HINDUSTAN CONSTRUCTION CO. LTD. A

v.

STATE OF JAMMU AND KASHMIR

AUGUST 28, 1992

[S. RANGANATHAN, V. RAMASWAMI AND B.P. JEEVAN REDDY, JJ.] B

Arbitration Act, 1940:

Sections 14, 29, 30 and 33—Award by Arbitrators—Interference with—When arises—Whether arbitrators competent to award interest from the date of award till date of payment. C

Civil Procedure Code, 1908:

Section 34—Award of interest Pendente lite—Applicability to proceedings before arbitrator. D

The appellant-company entered into a contract with the respondent-State for the construction of a bridge. Certain disputes which arose between them were referred to arbitration, in pursuance of a clause therefor in the contract. There were eight items of claims by the Contractor. The two joint arbitrators appointed for the purpose made an award allowing the entire claim of the appellant on items Nos. 1 and 2 and totally rejected the claims under items Nos. 3 and 7. Items Nos. 4, 5, 6 and 8 were allowed in part. E

There were further proceedings before the High Court under sections 30 and 33 of the Arbitration Act. A Single Judge made the award in respect of items Nos. 1, 4 and 6 a rule of Court, but set aside the award in respect of items Nos. 2 and 5. On items No. 8, he held that the arbitrators could not have awarded future interest upto the date of payment of the amounts awarded. Rejection of claims under item Nos. 3 and 7 was not challenged before the High Court. F G

The appeal by the contractor and the cross-objections by the State were dismissed by the Division Bench which, agreeing with the Single Judge, set aside the award on items No. 2 and 5 viz., dewatering of piers by more than one pump and refund of toll tax payment, on the ground that H

A it was in violation of express terms of the clauses of the contract between the parites. On the issue of interest claim i.e. items No. 8, the Court held that the power to award future interest (i.e. from the date of the award till the date of payment) was available only to the Court and not to the arbitrator.

B Hence the appellant-company filed two appeals before this Court in respect of item Nos. 2 and 5, and also the grant of future interest.

On behalf of the appellant, it was contended that in setting aside the award on items No. 2 and 5 the Court had overlooked that it was dealing C with a non-speaking award and travelled far beyond the scope of permissible grounds of judicial review of such an award; that in dealing with items No.5, the Division Bench considered itself at liberty to go beyond the award, take note of such reasons for the award as could proceed to examine whether those reasons were right or erroneous and, therefore, proceeded to place its own interpretation on clause 1.23 and condition 32 D of the contract, and having reached the conclusion that the interpretation placed by the arbitrators on the said clause was erroneous, proceeded to set aside that part of the award.

It was contended on behalf of the State that since these were items E covered by certain terms of the contract, the Court should look at those terms and interpret them.

Allowing the appeals, this Court,

HELD : 1. The arbitrator is competent to award interest for the F period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post award period is matter of procedure. Section 34 of the Code of Civil G Procedure, 1908 provides both for awarding of interest *pendente lite* as well as for the post-decree period and the principles of Section 34 has been held applicable to proceedings before the arbitrator, though the section as such may not apply. Therefore, the High Court was not right in setting aside the award of interest by the arbitrators. [303 B-D]

H *Secretary, Irrigation Department of Orissa* v. *G.C. Roy,* 1991 (6) J.T.

349, followed. A

Union of India v. *Bango Steel Furniture (P) Ltd.,* [1967] 1 SCR 324/329 and *Gujarat Water Supply & Sewage Board* v. *Unique Erectors,* [1989] 1 SCR 318, relied on.

