

(1998) 09 DEL CK 0040

In the Delhi High Court

Case No : Suit No.1887/86 and is 2144/87

Vaish Brothers and Co.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 10-09-1998

Acts Referred:

Citation : AIR 1999 Delhi 105 : (1998) 75 DLT 474 : (1998) 47 DRJ 489

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : Mr. D.P.Sharma, for the Appellant; Ms. Jyoti Singh, for the Respondent

Judgement

S.K. Mahajan, J.—After the disputes had arisen between the parties under Agreement No.CEDZ/19 of 80-81 relating to the provision of married accommodation for 55 officers at Delhi Cantt, the matter was referred to the arbitration of Shri P.Anatharam, Chief Engineer. The Arbitrator after hearing the parties and examining and considering the material before him made and published his award on 16th August, 1986. The award was filed in court and after notice of filing of the award was served upon the parties the respondent - Union of India filed its objections under Sections 30 and 33 of the Arbitration Act against the award. The objections can be summarised under the following heads:

1. That after the signing and acceptance of the final bill by the contractor and the payment having been made to the contractor in full satisfaction of its claim there did not arise any dispute between the parties which could be referred to the arbitrator and consequently the award was without jurisdiction.
2. That there was no evidence before the arbitrator to substantiate the claims of the contractor regarding reimbursement of escalation in wages of labour and increase in the cost of building material and consequently the decision of the arbitrator was entirely beyond the scope of the terms of the contract and
3. Since there was no provision in the contract for payment of interest the

arbitrator could not award interest.

2. Ms.Jyoti Singh learned counsel appearing on behalf of the respondent arguing on the first point contended that the contractor having signed the final bill and having received payment in full satisfaction of its claim could not later on raise a dispute. She has placed reliance upon the judgments reported as *Nathani Steels Ltd. v. Associated Constructions*, *P.K. Ramaiah and Company Vs. Chairman and Managing Director, National Thermal Power Corpn.,*, *State of Maharashtra Vs. Navbharat and State of Maharashtra Vs.Nav Bharat Builders*, 1994 Supp (3) 83 in support of her contention that once there was a full and final settlement in respect of any particular dispute or difference in relation to a matter covered under the arbitration clause in the contract and that dispute or difference is finally settled by and between the parties, such a dispute or difference does not remain to be dispute and the arbitration clause could not be invoked even though for certain other matters the contract may be in subsistence. Once the parties had arrived at a settlement in respect of any dispute or difference arising under a contract and that dispute or difference is amicably settled by way of a final settlement for and between the parties, unless that settlement was set aside in proper proceedings it could not lie in the mouth of one of the parties to the settlement to spurn it on the ground that it was a mistake and to proceed to invoke the arbitration clause. If this was permitted the sanctity of the contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the benefit under the settlement and then question the same on the ground of mistake without having the settlement set aside.

3. In all the judgments referred to by the learned counsel for the respondent the court was concerned with the question as to whether a dispute which has already been settled between the parties could at all be referred to an arbitrator and whether the contractor was justified in invoking the arbitration clause. In my view, none of these judgments are applicable to the facts and circumstances of the present case inasmuch as the contractor had signed the final bill which was prepared by the Union of India and had received payment only thereunder. It is nowhere mentioned that on the payment of this final bill there did not remain any dispute between the parties or all their disputes which had existed between the parties had been amicably settled. Moreover, it is stated in the reply that not only that the petitioner had signed the final bill under duress and coercion as the respondent was not making payment unless the petitioner had signed the same but the matter having already been referred to the arbitrator, the respondent cannot now make a grievance about the same. The respondent participated and submitted to the jurisdiction of the arbitrator without any demur and did not raise any objection to the matter having been referred to the arbitrator. No objection at any time was raised by the respondent before the arbitrator that the matter having already been settled, the arbitrator did not have the jurisdiction to enter upon the reference. The award having gone against the respondent in my view, it is too late a stage to agitate this question that the matter had been amicably settled between the parties. In *Prasun Roy Vs. Calcutta Metropolitan*

Development Authority and Another, it was held by the Supreme Court that:

"Where though a party is aware from the beginning that by reason of some disability the matter is legally incapable of being submitted to arbitration, participates in arbitration proceedings without protest and fully avails of the entire arbitration proceedings and then when he sees that the award has gone against him comes forward to challenge the whole of the arbitration proceedings as without jurisdiction on the ground of a known disability, the same cannot be allowed. This principle applies both before and after making of the award. The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceedings preclude such a party from contending that the proceedings were without jurisdiction. (1987) 1 Cal LJ 207, Reversed. Arbn. Jupiter General Insce. Co. Ltd. Vs. Corporation of Calcutta (with Award), , Rel. on.

In the instant case, both parties got extension of arbitration proceedings at least 14 times, the Arbitrator held 74 sitting which were attended by both parties and their counsel and a large amount of time and money was spent at the cost of public.

Held, that in view of the acquiescence of the parties, one of them could not be allowed to challenge the arbitration proceedings on ground that because of some disability the matter could not have been referred to arbitration."

