
(1994) 05 AHC CK 0012
In the Allahabad High Court
Case No : F.A.F.O. No's. 8 and 9 of 1993

U.P. State Electricity Board, Lucknow	APPELLANT
Vs	
M/s. Om Metals and Minerals (Pvt.) Ltd., Kota	RESPONDENT

Date of Decision : 20-05-1994

Acts Referred:

Arbitration Act, 1940 — Section 30, 39

Citation : AIR 1995 All 246

Hon'ble Judges : S.N. Sahay, J; Mrs. Shobha Dikshit, J

Bench : Division Bench

Advocate : R.P. Srivastava and Anil Kumar, for the Appellant;

Final Decision : Dismissed

Judgement

Mrs. Shobha Dikshit, J.—Those are two first appeals from order u/s 39 of the Indian Arbitration Act against the order dated 4-9-1992 passed by Second Additional Judge Small Causes Court Civil Judge, Lucknow, in R.S. No. 202 of 1991 and Misc. case No. 79C of 1991 by which learned Judge has rejected dismissed the objections preferred by the appellant U.P. State Electricity Board against the Award dated 26-3- 1991 given by the Arbitrators and filed before the aforesaid Court on 8-5-1991 as also made the award rule of the Court. As the matter involved in both these appeals is common, these appeals are decided by a common judgment.

2. The brief facts of the case are that the respondents/claimants are a private limited company said to be specialising in design, manufacture, supply and erection of all types of gates, hoists and cranes for dams barrage and hydro electric power projects and like requiring advance technology, expertise, quality control and high class workmanship. In response to a notice inviting tenders issued by the appellants U.P. State Electricity Board (hereinafter referred to as the U.P.S.E.B.) Respondents M/s. Om Metals & Minerals Pvt. Limited submitted the tender for the same on 4-4-1983 which was duly accepted by U.P.S.E.B. and a formal agreement was executed between the parties on 31-12-1983. The letter

of intent according to both the parties was issued on 5-10-1983 prior to formal execution of the aforesaid agreement.

3. The said agreement stipulated only six months period for completion of the work with effect from 19-10-1983 as mentioned in the letter of intent itself. According to the appellant, the work as agreed between the parties could not be completed within the stipulated time and could only be completed in July, 1985. It took 20 months and 21 days to complete the work as against the stipulated period of six months. After the aforesaid completion of the work, since disputes arose between the parties, hence the respondents/ claimants invoked the arbitration clause and set up 11 claims in all. Since the present controversy is confined to claim No. 1 only, hence the same is reproduced hereinbelow:

Claim No. 1 Extra expenditure on overheads incurred due to prolongation of contract and loss of profits. Total amount of claim Rs. 33,97,996-23 P.

4. Rest of the claims from claim Nos. 2 to 11 are for approximately Rs. 16 lacs only.

5-6. Sri R. N. Bhargava, Ex-Chairman, U.P.S.E.B. and Sri K. C. Kathuria, retired Chief Engineer, were appointed arbitrators in accordance with Clause 18 of the additional conditions of the contract who after entering upon the reference proceeded to arbitrate between the parties and gave a non speaking award dated 26-3-1991 awarding Rs. 25 lacs to the claimant as consolidated sum. 14% interest was also awarded on the said amount from 18-3-1989 till the date of award and 6% interest on the principal sum from the date of award till the date of payment. The award was filed before the concerned Court for being made a rule of the Court. U.P.S.E.B. filed its objections against the said award inter alia on the grounds that the award is in contravention of Clauses 7.06, 39.00, 45.10 of the special conditions and Clause 17 of the general conditions of the contract, that there is error apparent on the face of the records which amounts to legal misconduct by the arbitrators that the arbitrators have failed to look into the evidence on record, hence there has been non application of mind, and by awarding Rs. 25 lacs, as lump sum amount, the arbitrators have exceeded the jurisdiction as also acted without jurisdiction by considering such claims which the arbitrators could not have considered, in facts and law both.

7. The learned Civil Judge after hearing both the parties and appreciating the evidence on record as also various pronouncements of law, came to the conclusion that there is neither any error apparent on the face of the award nor the same is based on no evidence as canvassed before him, hence there is no non application of mind as alleged. It has further been held by the learned Judge that merely because the award is no speaking and a lump sum amount has been awarded, the same cannot be set aside on this count too. The argument that the arbitrators misconducted themselves by exceeding their jurisdiction was also negatived. The learned Civil Judge, therefore, rejected the objections preferred by the U.P.S.E.B. vide orders dated 4-9-1992 and made the award a rule of the

Court. It is these orders which are under challenge in these appeals.

