60/90 was dismissed on contest.

5. The prayer of the Petitioner in T.S. Arb. 46/94, was as below:

Your honour may be pleased to pass an order setting aside the award of the learned Arbitrators dated 15.3.1993 and may also set aside/remit the award in claim 14 of the award, and pass orders for fresh arbitration proceedings for entire "disputes", and pass any other order and orders as your honour may deem fit and proper in the facts and circumstances of the case.

6. The grounds on which the award was sought to be set aside are as follows:

- (i) For that, the Arbitrators have misconducted themselves and the proceedings,
- (ii) For that the award has been improperly procured.
- (iii) For that the award is also invalid as being perverse and the learned Arbitrators not acting just and fair.
- (iv) For that the Award is illegal for violation of principles of natural justice.
- (v) For that the award is invalid and illegal because the learned arbitrators have neglected to take into consideration the infraction of Article - 14 of the Constitution of India.
- (vi) For that the award is invalid and illegal because of the illegality in the appointment of the Umpire.
- (vii) For that the award is invalid and illegal because the learned arbitrators have not accepted the statutory compulsions under the Income Tax Act in the matter of depreciation of machineries (Claim No. 9).
- (viii) For that the award in respect of claim No. 14 i.e. Road Taxes, Insurance of vehicle and machineries upto January, 1991 is liable to be remitted because this has left undermined by the learned arbitrators.
- (ix) For that the learned arbitrators have not considered the valid vouchers.

7. The learned Judge vide impugned order, allowed the suit and set aside the award dated 15.3.93 and remitted the matter back to arbitrators with a direction to make a fresh arbitration regarding the dispute after giving reasonable opportunities to the parties to lay evidence and furnish documents. Hence, the present appeal.

8. The learned Counsel for the contractor has submitted that the award was rightly set aside as because there was illegality, infirmity in the award in the sense that although, the two arbitrators had appointed an umpire the said appointment was not informed to the contractor and as such, the award needs setting aside. In this case, we find that the joint award was given by the two arbitrators and although, the umpire was appointed by them, he (the umpire) was not involved in the arbitration as because, there was no difference of opinion between the two arbitrators and they gave joint award. As the umpire was no way involved in the matter, non-intimation of the same is immaterial. The finding of the learned Judge that the non-intimation of appointment of umpire amounts mis-conduct is not sustainable.

9. The learned Counsel for the Respondents, further submits that vide impugned order, matter was remanded back. Hence, no prejudice has been caused to the Appellant-Railways and as such, appeal should be dismissed, so that the arbitrators can re-examine the matter. The learned Counsel further submits that in this case, copy of the award presented by the Railways was not in accordance with the law. It may be mentioned here that the Appellant filed an application for making award as the Rule of the Court, but in view of setting aside the award, the above prayer was not considered. As the contractor has prayed for setting aside the award by filing a copy thereof, there is no dispute about the award or contents thereof.

10. Section 30 of the Arbitration Act reads as follows:

Grounds for setting aside award - An award shall not be set aside except on one or more of the following grounds, namely:

- (a) that an arbitrator or umpire has misconducted himself or the proceedings;
- (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid u/s 35;
- (c) that an award has been improperly procured or is otherwise invalid.

11. In the case of M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, the Apex Court observed as below:

The above noted three specific provisions u/s 30 thus can only be taken recourse to in the matter of setting aside of an award. The legislature obviously had in its mind that the arbitrator being the Judge chosen by the parties, the decision of the arbitrator as such ought to be final between the parties.

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 proceedings 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 as 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 v. Puri Construction Co. Ltd. wherein this Court relying upon the decision of Sudarsan Trading Co. Case (Sudarsan Trading Co. v. Govt. of Kerala) observed in para 31 of the Report as below (SCC PP. 502-03. para 31).

