

(2002) 07 KL CK 0095
In the High Court Of Kerala
Case No : M.F.A. No. 3192 of 1993

Veeraraghava Iyer and Co.

APPELLANT

Vs

Divisional Superintendent, Southern Railway and Others

RESPONDENT

Date of Decision : 04-07-2002

Acts Referred:

Arbitration Act, 1940 — Section 30

Citation : (2002) 07 KL CK 0095

Hon'ble Judges : K.S. Radhakrishnan, J;K.A. Mohamed Shafi, J

Bench : Division Bench

Advocate : T.R. Ramachandran Nair, Teresa, C., Saramma Cherian and Suman Chakravarthy, for the Appellant; K.C. Narasimhan and Shaji P. Chaly for Respondent No. 3 and V.J. Joseph, for the Respondent

Final Decision : Allowed

Judgement

K.S. Radhakrishnan, J.—This appeal was filed by the third Respondent in O.P. (Arb.) No. 197 of 1986 on the file of the Principal Sub Court, Trivandrum.

2. The challenge is against an Award passed by an Arbitrator which was made rule of the court. An agreement dated 22nd February 1974 was entered into between Divisional Superintendent of Southern Railway (hereinafter called Railway Administration) on the one part and the Petitioner and third Respondent (hereinafter called the licensees) on the other part for the use of railway land approximately 49 cents for the purpose of erecting bulk oil installation. As per Clause 5(a) of the agreement, licensees should pay from the date of the agreement to the Railway Administration in advance on the First day of April of every year rent of Rs. 5,586 plus shed rent of Rs. 40 and municipal taxes as demanded by the Corporation separately and also any charges due in respect of water on presentation of bills. As per the agreement, above-mentioned rates are subject to revision from time to time on one month's notice being given to the licensees. Clause 5(a) of the agreement states that licensees shall deposit a sum of Rs. 5,586 being equivalent to the amount thereon and municipal taxes, if any,

for an year as security for the due and faithful observance and compliance with the terms of the licence. In the event of increase in licence fee, shed rent etc. the security deposit shall also be increased to that extent and the licensees shall deposit the extra amount. The minimum deposit shall be Rs. 20. The said security deposit shall not bear any interest and shall be returned to the licensees on the determination of the licence after adjustment of any amount that may be found due to the Government. Clause 5(e) enables the Railway to review the rate of licence fee periodically and enhance the same if it considers necessary. The meaning and the purpose of the said clauses will be dealt with in the latter part of the Judgment. Clause 5(h) enables the Railway Administration to forfeit the entire deposit money referred to in Clause 5(f) thereof on the licensees making default in payment of the fees, shed rents etc. within four months i.e. before the end of July each year after the due date for payment of the same as stipulated in Clause 5 (e) thereof failing which the Railway Administration could initiate eviction proceeding. We will deal with the paid clause in detail later.

3. Railway Administration in the year 1983 invoking Clause 5(e) unilaterally revised the license fee payable by the licensees at the rate of Rs. 1,11,160 per year with effect from 30th October 1983 by issuing notice dated 13th April 1983. Demand made by the Railway Administration was objected to by the licensees by letter dated 26th May 1983 on the ground that the increase sought for was not supported by quid pro quo and the licensees were not made known the basis or reasons for such revision. Licensees again by letter dated 22nd December 1983 objected to the revision of licence fee stating that the unilateral revision of licence fee is arbitrary and illegal. The Railway Administration however took steps to realise the amount by invoking the provisions of the Revenue Recovery Act. One of the licensees approached this Court by filing O.P. No. 11080 of 1983 to quash the revenue recovery proceedings initiated against the licensees and for other consequential reliefs. Since licensees were continuing without paying the enhanced licence fee and proceedings were initiated under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 to evict the licensees from the premises. Notice to that effect dated 20th October 1984 was issued to them. One of the licensees filed Original Suit (Arb.) No. 300 of 1984 on 22nd October 1984 before the Principal Sub Court, Trivandrum for referring the dispute to an Arbitrator and also for other consequential reliefs. The Estate Officer later issued a notice dated 20th October 1984 directing the licensees to vacate the premise. That order was challenged by the licensee in C.M.A. No. 120 of 1984 before the District Court, Trivandrum. Appeal was dismissed as per order dated 22nd June 1987. Licensees then preferred O.P. No. 5629 of 1987 and 5590 of 1987 before this Court against the order of eviction. Both the writ petitions were allowed by a learned Single Judge of this Court directing the Railway Administration to return the land to the parties and directed the Estate Officer to pass fresh orders after giving reasonable opportunity to the parties and hearing them. Against the said Judgment Railway Administration filed W.A. Nos. 672 and 673 of 1987 before this Court. Appeals were disposed of by a common Judgment on the basis of the joint