8. The impugned orders have been challenged before us by the learned counsel for the appellants on the grounds that the learned Civil Judge failed to appreciate that the award made by the arbitrators is without/in excess of jurisdiction as the claims specifically barred i.e. claim No. 1 has been partly allowed by the arbitrators by awarding lump sum amount of Rs. 25 lacs which exceeds Rs. 16 lacs claimed for claim Nos. 2 to 11 and since the award is not severable, therefore, the whole of it is liable to be set aside. According . to the learned counsel since claim No. 1 is for Rs. 33,97,996-23 P. and rest of the 10 claims i.e. claims Nos. 2 to 11 are for Rs. 16 lacs, therefore, claim No. 1 if not wholly then at least partly has been included in the amount awarded by the arbitrators which has vitiated the whole of the award. It has been urged that the arbitrators have exceeded their jurisdiction by entertaining claim No. 1 which they were specifically barred to consider under Clauses 7.06, 39.00 and 45.10 of the special conditions as also condition No. 17 of the general conditions. Alternatively, it was urged by the learned counsel for the appellants that since claim No. 1 for completely outside the purview of the contract, therefore, the same would also be outside the scope of arbitration clause and the reference made thereafter, (Differently put, it was urged that the arbitrators could not clothe themselves with or confer upon them the jurisdiction to decide issues/claims which they were specifically barred to arbitrate of for which no reference was made) hence by allowing claim No. 1, they have acted without jurisdiction.

9. We now proceed to examine these contentions in the light of the submissions made by the learned counsel for both the parties who referred to some of the clauses of the agreement which read as follows:

Clause-17 of general conditions.

NO COMPENSATION FOR ALTERATION IN OR RESTRICTION OF WORK TO BE CARRIED OUT.

The Engineer acting on the written orders of his immediate superior, may at any time by notice in writing to the contractor either stop the work altogether or reduce or cut it down. If the work is stopped altogether, the contractor will only be paid for work done and expenses legitimately incurred by him or preparation for the execution of the work upto the date on which such notice is received by him. Such expenses shall be assessed by the Engineer, whose decision shall be final and binding on the contractor. If the work is cut down the contractor will be paid for It he work as so cut-down but in neither case will to paid any compensation whatever for the loss or profits which he might have made if he had been allowed to complete all the work included in the contract.

Clause 7.06, 39.00 and 45.10 of special conditions which shall prevail ever the general conditions in the event of conflict or inconsistency between the general and special conditions.

7.06 The Contractor will have to proceed with the work as and when drawings are released. At times it may be necessary for the contractor to retard his work. The contractor shall have absolutely no claim on the Board on this account and will not be entitled to any compensation whatsoever on account of delay in release or issue of drawings. In any case efforts will be made to release drawings progressively and ensure progress of construction.

39.00 ESCALATION

The unit rates quoted shall be firm and shall remain application during the entire period of execution of work upto the completion and no escalation in rates will be permitted due to increase in prices of materials, rise in labour wages, railway freight or due to any other reasons.

45.10 If, for some reason, the purchaser is unable at any time to issue materials as mentioned hereafter, and the work has to be stopped for want of materials, the Contractor shall not be entitled to any monetary claim arising out of such circumstances, provided always that the work does not remain suspended due to reason stated above for more than three months. The Contractor shall, however, be granted time-limit extension to the extent of such period as his work remains suspended for want of materials to be issued by the Board. The Contractor shall bring such circumstances to the notices of the Engineer within 24 hours of arising of such a situation.

10. According to the appellants, no compensation could be claimed under Clause 7.06 on account of delay which could be/or was caused due to delay in the release of drawings. Clause 39.00 deals with escalation and provided that no escalation in rates shall be permitted due to increase in price of materials, rise in labour wages, railway freight or due to any other reasons. Similarly, Clause 45.10 prohibits any monetary claim arising out of stoppage of work for want of material but not for more than three months and in these circumstances, U.P.S.E.B. rightly resisted the claim No. 1 set up by the claimants on the ground that they are not liable to compensate the contractors on account of delay in terms of the aforementioned clauses of the contract and as such the arbitrators have exceeded their jurisdiction by allowing Specifically barred claims if not wholly then at least partly as is clear from the amount awarded to the contractor.