31. 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 partes. It does not, therefore, stand to reason that the arbitrators 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. An erroneous decision of a Court of law is open to judicial review by way of appeal or revision in accordance with the provisions of law. 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 arbitration 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. Over the decades, judicial decisions have indicated the parameters of such challenge consistent with the provisions of the Arbitration Act. By and large the Courts have disfavoured interference with arbitration award on account of error of law and fact on the score of misappreciation and misreading of the materials on record and have shown definite inclination to preserve the award as far as possible. As reference to arbitration of disputes in commercial and other transactions involving substantial amount has increased in recent times, the Courts were impelled to have a fresh look on the ambit of

challenge to an award by the arbitrator so that the award does not get undesirable immunity. 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 arbitration. Precisely for the aforesaid reasons, the erroneous application of law constituting the very basis of the award and improper and incorrect findings of fact, which without closer and intrinsic scrutiny, are demonstrable on the face of the materials on record, have been held, very rightly, as legal misconduct rendering the award as invalid. It is necessary, however, to put a note of caution that 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. Where the error of , finding of facts having abearing 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 objective element is, however, reduced to minimum. Keeping the aforesaid principle in mind, the challenge to the validity of the impugned award is to be considered with reference to judicial decisions on the subject.

12. In view of the above settled proposition of law, let us examine the impugned judgment and the award. On going through the impugned order passed by the learned Civil Judge, it is seen that there was no finding of fact that the two arbitrators had misconduct themselves in the proceeding. The award shows that the each and every claims made by the contractor was considered and finding was given, and the parties were also heard before passing the award. There is also nothing in the judgment to show that the Trial Judge came to any finding that there was any error apparent on the face of the record. It seems that the Trial Judge acted as an appellate Court to re-appreciate the evidence and came to its own finding. The law is well settled that the Court does not sit as appellate authority over the award. In the case of Sudarshan Trading Company v. The

State of Kerala (1999) 2 SCC 38, the Apex court held as follows:

It may be stated that if on a view taken of a contractor; decision of the arbitrator on certain amounts awarded, is a plausible view though perhaps, not the only correct view, the award cannot be examined by the Court in the manner done by the High Court in the instant case.

13. On perusal of the impugned award, it is seen that the contractor had raised as many as 11 claims and all these claims were considered by the arbitrators and the relevant portion of the award reflects the same:

Claim No. 1 - Advance paid to the land owner

Out of a total contracted quantity of earth work of 3,60,000 cum, approximately a quantity of 16, 138 cum of earth work has been done for which payment has been made. Therefore, a sum of Rs. 3,43,862/- is considered to be the reasonable amount which should be paid to the claimant out of a total amount of Rs. 5,00,000/- as claimed by the claimant being the amount of advance paid to the land owner.

Claim No. 2 - Advance paid to quarry Mohaldar.

The total aggregate requirement would be approximately 2,831 cum at the rate of Rs. 200/- per cum and considering that 20% of the total amount can reasonable be paid for advance, an amount of Rs. 1,13,240/- is considered reasonable for payment to the claimant.

Claim No. 3 - Advance paid to truck owners.

The advance were paid to the truck owners during or after the Dipar Beel controversy arose. Moreover, the claimant was awarded contract worth Rs. 613 lakhs on Guwahati-Jogighopa project line. In view of very slow progress of the work i.e. 3.5% of the earth work being completed within the contracted time, it is felt that the maximum number of trucks could be utilised in the other works and at best 3 trucks left for the disputed work. On this consideration an amount more than Rs. 1.20,000/- is not considered reasonable.

Claim No. 4 - Advance paid to sardars.

Here also, as the work was progressing very slowly the bulk of the labours could have been easily deployed for the other works and the amount admissible for this item should not be more than Rs. 1,00,000/-.

Claim No. 5 - Interest on mobilisation advance.

The mobilisation advance can be paid back to the Railway without interest and hence no claim is admitted under this item.

Claim No. 6 - Bank's commission on Bank Guarantee No. 21/1 Rs. 36.318/- as claimed by " the claimant can be paid by the Respondent.

Claim No. 7 - Monthly rent of Firm" own trucks.

These were not specifically purchased for this work and hence no claim is admitted.

Claim No. 8-Establishment charges.

The establishment charges from April '89 to August '89 cannot be permitted as the contractor had done the work during that period and during the period October '89 to March '90 the claimant should have diverted the establishment elsewhere because he had indicated his unwillingness to do the work. Therefore, the proportionate establishment charges for the month of September '89 amounting to Rs. 30,173/- is permissible.