It is not disputed and it is clear from the proceedings before the arbitrator that the respondent did not raise any objection before the arbitrator about the proceedings without jurisdiction or the arbitrator having no authority to take upon the disputes which had been referred to him. The respondent participated in the proceedings without any protest and, in my view, Therefore, by participation and acquiescence in the proceedings before the arbitrator the respondent is estopped from challenging the jurisdiction of the arbitrator on the ground that the matter could not be referred to the arbitrator and the award of the arbitrator, Therefore, cannot be allowed to be challenged on this ground.

4. It is next contended by the learned counsel for the respondent that it is a case of no evidence inasmuch as no vouchers were placed before the arbitrator in support of the claim by the contractor that they had paid any amount towards increase in the wages of the labour or that there was increase in the cost of building material at the relevant time. It is submitted that there were vouchers of only Rs.81,000/- for which payment had already been made and it is not clear from the award of the arbitrator as to how a sum of Rs.1,81,000/- has been awarded. According to the learned counsel for the respondent under the terms of the contract, the contractor was required to submit proof of the payment of escalated wages by showing the vouchers and this having not been done, the arbitrator has clearly gone beyond the scope of the contract and the award has accordingly been vitiated. The arbitrator, according to the learned counsel, has acted without jurisdiction or in any case in excess of his powers by allowing the

claims of the contractor for escalation in wages and increase in the cost of material. She in support of her case has relied upon the Full Bench judgment of the Kerala High Court reported as Government of Kerala and Another Vs. V.P. Jolly, .

5. In State of Kerala and Another Vs. V.P.Jolly, (supra) the award was challenged on the ground of arbitrator's alleged violation of the terms of the contract and the court relying upon the judgment of the Supreme Court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, held that if an arbitrator by giving a non-speaking award acts in contravention of the clear, obvious or patent terms of the main contract which deals with the rights and obligations of the parties such action will be without jurisdiction. For the purpose of finding out if the arbitrator has so acted, it is open to look outside the award, including affidavits, pleadings and terms of the main contract.

6. The question before the court, Therefore, is whether the arbitrator has acted beyond the terms of the contract. The award of the arbitrator is a non-speaking award. A perusal of the award shows that the arbitrator had made and published his award after considering the pleadings, the documentary evidence and the arguments advanced by the parties. Is it open to the court "to speculate where no reasons are given by the arbitrator as to what impelled him to arrive at his conclusions"? In my view, the answer has to be in the negative. The arbitrator is the final arbiter of the disputes between the parties and it is not open to challenge the award on the ground the arbitrator has reached a wrong conclusion or has failed to appreciate the facts. The Court can not 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. One has to determine the distinction between the error within the jurisdiction and an error in excess of the jurisdiction. The court cannot substitute its own evaluation of conclusions of law or fact to come to the conclusions that the arbitrator has acted contrary to the stand taken between the parties. Whether a particular amount was liable to be paid is a decision within the competence of the arbitrator. By purporting to consider the contract the court cannot take upon itself the burden of seeing that this was contrary to the contract and as such beyond jurisdiction. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is a possible view though perhaps not the only correct view, the award cannot be set aside by the court. The court, in my view, has no jurisdiction to examine the different items awarded clause by clause by the arbitrator and to hold that under the contract this was not sustainable on the facts before the arbitrator.

7. In the case of a non-speaking award it is now well settled that the court cannot set aside the award unless the error or law is apparent on the face of the award or in a document incorporated therein. Further, in cases where the ground of attack is that the award is bad on its face it is not permissible for the court even to look into the agreement unless the same is incorporated in the award. In

the case of a non-speaking award one has to confine itself to a document incorporated therein. If the contract is not incorporated in the award it is not permissible for the court to look outside the award and refer to the terms of the contract. It is not the case of the respondent that the matter about payment of escalated wages was not referred to the arbitrator. It is true that the arbitrator cannot determine matters not referred to him but once a matter has been referred to him it is within his powers to take a decision thereon and the court cannot over-rule the said decision merely on the ground that the view taken by the arbitrator is contrary to the terms of the contract. While adjudicating upon the correctness or otherwise of the award of an arbitrator it has to be borne in mind that the arbitrator is made the final arbiter of disputes between the parties and the award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or has failed to appreciate facts and evidence. Some finality attaches to the decision of the arbitrator who is the judge of both the questions of fact and law referred to him. The court cannot sit in appeal over the decision of the arbitrator by re-examining and re-assessing the material before him. In my view, Therefore, there is no force in the arguments of the respondent that the award of the arbitrator is without jurisdiction.

8. The question about the award of interest has not been seriously challenged by the learned counsel for the respondent. In any case it is well settled that the arbitrator has the jurisdiction to award interest from the date of the award and in my view, Therefore, the decision of the arbitrator awarding 10% interest from the date of the award to the date of decree cannot be set aside.

9. In view of the above discussion, I do not find any merits in the objections and the same are accordingly dismissed.

10. The award of the arbitrator dated 16th August, 1986 is made a rule of the court and a decree in terms of the award is passed. The petitioner will be entitled to interest @ 10% per annum from the date of decree till the date of payment. In the circumstances of the case, parties are left to bear their own costs.