
(2007) 09 DEL CK 0035
In the Delhi High Court
Case No : CS (OS) No. 340 of 1993

Vaish Brothers

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 10-09-2007

Acts Referred:

Arbitration Act, 1940 — Section 14, 16, 16(1), 17, 30

Citation : (2008) 1 ARBLR 26

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Sandeep Sharma, for the Appellant; Sanjay Katyal, for the Respondent

Judgement

Anil Kumar, J.—This judgment shall dispose of petition under Sections 14 and 17 of the Arbitration Act, 1940, by Vaish Brothers & Company for filing the award dated 19th January, 1993 and to make the said award rule of the court and pass a decree in terms thereof and the objections filed by Union of India under Sections 30 and 33 of the Arbitration Act, 1940 against the said award.

2. The petitioner is a partnership firm and Mr. C.P.Vaish is a partner of the petitioner firm who contended that he is competent to sign, verify and file the petition being conversant with the facts of the case. The petitioner had entered into a contract with respondent No. 1, Union of India, for the execution of work of construction of building No. 6 at project site Milaram near Shankarapally bearing contract No.CE(P)FY/MDK/20 of 85-86 which agreement was executed between the petitioner and the respondent No. 1. During the execution of the work and after conclusion of the work by the petitioner, the disputes arose and on account of arbitration agreement between the parties, the disputes were referred to the arbitration of respondent No. 2, Shri S.G. Mahajan, one of the Arbitrators on the panel of respondent No. 1 by the Engineer-in-Chief of respondent No. 1 on 18th February, 1992. The Arbitrator, respondent no. 2, entered upon reference on 29th February, 1992. The parties filed their claims,

replies to the claims and produced evidence and there after Arbitrator made and published the award dated 19th January, 1993.

3. The present petition has been filed by the petitioner seeking filing of the original award along with arbitration record and for making the award dated 19th January, 1993 rule of the Court and for passing a decree in terms thereof and also for grant of interest @ 18% per annum from the date of decree till the date of payment or realization.

4. Pursuant to the petition filed by the petitioner, notice was sent to Union of India and the Arbitrator, who filed the award along with proceedings and the notice of filing of the award and the proceeding was accepted by the petitioner on 20th August, 1993 and the notice of filing of the award was served on Union of India/respondent No. 1 on 15th March, 1993.

5. Pursuant to the notice of filing the award, the respondent No. 1 filed the objections under Sections 30 and 33 of Arbitration Act, 1940 being is No. 4659 of 1993.

6. The objector/respondent No. 1 contended that while allowing the claim No. 1, the Arbitrator ignored the material placed before him. It was contended that plea of the petitioner that he did not furnish any guarantee against leakage is absurd and for rectification of defects carried out by the claimant/petitioner cannot be termed extra work and consequently the Arbitrator has misconducted while allowing part of claim No. 1. Regarding claim No. 2, it was contended that the Arbitrator ignored material placed before him and the damage to the structure was caused on account of workmanship and not due to faulty design and, Therefore, the repair work carried out by the petitioner could not be measured up again nor any amount could be awarded to the petitioner on that account.

7. The respondent No. 1 also challenged awarding of a part of the amount under claim No. 6 on the ground that the contract contemplated electrically operated rolling shutters and, Therefore, the reason given by the Arbitrator that electrically operated type shutters does not include electric motor is contrary to the agreement especially because the petitioner had claimed that he was asked to provide electronic fittings which were put by the petitioner under pressure from the respondent No. 1 and, Therefore, the finding of the Arbitrator is contrary to the claim of petitioner himself and thus the Arbitrator has misconducted himself in awarding the amount to the petitioner.

8. Regarding claim No. 7 which was allowed partly, the respondent No. 1 contended that the sanitary annexe to the building and the external sewerage were within the scope of work and the value of the work was 0.65% of the total work and consequently in terms of condition No. 7 of IAFW2249, it was within the deviation which had not radically changed the scope of the work and, Therefore, the Arbitrator misconducted in awarding the amount to the petitioner in respect of the said work as being outside the scope of the work. The finding of the Arbitrator was also challenged on the ground that the contractor while

receiving the approval letter or signing the deviation order did not raise any objection either to the work order or the rates at which the work was priced. The respondent No. 1 also challenged the award of amount under claim No. 7 on the ground that there has not been any reason given for allowing CP/SSR right which is higher than the prevailing percentage.

9. The respondent No. 1 has challenged the award under claim no. 9 where part of the claim has been allowed on the ground that the petitioner had signed the extension deviation orders with all Nil financial effects and Therefore awarding any amount on account of it makes the claim No. 9 untenable. It was contended that for making price adjustment three different formulas were given in the contract for material procured by the contractor. The contractor claimed Rs.7.18 lakhs as reimbursement for price variation and Rs.2.17 lakh as refund of minus price adjustment and awarding part of the amount is, thus, contrary to the specific terms of the agreement and consequently the Arbitrator has misconducted in awarding the said amount.

