

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.04.2010

CORAM

THE HONOURABLE MR.JUSTICE D.MURUGESAN
AND
THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

O.S.A.Nos.463 & 464 of 2009

The Union of India owning Southern Railway
represented by Chief Engineer (Construction)
18, Millers Road Appellant in
Bangalore 560 042 (Respondent) ... O.S.A.No.463 of 2009

The Union of India owning South Western
Railway (formerly Southern Railway)
represented by Chief Engineer (CN/Central
Bangalore Cantonment Appellant in
Bangalore 560 046 (Respondent) ... O.S.A.No.464 of 2009

-vs-

1. M/s Best Cast Construction (Private) Ltd.,
rep.by its President N.Venugopal AD-15
5th Street, Anna Nagar, Chennai 600 040 (Claimant)
2. Sri N.R.Rajasekaran
Financial Adviser and Chief Accounts Officer
Construction-I
Southern Railway, Egmore
Chennai 600 008 (Presiding Arbitrator)
3. Sri V.Somasundaram
Chief Track Engineer/Track Procurement
and Machine Control
Southern Railway
Chennai 600 003 (Arbitrator)
4. Sri P.Sriram
Chief Bridge Engineer
Southern Railway
Chennai 600 003 (Arbitrator) .. Respondents 1 to 4
in O.S.A.No.463 of 2009

1. M/s Best Cast Construction (Private) Ltd.,
No.9, 6th Street, T.N.Nagar, Palanipet
Arakkonam 631 002, Tamil Nadu (Claimant)

2. Sri N.R.Rajasekaran
Financial Adviser and Chief Accounts Officer
Construction
Southern Railway
Chennai 600 008 (Presiding Arbitrator)
3. Sri V.Somasundaram
Chief Administrative Officer, Construction
East Coast Railway
Bhubaneshwar, Orissa (Arbitrator)
4. Sri P.Sriram
Principal Chief Engineer
South Western Railway Respondents 1 to 4
Hubli (Arbitrator) ... in O.S.A.No.464 of 2009

Memorandum of Grounds of Original Side Appeals under Clause 15 of the Letters Patent read with Section 37 of the Arbitration and Conciliation Act, 1996 and Order XXXVI Rule 1 of Original Side Rules against the judgments and decrees dated 8.6.2007 made in O.P.Nos.469 of 2002 & 315 of 2006 on the file of this Court.

For Appellants :: Mr.V.G.Sureshkumar
For Respondents :: Mr.K.K.Muralitharan for R1

JUDGMENT

D.MURUGESAN, J.

O.S.A.No.463 of 2009 is filed by Southern Railway represented by its Chief Engineer (Construction), Bangalore and O.S.A.No.464 of 2009 is filed by South Western Railway represented by its Chief Engineer (CN)/Central, Bangalore Cantonment, Bangalore questioning the common order dated 8.6.2007 dismissing the original petitions filed by the appellants. The parties are referred to as arrayed in these original side appeals.

2. The controversy arose under the following set of facts. By an agreement dated 4.8.99 entered into between the appellants and the first respondent, the contract for construction of road under bridge near Lottegollahalli, between Yeshwanthpur and Yellahanka was awarded in favour of the first respondent. Clause 24.6 of the special conditions of contract relates to vitiation clause and the same reads as under:-

"24.6. When ever vitiation of contract is likely to occur either due to increase or decrease in the quantities of certain item(s) the tenderer/contractor shall be paid for such items at a rate which being the one quoted by the other tenderer(s) whose offer would become the lowest due to the vitiation."

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The above clause was subsequently modified as under:-

"In the event of vitiation occurring due to increase or decrease in quantities amongst the

first, second and third lowest tenderers, the total value of the work as done shall be calculated at the rates offered by the three lowest tenderers and the amount payable shall be limited to the lowest aggregate value as worked out."

3. In terms of the above vitiation clause, the appellants started to recover monies from the bills of the first respondent by placing reliance on that clause. The first respondent approached this Court by filing O.A.No.535 of 2000 under Section 9 of the Arbitration and Conciliation Act, 1996 and sought for an order of injunction restraining the railway administration from invoking the vitiation clause and recovering monies from their bills pending conclusion of arbitration proceedings. That application was dismissed on 12.7.2000. The first respondent filed an appeal in O.S.A.No.233 of 2000 before a Division Bench of this Court and the Division Bench by order dated 28.9.2000 directed interim payment of a sum of Rs.10 lakhs to the first respondent and also directed the arbitral tribunal to enter upon the reference within a period of one week with a further direction that the tribunal should consider the matter of dispute framed in terms of the reference and in addition to the same, to consider the scope and applicability of vitiation clause. The tribunal was appointed by order dated 22.9.2000 constituting respondents 2 to 4. The arbitral tribunal made an interim award dated 27.2.2001 only in regard to the vitiation clause and held that the recoveries made towards the vitiation from the contractor for the work done so far to be refunded without interest. That interim award was questioned by the railway administration in O.P.No.469 of 2002.