11. Learned counsel for the appellants in support of this contention that the arbitrators exceeded their jurisdiction by considering such claims which they were precluded to consider, placed reliance on a judgment of Hon'ble Supreme Court, namely, Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, . In this case, there was a specific clause 3.3.15 i.e. clause 15 which provided that under no circumstances whatsoever shall the contractor be entitled to any compensation from Government on any account unless the contractor shall have submitted claims in writing to the Engineer-in-Chief within one month of the cause of such claim occurring. The arbitrator while giving a speaking award allowed the claim of the contractor ignoring the objections of the State

Government and the Specific clause. In these circumstances, Hon"ble Supreme Court held as follows:--

"In the aforesaid light, we are of the opinion, the High Court was right that the District Judge was entitled to examine the contract in order to find out the legality of the claim of the appellant regarding extra cost towards rise in prices of material and labour. As was pointed out by the learned District Judge Clauses 2.16 and 2.4. stipulated that the contractor had to complete the work in spite of rise in prices of materials and also rise in labour charges at the rates stipulated in the contract. There was a clear finding of the arbitrator that the contract was not rendered ineffective in terms of Section 56 of the Act due to abnormal rise in prices of material and labour. This being so and the contractor having completed the work, it was not open to him to claim extra cost towards rise in prices of material and labour. The arbitrator misconducted himself in not deciding this specific objection raised by the State regarding the legality of extra claim of the appellant."

12. Learned counsel for the appellants referred to another decision of Hon"ble Supreme Court on this proposition *Associated Engineering Co. Vs. Government of Andhra Pradesh* and another, . in this case also, the facts were that the High Court set aside claims Nos. 3, 6 and 9 on the ground that those claims were not supported by the agreement between the parties and the arbitrator exceeded his juris diction by awarding those claims. The judgment of the High Court was thereafter challenged before the Hon"ble Supreme Court on this ground. In this case also, the aforesaid four claims were said to be not payable under the contract, as the contract did not postulate on the contrary prohibited payment of any escalation under claim No. 3 for napaslabs (sic) or claim No. 6. for extra lead of water or claim No. 9 for flattening of canal slopes or claim No. 2 for escalation in labour charges otherwise than in terms of the formula prescribed by the contract. Since these claims were allowed, therefore, it was contended before the Hon"ble Supreme Court that in spite of the specific bar, the arbitrator allowed the claims with regard to these items. Hon"ble Supreme Court hi the facts of the case held that the arbitrator cannot act arbitrarily, capriciously or inde pendently of the contract. His sole function is to arbitrate in terms of the contract. It was therefore, held as follows:

"An arbitrator who acts in manifest disregard of the contract acts without jurisdiction. His authority is derived from the contract and is governed by the Arbitration Act which embodies principles derived from a specialised branch of the law of agency (see *Mustill & Boyd's Commercial Arbitration*, Second Edition, P. 641). He commits misconduct if by his award he decides matters excluded by the agreements (see *Halsbury's Law of England*, Volume II, Fourth Edition, Para 622). A deliberate departure from contract amounts to not only manifest disregard of his authority or a misconduct on his part, but it may tantamount to a mala fide action. A conscious disregard of the law or the provisions of the contract from which he has derived his authority vitiates the award."

13. The aforesaid argument of the appellants that the arbitrators acted beyond their jurisdiction has been repelled by the respondent's counsel. On the ground that these clauses on which reliance has been placed by them stand eclipsed by Clause 16 of the additional conditions of the contract, which clearly stipulate that rates mentioned in the contract shall hold good for a period of 16 months only and not beyond it. It has further been submitted on behalf of the respondent that claim No. 1 is since based on such delays which are though not covered under Clauses 7.06, 39.00 and 45.10 of the special conditions of the contract, hence the arbitrators acted within their jurisdiction by considering the same. Thus, contrary to the above referred stand of the appellants, the plea of the respondents before the arbitrators was that they could raise bills for delay caused due to other reasons than those stipulated in Clauses 7.06, 39.00 and 45.10 of the contract and for this purpose reliance has been placed on Clause 16 of the special conditions which shall prevail over all other conditions of the contract which have been referred to hereinabove. According to the claimants the work was prolonged and could not be completed within the stipulated time because of delay caused by the U.P.S.E.B. in not making obstacle free site available for erection work, failure to inspect fabricated components at contractor's workshop at Kota, making of unwarranted deductions from running bills and delay in reaching, making and communicating decisions, they further alleged resort to dilatory tactics resulting into virtual financial strangulation by the U.P.S.E.B. in different ways which ultimately delayed the completion of the work. According to the claimants, all these grounds of delay are wholly unrelated to above referred clauses on which U.P.S.E.B. has placed reliance. Clause 16 of the additional conditions on which the claimants-respondents have placed reliance reads as hereunder:--

16. No delay in completion of Civil Works is anticipated. If there is any delay in completion of Civil Works the Contractor shall execute upto a maximum period of 16 months from the date of award of contract which is inclusive of four months as stated against Sl. No. 12 of this order.