undertaking filed by the Railway Administration and tie licensees. By the said undertaking licensees had agreed to vacate a portion of the premises on certain terms and conditions. It was also agreed that the Railway Administration would be entitled to only proportionate licence fee in respect of a portion of land in accordance with the adjudication regarding the quantum of licence fee payable in respect of original licenced premises.

4. The Sub Court, Trivandrum also later decreed the suit, O.S. No. 300 of 1984 by appointing the General Manager, Southern Railway as Arbitrator by order dated 9th April 1985. Since arbitration proceeding was already initiated, this Court disposed of O.P. No. 11080 of 1983 directing that the dispute be adjudicated by the Arbitrator. The licensees later surrendered the premises though belatedly after taking the matter upto the Supreme Court.

5. We have indicated that the question regarding the claim for the enhanced licence fee was referred to the Arbitrator. Following were the issues referred to arbitration.

(1) Whether the Respondents 1 and 2 are entitled to enhance the licence fee unilaterally with effect from 13th October 1983 retrospectively?

(2) Whether there was any proper notice as contemplated under Clause 5(e) of the agreement before revising the license fee?

(3) Whether there was any unconditional acceptance on the part of the licensee as envisaged under Clause 5(e) of the agreement for the enhancement of the licence fee?

(4) Whether the enhancement of the licence fee and deposit amount by the Respondents 1 and 2 is proper and valid?

(5) Whether Respondents 1 and 2 have complied with the terms and conditions of the agreement in enhancing the licence fee to be paid by the Petitioner?

(6) Whether Respondents 1 and 2 are entitled to invoke the provisions of the Revenue Recovery Act for realising the amounts alleged to be due against the Petitioner in the absence of quantification of the licence fee as per law?

(7) Whether Respondents 1 and 2 are entitled to recover the enhanced license fee as claimed by them?

The Arbitrator has answered the above-mentioned reference and ultimately passed an Award holding that Railway Administration would be entitled to recover the enhanced fee of Rs. 1,11,160 with effect from 13th October 1985 from the licensees. The Award was passed on 20th June 1986 and later filed by the Arbitrator before the Sub Court, Trivandrum. Licensees then filed separate petitions u/s 30 of the Arbitration Act for setting aside the Award passed by the Arbitrator. It was contended before the Sub Court that the Award was not in conformity with the terms of reference and that the Arbitrator had failed to appreciate the terms of the agreement. It was contended that the Railway

Administration had no right to enhance the licence fee unilaterally. Further it was also contended that the Award of the Arbitrator in respect of reference 3 and 5 is conflicting and that the Arbitrator had miscomputed himself in passing the Award acting contrary to the terms of Clause 5(e) of the agreement. Railway Administration filed objections stating that no interference is called for against a non-speaking Award and that the Arbitrator had not misconducted himself. The court below did not find any infirmity in the Award and it was made rule of the court and directed the licensees to pay to the Railway Administration license fee of Rs. 1,11,160 with effect from 13th October 1983. It was also ordered that prior to 13th October 1983 Petitioner and third Respondent were bound to pay licence fee at the old rate. Aggrieved by the Award as well as the order passed by the Sub Court, this appeal has been preferred by the licensees.