2.1. The High Court was not correct in setting aside the award on B items No. 2 and 5 on the ground that there was an error apparent on the face of the award. The award is a non-speaking one and contains no reasoning which can be declared to be faulty. The scope of the Court's jurisdiction in interfering with a non-speaking award on the above ground in extremely limited. The arbitrators have just awarded amounts to the C contractor, against its claim, on items 2 and 5. They made no reference to the contract or any of its clauses. Even if, in fact, the arbitrators had interpreted the relevant clauses of the contract in making their award on the items in question and even if the interpretation is erroneous, the Court cannot touch the award as it is within the jurisdiction of the arbitrators to interpret the contract. Whether the interpretation is right or wrong, the D parties will be bound; only if the arbitrators set out their line of interpretation in the award and that is found erroneous can the Court interfere. [304 G-H; 305 A, G, H, 306 A-B]

Champsey Bhara & Co. v. *Jivraj Balloo Spinning & Weaving Co. Ltd.,* E L.R. 1922-50 I.A, 324, followed.

Sudarsan Trading Co. v. *Govt. of Kerala,* [1989] 1 SCR 665, relied on.

Absalom Ltd. v. *Great Western (London) Garden, Village society Ltd.,* 1933 A.C. 592 and *Glacoma Costa Fu Andrea* v. *British Italian Trading Co.* F *Ltd.,* 1962 (2) A.E.R. 53, referred to.

2.2. A non-speaking award can be considered and if necessary, interfered with on the ground of excess of jurisdiction also, and Courts sometimes rely on this ground to set aside an award, when actually what G they were embarking upon was an interpretation of the contract and a criticism of the arbitrator's approach thereto. It is clear that this is what has happened in the instant case. However, the instant case cannot be brought within the scope of the "excess of jurisdiction" rule either. The High Court has not rested its decision on any question of the arbitrator having exceeded his jurisdiction or travelled beyond the contract; it has H

A **clearly held it to be a case of "error apparent on the face of the award".**

[307 G-H; 308-A]

Sudarsan Trading Co. **v.** *Govt. of Kerala,* **[1980] 1 SCR 665, relied on.**

B **2.3. The clauses of the contract are not so clear or unambiguous as to warrant an inference that the interpretation placed on them by the arbitrators is totally unsustainable. Clause 19 does not prohibit the use of more than one pump for dewatering the well. It permits the pneumatic sinking of well in addtion to sinking of well by dredging methods and it is not known whether any dewatering would have been necessary in this** C **process. This is purely a technical matter and there is no material to hold that the arbitrators' interpretation was erroneous. If the arbitrators had accepted the plea of the contractor that the dewatering with more than one pump was authorised by the officials on the spot, the Court cannot interfere therewith. Likewise in Clause 1.28 and condition 32, the import of the words "tender amount shall exclude" is very ambiguous and the** D **parties were themselves not clear as to whether they wanted "toll tax" to be within this clause or outside its purview. Even reading the clauses and the award side by side, it is difficult to say that the arbitrators' interpretation is erroneous on the face of it. [308 B-E]**

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 940 of 1978.

From the Judgment dated 31.12.1975 of the Jammu & Kashmir High Court in Letters Patent Appeal No. 7 of 1973.

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AND

Civil Appeal No. 2868 Of 1977.

From the Order dated 25.4.1977 of the Jammu & Kashmir High G Court in Application No. 4 of 1976.

R.F. Nariman and P.H. Parekh for the Appellant.

Ashok Mathur for the Respondent.

H The Judgment of the Court was delivered by

RANGANATHAN, J. The appellant company entered into a contract with the Public Works Department of the Jammu & Kashmir Government for the construction of a bridge on the River Chenab at Baradari. Certain disputes arose between them which were referred to arbitration in pursuance of a clause therefor contained in the contract. The two joint arbitrators made an award on 24th October 1972. There were eight items of claim by the contractor which were put up for their consideration. They allowed fully the entire claim of the appellant on items nos.1 and 2 and totally rejected the claims under items nos. 3 and 7. The rest of the claims were allowed in part.