14. In support of the aforesaid contention, the learned counsel for the respondents further submitted that it is not every possible reason for delay which has been excluded or barred for all times to come by different clauses of the agreement referred to by the appellants, rather, the claim which the claimant has set up is based on such delays which occasioned for altogether different reasons than those provided for in the said clauses. It is for this purpose that the learned counsel for the respondent placed reliance on Clause 16 of the additional conditions which overrides these clauses.

15. Learned counsel for the respondents further submitted that two decisions of the Hon'ble Supreme Court on which reliance has been placed by the appellants are not at all applicable to the facts of the instant case for the reason that firstly the awards given by the arbitrators in both these cases were speaking awards and secondly, there was no clause like Clause 16 of the additional agreement as

in this case which eclipsed other clauses prohibiting claims on the ground of delay. In this case, according to the learned counsel, the claim No. 1 is based on such delays which is for other reasons than that provided in Clauses 7.06, 39.00 and 45.00 and thus there was no absolute bar for the arbitrators to grant relief on claim No. 1. We have perused both these decisions and come to the conclusion that the law as laid down in these two decisions (*supra*) is not applicable to the facts of the present case where Clause 16 is the distinguishing feature as also the fact that the award in the present case is a non-speaking one whereas in the decisions referred to hereinabove the awards under challenge were speaking ones and the jurisdictional error was apparent on the face of the record.

16. It was next submitted by the learned counsel for the respondents regarding quantum of amount in the award that no doubt the award is a non-speaking one, but the arbitrators must have calculated the loss on the basis of some established formula, after ignoring the delay as per agreement. It was urged, before us that the law is now un-disputedly settled that the Courts of Law have to accept the award given by the arbitrator because it is no more open to the Court to sit in appeal over the decision of the arbitrator and the Courts would not adjudicate upon the justification for the conclusions arrived at by the arbitrator unless such awards are vitiated by fraud or due to error apparent on the face of the same. Learned counsel in support of his contention referred to para 9 of the judgment rendered by Hon''ble Supreme Court in the case of *Sudarsan Trading Co. Vs. Government of Kerala and Another*, , which reads as follows :

"The next question on this aspect which requires consideration is that only in a speaking award the court can look into the reasoning of the award. It is not open to the court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

In absence of any reasons for making the award, it is not open to the court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator cannot be challenged. Appraisal of evidence by the arbitrator is never a matter which the court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of the evidence, the arbitrator is the sole Judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a Judge on the evidence before the arbitrator."

17. In another decision referred by the learned counsel for the respondent reported in *State of Andhra Pradesh and another, etc. Vs. R.V. Rayanim etc.*, , Hon''ble Supreme Court held as follows regarding non-speaking awards:

"Only in a speaking award the Court can look into the reasoning of the award. It is not open to the Court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator as to what impelled the

arbitrator to arrive at his conclusion.

In case of an error apparent on the face of the record, it has to be established that an item or an amount which the arbitrator had no jurisdiction to take into consideration, has been awarded or granted."

18. In yet another decision reported in Hindustan Construction Co. Ltd. Vs. State of Jammu and Kashmir, , Hon"ble Supreme Court while dealing with the scope of permissible ground of judicial review of a non-speaking award held as follows:

"..... The award is a non-speaking one and contains no reasoning which can be declared to be faulty. The scope of the Court's jurisdiction interfering with a non-speaking award on the above ground is extremely limited. The rule of limitation in this respect. was enunciated by the Judicial Committee almost seven decades ago in Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd., (1923) 50 Ind App 324: (AIR 1923 PC 66), in words which have been consistently uniformly followed and applied in all subsequent decisions:. Lord Duned in said, after noting with disapproval certain attempts to extend the area of the court's interference with such an award."

Learned counsel for the respondent referred to yet another decision of Hon"ble Supreme Court in the matter of Neelakantan and Bros. Construction Vs. Superintending Engineer, National Highways, Salem and Others, , where the same principle has been reiterated in following terms:

"..... Unless there was a patent mistake of law and gross mis-statement of facts resulting in miscarriage of justice of equity, the award remains unassailable. In this case the arbitrator gave no reason for the award. There is no legal proposition which is the basis of the award, far less a legal proposition which is erroneous. There is no appeal from the verdict of the arbitrator. The Court cannot review, in such circumstances, the ?award and correct any mistake in the adjudication by the arbitrator -- See Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd. AIR 1923 SC 66 and the observations of Bachawat, J. in Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, of this Court."