4. Subsequently, by reason of poor performance of the contract by the first respondent, the contract was terminated at their risk and cost on 26.6.2001. A risk tender was also signed and the remaining work was entrusted to Modern Engineering Works, Nellore under letter of acceptance dated 12.9.2001. The unfinished portion of the work, calculated according to the rate quoted by the first respondent, worked out to Rs.1,35,50,685.94, whereas the risk tender for the same quantum of work was Rs.1,02,78,521.51. The arbitral tribunal passed a final award dated 21.5.2005 for a total sum of Rs.8,83,085.00 in respect of nine claims raised by the first respondent. In respect of scope and applicability of the vitiation clause, the tribunal held that the interim award formed part of the final award as well.

5. The appellants, though had accepted the final award for a sum of Rs.8,83,085.00, questioned that part of the award of the tribunal relating to the scope and applicability of vitiation clause before this Court by filing O.P.No.315 of 2006. Both the petitions were dismissed by the order under appeals.

6. We have heard Mr.V.G.Sureshkumar, learned counsel for the appellants and Mr.K.K.Muralitharan, learned counsel for the first respondent.

7. According to Mr.V.G.Sureshkumar, though the arbitral tribunal would be entitled to consider and give a finding as to a particular clause of the contract, it cannot give a finding that the particular clause itself is not applicable and in that event, it would amount to variation of the very contract and in that sense, the arbitral tribunal would be exceeding its jurisdiction. When the arbitral tribunal exceeds its jurisdiction, the power of judicial review is available. In this regard, the learned counsel relied upon a judgment of the Apex Court in Numaligarh Refinery Ltd. v. Daelim Industrial Company Ltd., (2007) 8 SCC 466, particularly paragraphs 17 and 19 of that judgment, and submitted that in a case where it is found that the arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law, then in that case there is no prohibition for the Court to set things right.

8. On the other hand, Mr.K.K.Muralitharan, learned counsel for the first respondent would submit that when the first respondent approached this Court on an earlier occasion, by order dated 28.9.2000, the Division Bench, among other directions, directed the tribunal to also consider the scope and applicability of vitiation clause. That order was passed on due representation to the appellants herein. Only in pursuance to the said order, the Tribunal had entered upon a reference and ultimately by interim award found that the recoveries made towards vitiation from the first respondent for the work done be refunded without invoking the vitiation clause. The final award was also passed on the same lines. Therefore, it cannot be now contended that the arbitral tribunal cannot go into that question. Secondly, all that the arbitral tribunal has found that the vitiation clause would give an impression that the railways had not made up their mind to indicate their intention in clear and definite terms to the tenderers. Even the railways were not sure as to what constitutes vitiation in a contract, when does it occur and how to avoid it and if it does occur during the execution of contract, how to regulate it. Hence, that being a finding on interpretation of a clause, the Court would not interfere in such finding.

9. Having regard to the above submissions, the question that arises for consideration is whether the arbitral tribunal would be justified in rendering a finding that the recoveries made from the first respondent towards vitiation should be refunded without invoking the vitiation clause and whether this Court could entertain any challenge to such an award in exercise of the power of judicial review.

10. In the judgment in Tarapore and Co. v. Cochin Shipyard Ltd., (1984) 2 SCC 680, while considering elaborately on the question as to when an award can be set aside, the Apex Court has observed as follows:-

"47. The discussion leads to the inescapable conclusion that specific question of law touching the jurisdiction of the arbitrator was specifically referred to the arbitrator and therefore the arbitrator's decision is binding on the parties and the award cannot be set aside

on the sole ground that there was an error of law apparent on the face of the award."

In *U.P.Hotels v. U.P.State Electricity Board*, (1989) 1 SCC 359, the Apex Court has observed as follows:-

"If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit it being set aside; and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance there is error in law which may be ground for setting aside the award.