10. The objector/respondent No. 1 also challenged the amount awarded under claim No. 10 on the ground that the electricity required for fabrication depends upon the type of work, i.e., quality of welding involved in a particular work and could not be generalized on the basis of other works. Since the assessment of the electricity consumption was based on the decision of the Board of Officers constituted for this purpose who had also based their assessment on the basis of tonnage of steel fabricated and electricity consumed and, Therefore, the Arbitrator misconducted in ignoring these factors and allowing the entire claim of the contractor.

11. Though in the objections the other claims allowed by the learned arbitrator, respondent no. 2 were challenged, however, during the arguments the learned Counsel for respondent No. 1 has confined his pleas and contentions only in respect of claims Nos.1, 2, 6, 7, 9 and 10.

12. The reply was filed on behalf of the petitioner to the objections filed by the respondent No. 1 contending inter alias that the objections raised by the respondent are not covered within the scope of Sections 30 and 33 of the Arbitration Act, 1940 as the objections raised by the respondent No. 1 are pertaining to challenge of the finding of facts, whereas the Arbitrator is the sole Judge of questions of fact and the court is not to sit in appeal over the findings of facts of the Arbitrator.

13. During the pendency of objections, a preliminary objection had been raised regarding the territorial jurisdiction of this Court to entertain and to dispose of the petition which was decided by order dated 30th September, 2002 holding that communication of acceptance of the contract to the petitioner at Delhi will also constitute a cause of action at Delhi and, Therefore, the Delhi courts will also have jurisdiction and consequently the preliminary objection of the respondent No. 1 was declined.

14. I have heard the learned Counsel for the petitioner and respondent No. 1 in detail and have also perused the record of the Arbitrator and the award dated 19th January, 1993.

15. The plea of the objector and the reply by the petitioner and adjudication thereof is as under:

16. Claim No. 1

16.1 The contractor/petitioner had claimed an amount of Rs.1,48,465/- on account of losses and damages suffered by the petitioner on account of defects in design and specifications for provision of GI flashing around AC roof extractors. The objection of the objector is that the amount of Rs.58,996/- has been awarded to plaintiff contrary to the conditions of the contract and the material evidence has been ignored and the reasons given in para 6(b) and (d) of award are contrary to the evidence brought on record.

16.2 The petitioner had filed a claim of Rs.1,48,465/- which was revised to Rs.1,44,304/-. The petitioner had contended that he had procured the extractors from the approved manufacturers and there was no dispute about the quality of extractors. The dispute has been raised on account of leakage having occurred from the roof where the extractors were fixed. According to the claimant/petitioner there was no defect with the extractors and the defect was in the design/fixing arrangement. As per the manufacturer's instructions, the extractors had to be located near the ridge but according to the design of the respondent they were located in the mid-span and had been fixed with PGI sheet lining of 1 MM thickness which was provided by the respondent though as per manufacturer's instructions lead sheet flashing had to be used. According to the petitioner, he did not provide any guarantee against leakage through fixing arrangement of the roof extractors and since he carried out the extra work in fixing the leakage from the extractors, he claimed the amount.

16.3 The respondent no. 1 has objected on the ground that fixing arrangement of extractors as given by the respondent no. 1 was adequate and lead was replaced with PGI sheet lining of 1 mm thickness as lead was a costly item. It was also contended that the petitioner had not pointed out alleged fault in the design at the time when the work was carried out and it was only an afterthought. The award of an amount of Rs.58,996/- is also challenged on the ground that the petitioner only carried out the rectification only to stop the leakage which is deemed to be a part of his work and consequently nothing extra is payable to the petitioner.

16.4 Learned Arbitrator has awarded an amount of Rs.58,996/- though an amount of Rs.1,44,304/- was claimed on the ground that the petitioner has used extractors of standard make "Everest" and under the agreement it was not provided that the roof extractors shall be leak proof. In order to make the roof extractors leak proof, the additional work was done by the petitioner which was also necessitated because though the manufacturer's instructions contemplated

use of lead sheet and even the Board of Officers which had gone into various aspects of construction of such type of building also recommended use of lead sheet lining, however, the respondent no. 1 only provided PGI sheet and Therefore lining was done with the PGI sheet resulting into leakage.

16.5 The petitioner had also claimed the amount for providing bituminous Gola and tarfelt lining which were, however, not found to be at site and so the claim was rejected but for making the extractors leak proof, an amount of Rs.58,996/- on account of cost of welding was awarded which also existed at the site.

16.6 The respondent is unable to show any term under the agreement under which it was the liability of the petitioner to make the extractor leak proof. If the leakage had occurred in the extractors, there is no evidence to show that this was not on account of using PGI sheet instead of lead sheet which was recommended by the Board of Officers of the respondent and which is also the manufacturer's instructions to install such extractors. Consequently, the leakage in the extractor cannot be imputed to the petitioner solely nor there can be liability of the petitioner solely for rectifying such defect.