6. When the matter came up for hearing we heard Sri T.R. Ramachandran Nair as well as Sri K.L. Narasimhan appearing for the licensees and Sri V.J. Joseph, Standing Counsel for Railways.

7. Counsel appearing for the licensees contended that the Arbitrator has clearly misread Clause 5(e) of the agreement. Counsel took us through the various clauses in the agreement, especially Clause 5(e) and contended that Railway Administration has no jurisdiction or power to enhance the licence fee in the absence of any unconditional acceptance by the licensees. Counsel submitted at best failure to give unconditional acceptance of the revised licence fee would enable the Railway Administration to get the licensees vacated from the premises. Consequence of non-payment of enhanced licence fee is also enumerated in the various provisions of the agreement, Counsel contended. Counsel contended that even though Award was not a speaking Award since Arbitrator had acted in violation of the terms and conditions of the contract between the parties Arbitrator has acted in excess of the powers and the said action would be without jurisdiction. Counsel also placed reliance on the decision of the apex court in K.P. Poulse Vs. State of Kerala and Another, . The said decision was followed by a Full Bench of this Court in State v. Jolly 1992 (1) KLT 240 . Reliance was also placed on the decision of the apex court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, .

8. Counsel appearing for the Railway Administration contended that the Award being a non-speaking Award the court below has rightly rejected the contentions and made the Award rule of court. Counsel also took us through the various provisions of the agreement and contended that the Arbitrator had not misconducted himself in passing the Award. Consequently no interference is called for.

9. Before we examine the rival contentions with regard to the various clauses of the agreement, let us examine the scope of interference of a non-speaking Award. The apex court in Associated Engineering Co. Vs. Government of Andhra Pradesh and another, , held that if an Arbitrator while 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 would be without jurisdiction. It was also held that 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. Such conduct also amounts to legal misconduct. The above-mentioned, decision was followed by the Full Bench of this Court in Jolly's case, (supra). In Steel Authority of India Limited Vs. J.C. Budharaja, Government and Mining Contractor, , the apex court dealing with the powers of the Arbitrator held as follows:

The Arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one. The Arbitration Act does not give any power to the Arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement. To find out whether the Arbitrator has travelled beyond his jurisdiction and acted beyond the terms of the agreement between the parties, the agreement is required to be looked into. It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the Arbitrator. However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the Arbitrator ignores it and awards the amount despite the prohibition in the agreement, the Award would be arbitrary, capricious and without jurisdiction.

In Rajasthan State Mines and Minerals Limited Vs. Eastern Engineering Enterprises and Another, , the apex court held that the Award made by the Arbitrator disregarding the terms of the reference or the arbitration agreement or terms of the contract would be a jurisdictional error which requires ultimately to be decided by the court. He cannot award an amount which is ruled out or prohibited by the terms of the agreement. In Grid Corporation of Orissa Ltd. and Another Vs. Balasore Technical School, , the apex court held that it is clear that when an Award is made plainly contrary to the terms of the contract not by misinterpretation it would certainly lead to an inference that there is an error apparent on the face of the Award which results in jurisdictional error in the Award. In such a case the courts can certainly interfere with the Award made by the Arbitrator. Similar is the view taken by the apex court in Paradip Port Trust v. Unique Builders 2001 (2) S.C.C. 680 , Bharat Coking Coal Ltd. Vs. M/s. L.K. Ahuja and Co., and West Bengal State Warehousing: Corporation v. Sushil Kumar Kayar and Co. J.T. (2002) Supp. 1235. The above-mentioned decisions would show that if the Arbitrator has exceeded the terms of the contract and acted in contravention of the clear, obvious and patent terms of the contract and such action of the Arbitrator is without jurisdiction and could be interfered with by this Court even if Award is a non-speaking Award.