If a question of law is specifically referred and it becomes evident that the parties desired to have a decision on the specific question from the arbitrator rather than one from the court, then the court will not interfere with the award of the arbitrator on the ground that there was an error of law apparent on the face of the award even if the view of law taken by the arbitrator did not accord with the view of the court. A long line of decisions was relied upon by this Court for that proposition."

11. In *M/s Sudarsan Trading Co., v. The Government of Kerala and another*, AIR 1989 SC 890, on a similar question, the Apex Court in paragraph-32 observed as follows:-

"32.....If an arbitrator, even in a non-speaking award decides contrary to the basic features of the contract, that would vitiate the award, it was held. It may be mentioned that in so far as the decision given that it was possible for the court to construe the terms of the contract to come to a conclusion whether an award made by the arbitrator was possible to be made or not, in our opinion, this is not a correct proposition in law and the several decisions relied by the learned Judge in support of that proposition do not support this proposition. Once there is no dispute as to the contract, what is the interpretation of that contract is a matter for the arbitrator and on which court cannot substitute its own decision."

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In *Himachal Pradesh State Electricity Board v. R.J.Shah & Co.*, (1999) 4 SCC 214, the Apex Court has observed as follows:-

"27. In this case, the arbitration clause is widely worded. The dispute which was referred to the arbitrators, inter alia, related to the construction of the contract. The contract did visualise the contractor raising a claim for revision of rates. The dispute was as to when such a claim could be raised. According to the appellant herein, this being an item rate contract the revision of rates could take place only in accordance with clause 12-A when there was a deviation of more than 20 per cent with regard to individual items. On the other hand, the terms of the contract, according to the claimant, permitted a claim being made of revision in rates if there was an increase of 20 per cent of the total value of the contract. The dispute before the arbitrators, therefore, clearly related to the interpretation of the terms of the contract. The said contract was being read by the parties differently. The arbitrators were, therefore, clearly called upon to construe or interpret the terms of the contract. The decision thereon, even if it be erroneous, cannot be said to be without jurisdiction. It cannot be said that the award showed that there was an error of jurisdiction even though there may have been an error in the exercise of jurisdiction by the arbitrators."

12. In *P.V.Subba Naidu v. Government of Andhra Pradesh*, (1998) 9 SCC 407, the Apex Court, while dealing with a case where the High Court had set aside a non-speaking award after construing the terms of the contract between the parties, allowed the appeal by holding that the High Court was not right in examining and interpreting the contract to see whether the claim was sustainable under the terms of the contract.

13. In fact the judgment in *Sudarsan Trading Company case* (supra) was quoted with approval by the Apex Court in *Continental Construction Ltd. v. State of U.P.*, (2003) 8 SCC 4. The very same view is also expressed by the Apex Court in *Pure Helium India (P) Ltd., v. Oil & Natural Gas Commission*, (2003) 8 SCC 593.

14. The above law laid down by the Apex Court would show that while an arbitrator is entitled to interpret a clause in the contract, he has to act within his jurisdiction. If the construction is within his jurisdiction and with reference to the terms of the contract as such, even if the construction is made in such a manner where another construction is also possible, the Court should not interfere with such interpretation of the arbitral tribunal, as it is only an error within the jurisdiction and in such case, the judicial review is not available. However, when an arbitral tribunal makes a construction which would amount to an act without jurisdiction or an interpretation on the clause of the agreement which is wholly contrary to law, in that event, the Court would be certainly entitled to set things right, as has been held by

the Apex Court in Numaligarh Refinery Limited case (supra) referred to by Mr.V.G.Sureshkumar.

15. It is a normal rule that the arbitral proceedings are only to ensure speedy resolution of a dispute. The Court would not interfere with an award as the scope is very limited to a case where the award was without jurisdiction, arbitrary, illegal and against the proceedings of law or on the ground of misconduct of the arbitrator.

16. Keeping the above in mind, the grievance of the appellants in these appeals must be considered. There is no dispute that the agreement in question is binding on the authority. However, whether a particular clause, namely, 26.4 of the agreement, could be given effect to in case of a dispute referred to an arbitrator, the arbitrator would be justified in considering that clause and to find out as to whether that particular clause could be given effect to or not. By interim award, the arbitral tribunal has held that the vitiation clause cannot be made applicable to the first respondent. The same view has been reiterated in the final award, though not in elaborate terms. While considering the findings of the arbitral tribunal, the learned Judge has held that the arbitral tribunal, while interpreting the vitiation clause in the interim award, has held that the general reading of these clauses would give an impression that the railways had not made up their mind to indicate their intention in clear and definite terms to the tenderers. The learned Judge has also observed that the findings of the arbitral tribunal stating that the railways could not produce any documentary evidence regarding policy, rules and guidelines as to what constitutes vitiation in a contract, when does it occur, how to avoid it and if it does occur during the execution of the contract, how to regulate it.