There were further proceedings before the Jammu & Kashmir High Court under Sections 30 and 33 of the Arbitration Act. The learned Single Judge made the award in respect of items nos. 1, 4, 6 a rule of Court but set aside the award in respect of items nos. 2 and 5. The rejection of the claim under items nos. 3 and 7 was not challenged before him. On item 8, he held that the arbitrators could not have awarded furture interest upto the date of payment of the amounts awarded. The contractors filed an appeal before the Division Bench and the State preferred a memorandum of cross-objections. Both the appeal and the cross-objections were dismissed by the Division Bench. Hence the present two appeals.

The contractors are aggrieved by the High Court's order on three of the claims made by them :

Item No.	Subject	Amount Claimed Rs.	Amount Awarded Rs.
2	Dewatering of piers by more than one pump	1, 26, 376.62	1, 26, 376.62
5	Refund of Toll Tax payment	2, 49, 595.39	2, 39, 204.67
8	Interest on the total amount of claim remaining unpaid at	9% p.a.	6% p.a. from date of reference (6.12.68) to date of payment or decree, whichever is earlier.

The High Court as mentioned earlier, set aside the award on items nos. 2 and 5 and also set aside the grant of future interest. These are the

A three issues before us.

In regard to item no. 2 above, the arbitrators had accepted the contractor's claim in full. The Division Bench, agreeing with the Single Judge, has set aside the award on this issue on the ground that it is in violation of an express clause of the contract between the parties which
B read thus :

> "19. The foundation wells will be sunk by open dredging methods only. If the grabs persistently done less than half full (i.e. not less than half a yd.) dewatering of wells and
> C removing the stratum by putting men inside will be resorted to only if the wells can be dewatered by 1 no. 6" x 6" pump without blowing. For sinking well in this manner the contractor will be paid extra rupees three per cft. of sinking done. If complete dewatering by 1 no. 6" x 4" (sic) pump without blowing of sand is not possible, pneumatic sinking
> D will be permitted for further sinking of the wells for which the contractors will be paid extra at rates quoted by them."

Likewise, in regard to item no.5, the Court set aside the award on the ground that it violated the terms of clause 1.28 and condition 32 of the
E contract which were in the following terms :

> "1.28 Tender amount shall exclude all quarry fees, royalties, terminal taxes and octroi duty if any payable for materials to be consumed on the work. No sales tax is payable by the contractor on constructional works. Any payments made
> F by the contractor on this account shall be reimbursed by the department on production of proper original vouchers.
>
> Condition 32. Tender amount will exclude all quarry fees, royalties, terminal taxes and octroi duty if any. No sales tax
> G is payable by the contractor on the constructional works. Any payments made by the contractor on such account shall be reimbursed by the department on production of proper original vouchers."

On the issues of interest (claim no.8) the Court held that the power
H to award furture interest (i.e. from the date of the award to the date of

payment) was available only to the Court and not the arbitrator. A

The question of interest can be easily disposed of as it is covered by recent decisions of this Court. It is sufficient to refer to the latest decision of a five-judge Bench of the Court in *Secretary, Irrigation Department of Orissa* v. *G.C. Roy,* (1991) 6 J.T. 349. Though the said decision deals with the power of the Arbitrator to award interest *pendente lite,* the principle of B the decision makes it clear that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest, for the period prior to a arbitrator entering upon the reference is a matter of substantive law, the grant of interest for C the post-award period is a matter of procedure. Section 34 of Code of Civil Procedrue provides both for awarding of interest *pendente lite* as well as for the post-decree period and the principle of Section 34 has been held applicable to proceedings before the arbitrator, though the section as such may not apply. In this connection, the decision in *Union of India* v. *Banoo* D *Steel Furniture (P) Ltd.,* [1967] 1 SCR 324/329 may be seen as also the decision in *Gujarat Water Supply & Sewage Board* v. *Unique erectors,* [1989] 1 S.C.R. 318 which upholds the said power though on a somewhat different reasoning. We, therefore, think that the award on item no.8 should have been upheld.