16.7. The amount claimed under claim no. 1 is given in appendix 1 which also includes the cost of welding which has been allowed by the Arbitrator. In the appendix annexed with the claim filed by the petitioner, the cost of welding has been claimed at Rs.96/- per extractor for 301 extractors for a total amount of Rs.28896/-. Learned Counsel for the petitioner has pointed out that on 19th October, 1992 petitioner had submitted additional documents as per appendix A and the respondent No. 1, Union of India, had also filed documents which were detailed in Appendix B. These documents filed by the petitioner also included the revised details of claim No. 1 filed by the petitioner where he had claimed the welding charges at Rs.195.18 rounded off to Rs.196/- and Therefore for 301 extractors an amount of Rs.58,996/- has been claimed. This amount of Rs.58,996/- has not been challenged by the respondent except denying the entire claim. The Arbitrator considering the material on record has disallowed the claim for bituminous gola and tarfelt lining but allowed the claim for the cost of welding and, Therefore, the award of Rs.58,996/- cannot be faulted in the facts and circumstances. The learned Arbitrator has considered the material on record and applied his mind taking into consideration the relevant material for arriving at the findings and the respondent is unable to show any evidence or plea which has not been considered or any error apparent on the face of the record. What has to be seen is whether the reasons given by the Arbitrator are perverse and no reasonable person could have come to that view. Since while awarding the amount of the present claim, the Arbitrator had applied his mind and taken into consideration the relevant material for arriving at the findings, the award of Rs.58,996/- under claim No. 1 cannot be interfered with.

17. Claim No. 2.

17.1 Under claim No. 2, the petitioner claimed an amount of Rs.2,44,712/- for

repairing the damages which was caused to AC sheet roofing, AC north light curves and north light aluminium glazing on account of cyclonic wind storm which caused widespread damages. According to the petitioner, the damages was caused on account of faulty design of the respondent no. 1 and for repairing the damage he is entitled for the amount because the damage was not caused on account of any act attributable to him.

17.2 The objection of the respondent no. 1 is that damage was caused during the currency of the contract and during the maintenance period and consequently the petitioner was liable to repair the damage caused to the building which was got repaired by the respondent no. 1 through another agency which was the liability of the petitioner under the contract. According to the respondent no. 1, the damage which was caused was attributable to the petitioner and Therefore the petitioner is liable for the amount spent on the repair of the same.

17.3 The arbitrator has awarded an amount of Rs.1,22,356/- on the ground that the damage had taken place on account of abnormal nature of storm and even the respondent carried out modification in the design to avoid any further damage due to storms which reflects that initially the design was defective which led to the damage. The arbitrator has also considered that had a plea been taken that the work was half done and the petitioner had not taken adequate precaution then no damage would have taken place after the completion of the work. The arbitrator also considered that the damage to the building had also taken place in a storm in 1989 and the respondent had to adopt strengthening measures which in the opinion of the Arbitrator was reflective of defective design which led to the damage to the building and because of the factors attributable to the petitioner.

17.4 The plea of the objector/respondent no. 1 is that the damage which was caused due to the storm was got repaired from another agency and the petitioner has not carried out any repair to the damage caused due to the storm. Learned Counsel for the respondent is unable to show any evidence to reflect that the damage which was caused by the storm was attributable to the petitioner and the repair work was got done from other agency. The arbitrator has considered the evidence on record and has applied his mind taking into consideration the relevant material. It is not denied that the design was got modified through other agencies. If the design was got modified through other agencies, it is reasonable to infer that there were some defects which lead to damages earlier also in 1989, Therefore, the possibility that the damage was caused on account of defect in the design could not be ruled out in the opinion of the arbitrator. The finding of the Arbitrator in the facts and circumstances cannot be inferred to be so perverse or so unreasonable that any reasonable person could not have come to the same. If any inference drawn by the arbitrator is plausible on the basis of material on record, this Court will not substitute its inference with the inferences drawn by the Arbitrator while considering the objections u/s 30 and 33 of the Arbitration Act, 1940. This is no more rest

integra that there are limits for judicial review ability and the courts exercise limited jurisdiction in setting aside the findings of an Arbitrator. Though the court cannot go into insufficiency of the evidence led before the arbitrator but in the present facts and circumstances of this claim, it cannot even be inferred that there is insufficiency of evidence. The arbitrator has given a reason and even considering the reasonableness of the reasons, though it is not permitted, the reasons given by the arbitrator cannot be faulted on the basis of the material referred to by the learned Counsel for the respondent no. 1. The finding of the arbitrator awarding a amount of Rs.1,22,356/- does not suffer from such perversity or wrong proposition of law so as to entail inference by this Court and setting aside the same. Consequently, awarding of an amount of Rs.1,22,356/- under this claim no. 2 by the Arbitrator cannot be inferred with.