10. We will examine the scope of Clause 5(e) vis-a-vis other provisions of the agreement and see whether the Arbitrator has acted in contravention of the clear, obvious and patent terms of the main contract which dealt with the rights

and liabilities of the parties. Clauses 5(a) and (b) read as follows:

5. (a) The Licensees shall from the day of... 1974 pay to the administration, the following fees in advance the 1st day of April of every year:

(1) Rent Rs. 5,586 plus shed rent Rs. 40.

(2) Municipal taxes as demanded by the Corporation separately.

(b) The Licensees shall pay monthly to the Administration any charges due in respect of water on presentation of bills.

Clause 5 (e) deals with the power to review the rate of licence fee which reads as follows:

5 (e) The Railway shall have the right to review the rate of licence fee periodically and enhance the same if it considers necessary. The licensees will be given six months notice in advance of the due date of such revision and their unconditional acceptance obtained to pay the revised licence fee from that date, it shall be recoverable with retrospective effect from the date the revision was due. If the licensees fail to give their unconditional acceptance thereof as required by the notice they shall vacate the premises before the currency of the agreement expires. If the licensees fail to pay the fee within the stipulated time, they shall also pay liquidated damages at the rate of 1 per cent per month or part thereof to be reckoned from the date of actual payment.

(underline supplied)

We may also refer to Clauses 5(J) and (h) which reads as follows:

(f) The Licensees shall deposit a sum of Rs. 5,586 (Rupees five thousand five hundred and eighty-six only) being equivalent to the amount thereon and municipal taxes, if any, for a year, as security (paise being rounded off to a rupee) for the due and faithful observance and compliance with the terms of the licence. In the event of increase in licence fee, shed rent, etc. the security deposit shall also be increased to that extent and the licensees shall deposit the extra amount. The minimum deposit shall be Rs. 20. The said security deposit shall not bear any interest and shall be returned to the licensees on the determination of this licence after adjustment of any amount that may be found due to the Government.

The Government shall forfeit the entire deposit money referred to in Clause 5(f) hereof on the licensees making default in payment of the fees/shed rents etc. within four months i.e., before the end of July each year after the due date for payment of the same as stipulated in Clause 5(e) hereof. The licence shall stand cancelled and revoked on the expiry of this period of four months. The Government shall also initiate eviction proceedings for getting the Railway premises vacated and take action for recovery of above fees and liquidated damages upto the date of actual vacation.

It is evident from Clause 5(a) that as per the agreement entered into on 22nd February 1974 licensees shall pay to Railway Administration in advance on the first day of April of every year rent Rs. 5,586 plus shed rent of Rs. 40 and municipal taxes as demanded by the Corporation has to be paid separately. They shall also pay monthly to the Administration any charges due in respect of water on presentation of bills. Clauses (a) and (b) are subject to review from time to time on one month's notice being given to the licensees. As per Clause (e) Railway shall have the right to review the rate of licence fee periodically and enhance the same if it considers necessary. However, if the Railway wanted to review the rate of licence fee, licensees will be given six months' notice in advance of the due date of such revision and their unconditional acceptance to be obtained to pay the revised licence fee from that date. Clause (e) also states that if the licensees fail to give their unconditional acceptance thereof as required by the notice they shall vacate the premise before the currency of the agreement expires. If they fail to pay the fee within the stipulated time, they shall also pay liquidated damages at the rate of 1 per cent per month or part thereof to be reckoned from the date of actual payment. Clause (e) further states that even in case the revised licence fee is fixed at a subsequent date, it shall be recoverable with retrospective effect from the date the revision was due. It is evident from Clause 5(e) that before reviewing the rate of licence fee and enhance the same two conditions are to be satisfied; (i) licensee will be given six months' notice in advance of the due date or revision, and (ii) the Railway Administration would get unconditional acceptance to pay revised licence fee from the licensees. Unless and until the above-mentioned two conditions are satisfied, Railway Administration has no power to review the licence fee and enhance the same. Consequence of not giving unconditional acceptance is provided in Clause 5(e) itself, that is, Railway Administration can require by notice the licensees to vacate the premises before the currency of the agreement expires.