19. The other cases referred to by the learned counsel in support of his contention are Smt. Santa Sila Devi and Another Vs. Dhirendra Nath Sen and Others, , The Hindustan Construction Company Ltd., Bombay Vs. State of Uttar Pradesh, and other cases which are in support of the aforesaid proposition of law and it is not at all necessary to discuss the same in detail.

20. We have perused the above referred decisions and have considered the rival contentions addressed by both the counsel and come to the conclusion that in the facts and circumstances of the present case, the award is not vitiated on the ground that the arbitrators exceeded their jurisdiction by taking into account claim No. 1 as set up by the claimants. While holding so, we reject the argument of the appellants that the clauses 7.06, 39.00, 45.10 precluded the arbitrators

from considering the same and it was open to the arbitrators to consider the claim No. 1 under clause 16 of the additional conditions of the contract.

21. We are reminded at this stage of the settled legal position as reiterated by the Hon'ble Supreme Court in the case of Union of India v. J. N. Misra reported in AIR 1970 SC 753 in following words:

"The arbitrator is not bound to give an award on each point. He can make his award on the whole case, see Ghulam Khan. v. Mohammad Hassan ILR (1901) Cal 167 at p. 186 (PC). An arbitrator may award one sum generally in respect of all money claims submitted to him, unless the submission requires him to award separately on some one or more of them. See Whiteworth v. Hulse LR I (1866) Ex. 251. The arbitrator can lawfully make an award of a sum admitted to be due and a lump sum in respect of the remaining claim. As the final award in favour of the respondent professes to be made of and concerning all the matters referred to him, it must be presumed that in making it the arbitrator has taken into consideration all the claims and counter claims."

22. Thus it is apparent from the above that an arbitrator is not bound to deal with each claim or counter claim separately unless the reference to the arbitrator specifically so requires. It is not disputed that in the present case the reference to the arbitrator did not require the arbitrator to give an itemwise award. The arbitrator was, therefore, free to deliver a lump sum and consolidated award. This is clear from the following recital in the award:--

"After hearing the arguments advanced by the respective authorised counsel and after having given their careful consideration to all the claims of the claimant and counter claims of the respondent and after having considered all items of dispute and after giving due and adequate consideration to the contentions urged by both the parties, the arbitrators have come to the conclusion for making the award as specified under:

1. The claimant is entitled to receive a consolidated sum of Rs. 25,00,000.00 (Rs. Twenty five lacs) from the respondent.

2.

3. The counter claims of respondent are hereby rejected."

23. Now we come to the next and the alternative argument that the arbitrators acted without jurisdiction as the claim No. 1 fell completely outside the purview of the contract and, therefore, there was no reference to arbitrate on the said claim. In order to examine this contention, it would be necessary to see the scope, width and ambit of the -arbitration clause. In the instant case, clause 12 of the special conditions which is the arbitration clause of- the contract clearly provides that if any dispute, difference or controversy shall at any time arise between the parties, touching the contract or as to any other matter or thing whatsoever connected with or Vising out of the contract, whether before or during the progress of or after the completion of the contract then the same shall

be referred to the arbitrators for adjudication. The clause, therefore, is very wide in terms and certainly includes the present dispute regarding adjudication. The contention of the appellant that there was no reference qua claim No. 1 is devoid of any merit because the parties have specifically referred to different clauses of the general conditions, special conditions and additional terms and conditions of the contract. Since both the parties have placed reliance on the terms and conditions of the contract, therefore, it clearly transpires that both of them had taken recourse to the contract which they have entered into and, therefore, the claim made by the claimant is certainly covered by the arbitration clause. In such a situation, the test is whether recourse to the contract by which the parties are bound is necessary for the purposes of determining the matter in dispute between them or not? If such recourse to the controversy is necessary, then the matter comes within the scope of the arbitrators' jurisdiction. In this case undoubtedly, reference to various clauses of the agreement has been made, hence it cannot be said that there was no reference for claim No. 1 and the arbitrators acted without jurisdiction. In these circumstances the alternative argument of the appellant too fails.

24. No other point has been canvassed before us.

25. The appeals therefore, fail and the same are dismissed with costs, the total decretal amount along with interest be paid/released in favour of the respondents within two months from the date a certified copy of this order is produced before the appellants after adjusting the amount which has already been released in favour of the respondents during the pendency of these appeals.

26. Appeals dismissed.