18. Claim No. 6

18.1 Under claim No. 6, the petitioner claimed an amount of Rs.10,26,460/- on account of non-payment for electrically operated rolling shutters over and above the contractual stipulation. However, while giving the details of this claim in the claim petition filed before the Arbitrator, the petitioner contended that he had to provide steel rolling shutters which were to be operated manually or electrically. For operating the steel rolling shutters, respondent wanted electronic equipment also to be installed for operation of these shutters and providing and using electronic equipment was outside the scope of the contract and thus the petitioner became entitled for Rs.10,26,460/-. In the claim filed before the Arbitrator, petitioner contended that the details of electronic equipment provided over and above the electric equipment were given in appendix 5 annexed with the claim petition. The claim No. 6 of the petitioner in the claim petition was as under:

Claim No. 6: NON PAYMENT FOR ELECTRICALLY OPERATED ROLLING SHUTTERS OVER AND ABOVE THE CONTRACTUAL STIPULATIONS

The contract agreement vide Clause 13.31 on page 149 of the contract agreement stipulates that we have to provide steel rolling shutters which should be susceptible of being operated manually or electrically. This was done but the respondent wanted electronic equipment also to be installed for operation of these shutters. This was clearly outside the scope of the contract. Non-the-less we were prevailed upon to provide such equipment for which no payment has been made. Apart from the extra expenditure so incurred by us, the delay in ordering the work was also instrumental in incidence of additional expenditure to be incurred by us. The respondent interprets that provisions of the electronic gadgetry is covered by the contract provision. We shall further explain the irrelevance of such a misinterpretation of the contract provision at the time of hearing. The details of the claim are at Appendix 5.

18.2 Perusal of claim petition of the petitioner reflects that it did not have appendix 5 and the details of electronic equipment, the price of which amounting

to Rs.10,26,460/- was claimed were not given. The respondent no. 1 categorically contended in the reply to the claim petition that there is no appendix 5 giving the details of electronic equipments for which amount of Rs.10,26,460/- was claimed by the petitioner. The respondent relied on Clause 13.6.1 which is as under:

Steel rolling shutters shall be electrically operated type (as also manually operated in case of power failure) ball bearings and made out of 1.25mm thick mild steel laths of convex corrugations complete all as specified in Clause 10.23 of MES schedule Part-I. Rolling shutters shall be given two coats of synthetic enamel paint over a coat of primer as specified. Rolling shutter shall conform to the requirements of IS-6248 and shall be of approved make/manufacturer, Steel rolling shutters shall be procured from any one of the following manufacturers:

- (a) M/s.Swastic Rolling Shutters.
- (b) M/s.Standard Rolling Shutters.
- (c) M/s.Venkateshwara Rolling Shutters & Engineering Works, Secunderabad.
- (d) Ganesh Rolling Shutters & Engineers Works, Secunderabad.
- (e) M/s.Shaktiman Industries.
- (f) M/s Best & Company

18.3 According to the respondent no. 1 from the said clause, it is apparent that the petitioner had to provide electrically operated as well as manually operated rolling shutters and not only manually operated or electrically operated shutters only. It is also not provided that the petitioner had to be paid separately for electric equipment used for operating the shutter electrically.

18.4 Learned Arbitrator has, however, awarded an amount of Rs.2,18,450/- for the electric motors which were provided by the petitioner which according to the arbitrator was distinct separate feature which had to be specified clearly. According to the arbitrator, in a similar contract the provision of electric equipment had been clearly spelled out and in case electrically operated equipment was to be used, it ought to have been stipulated categorically as electric fittings are generally specified separately. The arbitrator also considered that the claim for extra charges, is for providing electric motor and other features such as reduction gear, steel couplings device etc. which are deemed to be included in the contractor's rate when it is stated that shutters shall also be electrically operated. The reasons given by the arbitrator in para 23 while allowing part of claim No. 6 are as under:

23. Contractor's claim is partly sustained for the following reasons:

- (a) Contract does not give any specifications for electric equipments required for electrically operated rolling shutters. In fact this is a distinct feature which has to be specified clearly.

(b) In a similar contract which was perhaps running concurrently, provisions of electric equipments have been clearly spelt out. If by merely saying electrically operated would have included the complete electric equipments, there was no necessity of specifying it separately in other contracts.

(c) It is also seen that those electric fittings are generally specified separately.

(d) As per contra proferentem rule, the clause is to be interpreted against the drafter of the contract.

(e) However, it is seen that the contractor has claimed extra charges for providing electric motor and other features. It is considered that the other features such as reduction gear, steel coupling device etc are deemed to be included in the contractor's rate when it is stated that shutters shall also be electrically operated. It is considered that contractor's claim is sustained for provision of electric motor which is a distinct separate feature. I, Therefore, uphold contractor's claim partly and cost of providing electric motor will work out to Rs.2,570/- each. The cost of providing 85 Nos would be Rs.2,18,450.00/-.