11. We are of the view Clause 5(e) does not enable the Railway Administration to unilaterally fix or enhance the licence fee and compel the licensees to accept such unilateral fixation of revised licence fee. We are not prepared to say that Clause 5(e) has given any unilateral or arbitrary power to the Railway Administration to fix the licence fee as they deem fit prospectively or retrospectively and recover the same from the licensees. The Arbitrator has completely misread Clause 5(e) and answered the reference (1) as follows:

As per Clause 5(e) of the agreement entered into between the parties in this case, Respondents 1 and 2 (Railway Administration) are entitled to enhance the licence fee unilaterally with effect from 13th October 1983 prospectively. The claim for retrospective levy of the revised licence fee of Rs. 1,11,160 is disallowed.

The above-mentioned finding of the Arbitrator would indicate that Railway Administration is entitled to enhance fee with effect from 13th October 1983. The word "unilaterally" is not employed in Clause 5(e) but an invention of the

Arbitrator. Clause 5(e) does not empower the Railway Administration to enhance the licence fee unilaterally. As we have indicated two conditions are to be satisfied to review the licence fee, that is, six months" notice in advance of the due date of such revision and obtaining unconditional acceptance from the licensees. There can be no unilateral enhancement of licence fee by the Railway Administration. The finding on reference (1) by the arbitrator goes contrary to the clear terms of Clause 5(e). In this connection we may also-examine the answer given to reference (3) which reads as follows:

As per Clause 5(e) of the agreement, six months" notice in advance of the due date of such revision should be given and the unconditional acceptance of the licensees is to be obtained to pay the revised licence fee from that date. Hence there is no unconditional acceptance on the part of the Petitioner and the third Respondent for payment of revised licence fee from the due date.

This finding is in consonance with Clause 5 (e) and the Arbitrator rightly held so. Consequently the findings on reference (1) and reference (3) are conflicting. Arbitrator has found in answer to reference (1) that Railway Administration are entitled to enhance the licence fee unilaterally, but at the same time on reference (3) it is stated that six months" notice in advance of the due date of such revision should be given and unconditional acceptance of the licensees is to be obtained to pay the revised licence fee from that date. Both these findings are inconsistent and contradictory. In answer to reference (5) the Arbitrator has stated as follows:

Respondents 1 and 2 (Railway Administration) have complied with the terms and conditions of the agreement for enhancement of the licence fee to be paid by the Petitioner as well as the third Respondent.

The above finding on reference (5) would also go against the answer given to reference (3).

12. We are of the view, arbitrator has completely misread Clause 5 (e) and has exceeded his jurisdiction and has acted in contravention of the clear, obvious and patent terms of the main agreement giving rights and obligations of the parties which would amount to a jurisdictional error. We may indicate, rights and obligations of the parties have already been dealt with in various clauses of the agreement which were ignored by the Arbitrator. In case of non acceptance of the revised rate by the licensees by giving unconditional acceptance Clause 5(e) itself would enable the Railway Administration to require the licensees to vacate the premises before the currency of the agreement expires by giving notice. Railway Administration has also got the power under Clause 5(h) to forfeit the entire deposit money refereed to in Clause 5(f) On the licensees making default in payment of the fee, shed rent etc. within four months the licence shall be cancelled and appropriate eviction proceedings can be initiated to recover the licence fees and also claim liquidated damages after the date of actual vacation.

13. We are of the view Arbitrator has completely misunderstood the various

clauses of the agreement which is clear from the award. The Award passed by the Arbitrator is not in terms of the contract and consequently without jurisdiction. The Award passed is therefore liable to be interfered with. We therefore set aside the Award of the Arbitrator as well as the order of the court below making it rule of court. Appeal is allowed as above without prejudice to the rights of the Railway Administration, if any, to recover any other amount in terms of the various provisions of the agreement in accordance with law.