Claim No. 9 - Depreciation on plant and machineries.

As per Railway Manual for way and Works and depreciation charges permissible for special plant is 6% per annum. The total depreciation on plant and machineries worth Rs. 85,62,867/- for a period of 5 months from November '89 to March '90 works out to Rs. 2,14,071/-. It is noticed from the vouchers submitted that the earliest date of contract made by the claimant with his suppliers date back to November '89. Therefore, the period of consideration has been reckoned from November '89 to March '90.

Claim No. 10 - Expenditure on temporary construction No. 10.

Reasonable amount is Rs. 20,000/- considering that the claimant could have realised the value of temporary construction.

Claim No. 11 - Purchase of soil test equipment.

Rs.9,593/- as claimed by the claimant may be admitted.

Other claims:

The interest on Rs. 9,83,562/- may not be admitted as the Respondent had offered to pay the sum to the claimant, which the claimant did not accept. The total amount of the claims discussed in the previous paras works upto Rs. 9,87,257/- and hence, no amount by way of interest need be paid to the claimant.

The claimant should pay back the mobilisation advance amounting to Rs. 22,93,740/- to the Railway administration. No interest on this amount need be paid. The interest claimant of this amount has been disallowed from the claimant's claim also.

14. The learned Counsel for the Respondent has submitted that the arbitrators did not consider all the vouchers and there is no statement in the award that the vouchers produced by the claimant were considered and this has resulted in erroneous decision. While, discussing claim No. 9, arbitrators had mentioned about examining vouchers submitted by the claimant. The learned Civil Judge,

was, therefore, wrong in holding that the vouchers were not perused by the arbitrators.

15. The learned trial Court also gave its own finding regarding alleged unwillingness of the contractor and effect of the letter sent by the contractor. As stated above, the Court was not required to re-appreciate the evidence or the contents of the letter, as because there was no dispute that the contractor had showed his unwillingness to execute the contract as per the revised/diverted line.

16. The learned Counsel for the Respondent has further submitted that against the claim of the contractor, arbitrators have given a lumpsum amount. In the case of State of Rajasthan Vs. Puri Construction Co. Ltd. and Another, the Apex Court held as follows:

The arbitrators have given the award by referring to various documents and statements available on record and indicating the reasons for basing the findings. Even if it is assumed that on the materials on record, a different view could have been taken and the arbitrators have failed to consider the documents and materials on record in their proper perspective, the award is not liable to be struck down in view of judicial decisions referred to hereinbefore. Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the arbitrator may be held to be erroneous. Judicial decisions over the decades have indicated that an error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award. It does not appear to us that the findings made by the arbitrators are without any basis whatsoever and are not referable to documents relied upon and such findings are so patently unjust or perverse that no reasonable man could have arrived at such findings. Hence on the score of alleged misreading, misconstruction, misappreciation of the materials on record or failure to consider some of the materials in their proper perspective, the impugned award is not liable to be set aside. It has been urged that computation of lump sum damage in the absence of any material showing actual loss suffered by the contractor is patently unjust and improper warranting interference by this Court. Lump sum award by itself is not illegal as held in a number of decisions of this Court.

17. In this case, we find that the arbitrators were not called upon to decide any question of law. They were considering the claim of both sides and on perusal of the documents produced, they gave the award without giving any detailed reasons, which is permissible in law. The proceedings were conducted by adhering to the principle of natural justice and plausible view was taken by the arbitrators in making the award. There was no mis-conduct and none of the grounds provided in Section 30 of the Act as quoted above are applicable/available to the Respondent applicant. Considering the facts and circumstances of the case, and in view of the foregoing discussion, we hold that the award given by the arbitrators needs no interference.

18. In the result, impugned order passed by the learned Civil Judge is set aside. The application filed by the Respondent-applicant u/s 30 of the Act is dismissed. The learned Civil Judge shall now dispose of the application filed by the applicant Railways for making the award rule of the Court. Under the facts and circumstances of the case, parties shall bear their own costs.