18.5 It is apparent that along with the claim petition, appendix 5 was not filed by the petitioner and, Therefore a specific objection was taken by the respondent No. 1 that the appendix 5 giving the details of electronic component in respect of which claim No. 6 was filed were not detailed. However, the details of claim No. 6, appendix 5, was filed on 19th October, 1992 when the respondent No. 1 also filed their documents. In appendix 5 filed subsequently the details have been given for an amount of Rs.10,26,460/- for 85 numbers of complete electric drive units at Rs.12,076/-. The petitioner has claimed the amount in an electric drive unit for one electric motor of 2 horse power rating; one reduction gear (20:1 reducing) radicon; one steel coupling device; one manual clutching device with shifting lever/handle; electric starter with reverse service switches having three push buttons for up, down and stop operation and two electrical limit switches besides labour charges for fixing and aligning electric driving unit and for onsite fabrication of pedestal for mounting plate and supporting legs/brickets with angle iron complete including fixing and grouting in walls and three coats of synthetic enamel paint and 10% of profit excluding sales tax.

18.6 Learned Counsel for respondent No. 1 had contended that when the specific objections was taken in reply to the claim that the appendix had not been filed giving the details of electronic equipments, subsequently filing of the details negates the opportunity to the respondent no. 1 to reply to the various equipments in respect of which the amount was claimed by the petitioner. However, on the perusal of the record, it is apparent that not only the petitioner filed appendix 5 regarding claim no. 6 along with various other documents but the respondent no. 1 also filed various documents. Respondent No. 1 had the notice and the knowledge about the claim of the petitioner and, Therefore, cannot challenge the same now on the ground that respondent No. 1 did not have the notice of the appendix no. 5 regarding claim no. 6 which was filed later

on after the objection had already been taken by the respondent no. 1.

18.7 From the perusal of the above facts what emerges is that petitioner has claimed the amount under claim No. 6 on account of electronic equipment which was installed for operation of these shutters which, according to the petitioner, was outside the scope of the contract which the petitioner had to provide, as the respondent prevailed upon them. From the perusal of the details which had been filed by the petitioners later on, it is apparent that none of the components in respect of which the claim has been filed by the petitioner are electronic equipments. The claim of the petitioner is not only for electric equipment but for enamel paint on the same and even for the profit. The petitioner had claimed the amount on account of electronic equipment which petitioner was forced to supply. The Arbitrator has misconducted in awarding the claim on the ground that it was not the electronic equipment but the electrical motor for which the petitioner was entitled. The findings of the arbitrator are inconsistent. The petitioner had claimed the amount on account of electronic equipment contending that the electronic equipment which was installed by the petitioner were outside the scope of the agreement whereas the arbitrator has held that some of the components used for electrical drive units were to be provided as a part of the contract but the electric motor was not part of the contract. The contract between the parties does not provide specifically as to what parts were to be used to make the shutter electrically operatable. In the circumstances to hold that some of the parts of the electric drive unit were within the scope of the contract and the electric motor was not part of the drive unit and was beyond the scope of the contract reflect inconsistent conclusions arrived at by the arbitrator. The arbitrator has also assumed that to make the shutter electrically operatable, the details of the equipments ought to have been given separately in the contract. It is no more rest integra that an arbitrator is not a conciliator and his duty is to decide the dispute according to the legal rights of the parties and not according to what he may consider to be fair and reasonable. How one component of the electric drive unit is not within the scope of the agreement whereas other parts are within the scope of the agreement, reflects non application of mind by the arbitrator. Therefore the amount awarded cannot be termed to be fair and reasonable in the facts and circumstances.

18.8 In *Sikkam Subba Associates v. State of Sikkam* (2001) 1 SCC 629 the Supreme Court had held relying on AIR 1923 66 (Privy Council) and *Alopi Parshad and Sons Ltd v. Union of India* AIR 1966 SC 588 as under:

12. Relying upon the ratio in AIR 1923 66 (Privy Council) this Court in *Alopi Parshad and Sons Ltd. v. Union of India* AIR 1966 SC 588 observed that the award may be set aside on the ground of an error on the face thereof, when in the award or in any document incorporated with it, as for instance, a note appended by the arbitrator(s) stating the reasons for the decision wherein the legal propositions which are the basis of the award are found to be erroneous. A specific question submitted to the arbitrator for his decision, even if found