17. In the Numaligarh Refinery Limited case (supra) cited by Mr.V.G.Sureshkumar, the Apex Court had in fact observed that in the event the arbitrator has acted without jurisdiction and has put an interpretation on the clause of the agreement which is wholly contrary to law, the award can be interfered with. In our opinion, that judgment is not applicable to the facts of this case, as the arbitral tribunal has not acted without jurisdiction, as the tribunal was directed to go into the interpretation of the clause. Secondly, the finding as to the non-applicability of clause 26.4 of the special conditions of contract was on the above reason and it is not contrary to any law. Further, in our opinion, the Court should be very circumspect to set aside an award, as the Court generally must approach to uphold the award and not to upset it. In view of the well settled principles that even the interpretation of the clauses in a contract can be well within the realm of the tribunal and even when two interpretations are possible and the tribunal had adopted one interpretation, the Court would not interfere in such finding. In view of the above finding, the learned Judge is justified in not interfering with the award which conclusion, according to us, needs no interference in view of the limited scope of judicial review available for this Court under Section 34 of the Act.

18. For all the above reasons, we are not inclined to interfere with the impugned order. Accordingly, the original side appeals fail and they are dismissed. No costs.

ss

Sd/-
Asst. Registrar

//True Copy//

Sub Asst. Registrar

To

The Sub Assistant Registrar (O.S.)
High Court, Madras

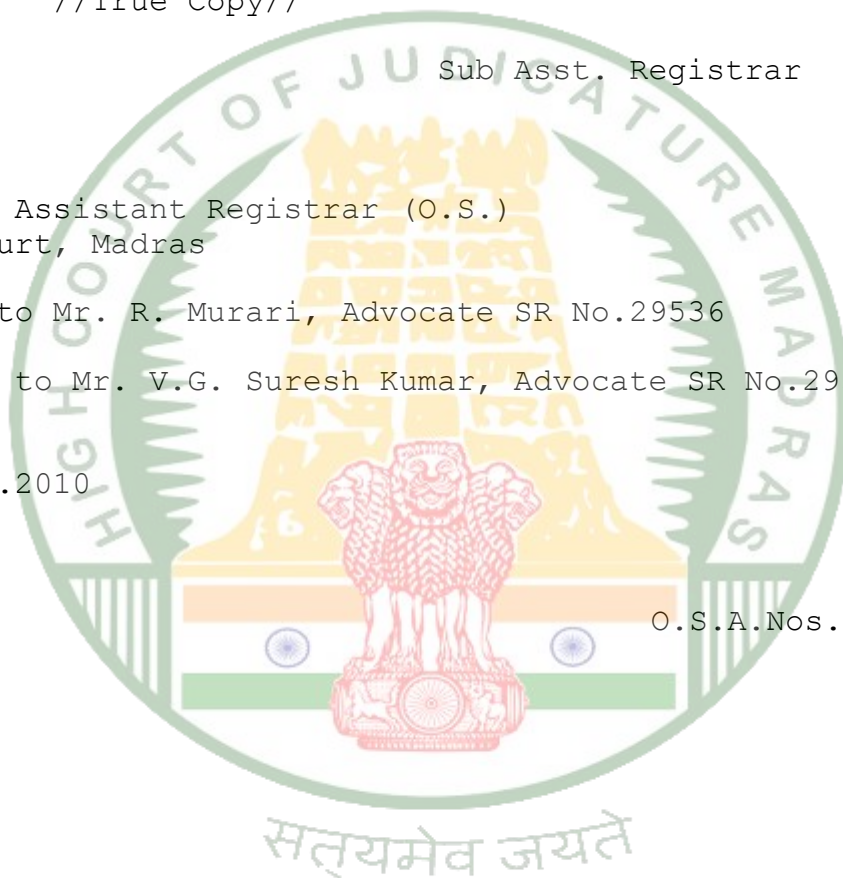
+ 1 cc to Mr. R. Murari, Advocate SR No.29536

+ 2 ccs to Mr. V.G. Suresh Kumar, Advocate SR No.29518, 29515

JSV(CO)
SR/28.5.2010

Judgment in

O.S.A.Nos.463 & 464 of 2009



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