answered wrongly involving an erroneous decision in point of law also, was considered not to make the award bad on its face so as to call for interference. While emphasising the position that "misconduct" in Section 30(a) of the Act comprises legal misconduct, this Court held it to be complete in itself when the arbitrator was found to have, on the face of the award, arrived at a decision by ignoring the very material and relevant documents which throw abundant light on the controversy to help a just and fair decision or arrived at an inconsistent conclusion on his own finding *K.P. Poullose Vs. State of Kerala and Another*, In *M/s. Chahal Engineering and Construction Co. Vs. Irrigation Department, Punjab, Sirsa*, this Court held that the words "is otherwise invalid" in Clause (c) of Section 30 of the Act would include an error apparent on the face of the record. In *Trustees of the Port of Madras Vs. Engineering Constructions Corporation Limited*, after adverting to the ratio of the Constitution Bench of this Court in *Raipur Development Authority Vs. M/s. Chokhamal Contractors etc. etc.*, this Court held that the error apparent on the face of the award contemplated by Section 16(1)(c) and Section 30(c) of the Act is "an error of law" apparent on the face of the award and not an error of fact and that the arbitrator cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. In *State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd.*, it was held that the court, in a proceeding to set aside the award cannot exercise jurisdiction, as if on an appeal by re-examining and re-appraising the evidence considered by the arbitrator and come to the decision that the arbitrator was wrong [see also *U.P. Hotels v. U.P. SEB (1989) 1 SCC 539* , *Puri Construction Pvt. Ltd. Vs. Union of India (UOI)*, and *Sudarsan Trading Co. Vs. Government of Kerala and Another* ,

13. In *Union of India (UOI) Vs. Jain Associates and Another*, this Court held as follows: (SCC pp. 670-71, para 7)

7. In *K.P. Poullose v. State of Kerala* 5 this Court held that misconduct u/s 30(a) does not connote a moral lapse. It comprises legal misconduct which is complete if the arbitrator, on the face of the award, arrives at an inconsistent conclusion even on his own finding, by ignoring material documents which would throw abundant light on the controversy and help in arriving at a just and fair decision. It is in this sense that the arbitrator has misconducted the proceedings in the case. In that case the omission to consider the material documents to resolve the controversy was held to suffer from manifest error apparent ex facie. The award was accordingly quashed. In *Dandasi Sahu Vs. State of Orissa*, this Court held that the arbitrator need not give any reasons. The award could be impeached only in limited circumstances as provided under Sections 16 and 30 of the Act. If the award is disproportionately high having regard to the original claim made and the totality of the circumstances it would certainly be a case of non-application of mind amounting to legal misconduct and it is not possible to set aside only invalid part while retaining the valid part. In other words the doctrine of severability was held inapplicable in such a situation. It is, Therefore, clear that the word "misconduct" in Section 30(a) does not necessarily comprehend or

include misconduct of fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the arbitrator, which on the face of the award, are opposed to all rational and reasonable principles resulting in excessive award or unjust result or the like circumstances which tend to show non-application of the mind to the material facts placed before the arbitrator or umpire. In truth it points to the fact that the arbitrator or umpire had not applied his mind and not adjudicated upon the matter, although the award professes to determine them. Such situation would amount to misconduct. In other words, if the arbitrator or umpire is found to have not applied his mind to the matters in controversy and yet, has adjudicated upon those matters in law, there can be no adjudication made on them. The arbitrator /umpire may not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. Misconduct is often used, in a technical sense denoting irregularity and not guilt of any moral turpitude, that is, in the sense of non-application of the mind to the relevant aspects of the dispute in its adjudication. In *K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another*, this Court held that the arbitrator had committed misconduct in the proceedings by making an award without adjudicating the counter-claim made by the respondent. In *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, the counter-claim was rejected on the ground of delay and non-consideration of the claim, it was held, constituted an error on the face of the award.

14. It is also, by now, well settled that an arbitrator is not a conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider to be fair and reasonable. An arbitrator was held not entitled to ignore the law or misapply it and he cannot also act arbitrarily, irrationally, capriciously or independently of the contract (see *Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another*,

18.9 Therefore an arbitrator being a creature of the agreement between the parties has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be question of jurisdictional error on the face of the award falling within the ambit of legal misconduct which can be corrected by the court. It is also true that if an arbitrator commits an error in construction of the contract that is an error within his jurisdiction but if he wanders outside the contract and deals with the matters not allotted to him it becomes a jurisdictional error. The agreement between the parties does not provide that the electric drive unit will be separate. No reliance could be placed on the similar contracts where the electric equipments had been spelt out and provided separately. If in the contract between the parties in respect of building no. 6, no electric equipment had been spelt out separately then what was contemplated was that rolling shutters should be capable of being operated manually as well as electrically and any equipment to operate the same electrically will be part of the agreement. The Arbitrator could not read the terms and conditions of some other contract and extrapolate the same to the present

contract between the parties. The observation of the Arbitrator that electric fittings are generally specified separately also seems to be based on his own assumption. If the steel rolling shutters which was to be provided had to be operated electrically, the electrical fittings would be part of the contract. Another glaring misconduct on the part of the arbitrator is that the petitioner had claimed for electronic equipment while the arbitrator has awarded for electrical motor.

18.10 The respondent No. 2 has also awarded a sum of Rs.2,18,450/- for providing 85 motors at the rate of Rs.2,570/- whereas the claim of the petitioner is for Rs.2175/- per motor in appendix 5 filed later on. No reason has been given for awarding an amount of Rs.2570/- per electric motor and not Rs.2175/- demanded by the petitioner. The reasoning of the Arbitrator runs counter to his own reasoning and is contradictory inasmuch as if the amount has only been awarded for electric motors and not for reduction gear and other accessories which were required to operate the shutters electrically, then the amounts could not be awarded for even the electric motors. There is an apparent error in awarding the claim No. 6 by the Arbitrator to the petitioner and it is also contrary to the terms of the award. The contention of the learned Counsel for the petitioner that only a shutter which should be operated electrically was to be provided and not anything required to operate the shutter electrically also runs contrary to the agreement entered into between the parties and his own claim. Consequently, the award of Rs.2,18,450/- under claim No. 6 by the respondent No. 2 to the petitioner is set aside being erroneous on the face of the award.

19. Claim No. 7

19.1 The petitioner claimed an amount of Rs.2,06,126/- on the ground that the work in respect of sanitary annexe and external sewage to building was outside the scope of the contract and he was forced to do it as a DO whereas this additional work could be got done as an amendment to the contract only. According to plaintiff, he was paid less and, Therefore, the claim of Rs.2,06,126/- was filed. The respondent No. 1 refuted the claim on the ground that under Clause 7 it was a deviation and had to be done under the contract and was not beyond the scope of the agreement. Clause 7 is stipulated hereinafter:

7. Deviations (Applicable specifically to Measurement and Lump Sum Contracts and generally to Term Contracts) - The Contractor shall not make any alteration in addition to or omission from the Works as described in the tender document except in pursuance of the written instructions of the G.E.

No work that radically changes the original nature and scope of the Contract shall be ordered as a Deviation and in the event of the disagreement between the Contractor and the Accepting Officer, the decision, of the next higher authority (or of the Chief Engineer in case of contracts accepted by him) shall be final and binding on the contract or,

The Accepting Officer, or person specifically authorised by him on his behalf, may vary either by way of addition to and/or deduction from the Works so described

provided that the Contract Sum be not thereby varied on the whole by more than the percentage set out in the tender documents (referred to hereinbelow as the "Deviation Limit"), subject to the following restrictions:

- a) The Deviation Limit referred to above is the net effect (algebraically sum) of all additions and deductions ordered.
- b) In no case shall the addition/Deductions (arithmetical sum) exceed twice the Deviation Limit.
- c) The Deviation ordered on terms of any individual trade included in the Contract shall not exceed plus/minus 25% of the value of that trade in the Contract as a whole or half the Deviation Limit, whichever is less except in the case of Prime Cost and Provisional Items where the parties to the contract may agree to at different percentage for any particular trade item.
- d) The value of additions of items of any individual trade not already included in the Contract shall not exceed 10% of the Deviation Limit.

All additions and deductions will be priced as per Condition 62 hereof and added to or deducted from the Contract Sum. Whenever the Accepting Officer intends to exercise such right his intentions shall be communicated to the Contractor by the G.E, whose order in writing shall specify the deviations which are to be made, the lump sum assessment or the proposed basis of payment, the change, if any in the date or completion of the relevant phase and/or the entire Contract. Any objection by the Contractor to any matter concerning the Deviation Order, shall be notified by him in writing to the G.E within fifteen days from the date of receipt of such order, but under no circumstances shall the progress of the Works be stopped (unless so ordered by the G.E) owing to differences or controversy that may arise from such objection. In default of such notification the Contractor will be deemed to have accepted the order and the conditions stated therein without in any way affecting the right of the parties to rectify any mistake on the basis of payment only to the extent it differs from Condition 02. In the event of the Contractor failing to agree with the G.E regarding the proposed alteration of time, the objection shall be referred to the Accepting Officer or, in the case of Contracts (other than Term Contracts) accepted by the G.E to the C.W.E whose decision shall be final.

19.2. The petitioner had accepted this DO without reservation and in any case in accordance with Clause 7 of the agreement, the sanitary annexe to the building and the external sewage was not such a work which will radically change the original nature and scope of the contract. As the value of the additional items did not exceed 10% of the deviation limit, as the work was admittedly about 0.65% of the total contract amount, the same will be covered under Clause 7 and the petitioner is not entitled for the additional charges demanded by him after the conclusion of the work.

19.3. The learned Arbitrator has sustained the claim on the ground that it is not

covered in the scope of the contract and this cannot be ordered as deviation. Learned Arbitrator, however, has not considered Clause 7 and has given no reason as to why this is not a deviation. There is nothing to show that the sanitary annexe and sewage of the building is such a work which radically changes the building work awarded to the petitioner. Merely contending that it is not covered in the scope of work is on account of non application of mind and the error in the observation of the arbitrator is apparent on the face of the award.

19.4 Clause 7 of the contract considers as to what is deviation. It stipulates that if a work does not radically changes the nature of contract and it is less than 10% of the total work it would be deviation. It is admitted that the contract was for construction of a building and in a building the sanitary annexe and external sewage cannot be termed as such works which would radically change the original nature and scope of the contract. It is also admittedly 0.65% of the total value of work which was about Rs.4 lakhs which amount was paid to the petitioner. The petitioner can not claim that it should have been done as an amendment to the contract in the facts and circumstances. In any case, the learned Arbitrator has allowed the same mechanically without giving any reasons and holding that it is not covered in the scope of the contract and cannot be ordered as deviation. The error is apparent on the face of award and awarding of this claim to the petitioner cannot be sustained and it is set aside

20. CLAIM NO.9

20.1 The plaintiff had claimed a revised amount of Rs.9,36,422.54 as reimbursement in price due to escalation. It was contended that in keeping with the spirit and intention of the contract, the petitioner was required to be compensated for the escalation of the total quantity of stores procured by him particularly when substantial quantity of stores were procured after original date of completion. According to the plaintiff, the delay in execution of the work was attributable to the defaults and breaches of the contract on the part of the respondent No. 1. Respondent No. 1 contested the claim on the ground that the reimbursement on account of escalation in the material was covered by the contract condition which stipulated pre-determined constant which were quoted in the tender and according to respondent No. 1 they could not be changed later on. It was also stated that the escalation has been paid to the plaintiff up to the actual date of completion which is beyond the original scheduled date of completion. It was also contended that the plaintiff has signed the DOs for extension of time with nil financial effect.

20.2 Learned Arbitrator has considered the fact that a sum of Rs.7,18,890.45 is the demand for the material procured by the petitioner after the original date of completion. The Arbitrator did not uphold the claim on account of formula given in the contract being the basis for making any payment for escalation of the material which formula was agreed by both the parties. However, the Arbitrator justified the claim of Rs.2,17,532.09 for the adjustment of the escalation done in the final bill on the ground that the intention of the contract was to compensate

the contractor for any increase in the material when the price index was rising. The Arbitrator has considered the formula $Vm2 - Vm1$ which was in minus whereas the intention was not to make any plus payment when the price index was decreasing. Taking into consideration all these aspects, the amount of Rs.2,17,532.09 was awarded.

20.3 Learned Counsel for the respondent No. 1 has contended that the stores were procured by the petitioner in advance and consequently the petitioner is not entitled for escalation. Perusal of the record of the arbitration reflects that no such plea was taken nor there is any evidence that stores were procured by the petitioner in advance so as to disentitle him for escalation. Learned Arbitrator has considered the claim and reply of the respondent No. 1 and after due application of mind has sustained the claim for Rs.2,17,532.09 and same cannot be interfered in the facts circumstances.

21. Claim No. 10

21.1 Under claim 10, the petitioner has claimed an amount of Rs.1,84,726/- deducted on ad hoc basis without any justification. According to the petitioner, he had to pay electric charges on actual meter consumption basis whereas the respondent No. 1 has claimed the electricity charges on ad hoc basis on higher side and consequently the petitioner is liable for refund of extra charges.

21.2 The respondent No. 1 had justified the recovery made on the basis of assessment made by the board of officer. The learned Arbitrator has relied on the terms of the contract and the fact that the meter for recording the consumption was to be installed by the respondent No. 1 and was also to be kept in working condition. The ad hoc charges claimed by the respondent No. 1 on the basis of assessment made by a Board of Officers was held to be not binding, as the petitioner was not associated with the Board of Officers. The petitioner had given the electric charges in respect of other similar contracts which was relied on by the Arbitrator and an amount of Rs.1,84,726/- has been awarded which finding cannot be impugned on the ground that the meter showing the consumption of electricity went out of order and thus the recovery for the same has been made in RARs on the basis of similar work during the same period. The meter had to be maintained by the respondent No. 1 which fact has been noticed by the Arbitrator and since the Board of Officers on whose recommendation the amount has been deducted were not associated with the petitioner, the decision of the Arbitrator cannot be faulted within the scope of interference by this Court under Sections 30 and 33 of Arbitration Act, 1940. Consequently, the award of Rs.1,84,726/- is sustained and the objection of the respondent No. 1 is rejected.

22. No other claim has been disputed by and on behalf of respondent No. 1. Consequently, the amounts awarded to the petitioner under claim No. 6 and 7 are rejected and other amounts awarded to the petitioner under different claims are sustained. The objection to the claims no. 6 & 7 are allowed whereas objections filed by the respondent no. 1 for other claims are dismissed. The

claims 6 and 7 can be segregated from the other claims, Therefore, the award can be made rule of the court in respect of other claims except claim Nos.6 and 7.

23. Consequently, the application is no 4659 of 1993 of the respondent no. 1 in respect of claim no. 6 and 7 is allowed and for other claims it is dismissed. The petition of the petitioner u/s 14 and 17 of the Arbitration Act, 1940 is allowed and the award is made rule of the Court except claims no. 6 & 7. The decree for recovery of amount as awarded in respect of claims other than 6 and 7 is passed in favor of petitioner and against the respondent no. 1. Future simple interest at the rate of 8% per annum till the realization of decretal amount is also awarded to the petitioner. Decree sheet in terms hereof be drawn.