E

Now coming to the High Court's decision regarding items nos. 2 and 5, Sri Nariman, for the appellant contends that, in setting aside the award on these items, the Court has overlooked that it was dealing with a non-speaking award and travelled far beyond the scope of permissible grounds of judicial review of such an award. He draws our attention to F certain passages in the judgment of the Division Bench which, he submits, are contrary to the principles laid down in several decisions of this Court. In dealing with the award on items no.2, the Court observed :

> "The above cited passage from the award clearly shows that the determination of dispute between the parties by the arbitrators was based on consideration of documentary and oral evidence. Although that evidence has not been specially discussed in the award, yet, that evidence which has been perused and considered by the learned arbitrators for giving the award would, in our opinion, G H

A form part of the award and the larned Judge in Chambers could, therefore, look into all that evidence. The submission of the learned counsel therefore deserves to be repelled, as we do not find that the learned Judge committed any error in looking into the record accompanying the award while setting aside the awrd in respect of the B claim relating to item no.2."

Again, dealing with item no.5, the Division Bench considered itself at liberty to go beyond the award, take not of such reasons for the award as could be deduced from the record accompanying the award and proceed C to examine whether those reasons were right or erroneous. In this view, it proceeded to place its own interpretation on clause 1.28 and condition 32 of the contract, and having reached the conclusion that the interpretation placed by the arbitrators on the said interpretation placed by the arbitrators on the said clause was erroneous, proceeded to set aside that part of the award. Sri Nariman submits that in adopting this type of approach D to the issue the Division Bench was influenced by the following observations of Lord Wright in *Absalom Ltd.* v. *Great Western (London) Garden Village Society Ltd.,* (1933) A.C. 592 at 612 :

"As the action is to set aside the award for matter appearing E on its face the court is deparred from considering any matter which does not appear in the award itself or in documents incorporated in it. The award recited the contract between the parties and referred in terms to certain conditions of the contract namely clauses 26, 30 and 32; though these clauses are not set out in full, they must, I F think, be taken to be incorporated."

which represent a line of approach which has been specifically deviated from by our Courts.

G In our opinion, there is great force in the contentions urged by learned counsel. The High Court has set aside the award on the above items on the ground that there is an error apparent on the face of the award. This is clearly incorrect. The award is a non-speaking one and contains no reasoning which can be declared to be faulty. The scope of the Court's jurisdiction in interfering with non-speaking award on the above H ground is extremely limited. The rule of limitation in this respect was

enunciated by the Judicial Committee almost seven decades ago in *Champsey Bhara & Co.* v. *Jivraj Balloo Spinning & Weaving Co. Ltd.*, L.R. 1922-50 I.A. 324, in words which have been consistently and uniformly followed and applied in all subsequent decisions. Lord Dunedin said, after noting with disapproval certain attempts to extend the area of the court's interference with such an award:

> "An error in law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can they say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound. Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made. The only way that the learned judges have arrived at finding what the mistake was is by saying : "inasmuch as the arbitrators awarded so-and-so, and inasmuch as the letter shows that the buyer rejected the cotton, the arbitrators can only have arrived at that result by totally misinterpreting rule 52." But they were entitled to give their own interpretation to rule 52 or any other article, and the award will stand unless, on the face of it, they have tied themselves down to some special legal proposition which they, when examined, appears to be unsound."

The present case is precisely one of the same type as the one before the Judicial Committee. The arbitrators have just awarded amounts to the contractor, against its claims, on items 2 and 5. They make no reference to the contract or any of its clauses. Yet, the State contends that since these are items covered by certain terms of the contract, the Court should look at those terms and interpret them; if this is done, it is said, the State's interpretation is bound to be accepted and that apparently accepted by the arbitrators will be found to be wrong. It is this contention that has been accepted. This cannot be done. Even if, in fact, the arbitrators had inter-

A preted the relevant clauses of the contract in making their award on the impugned items and even if the interpretation is erroneous, the Court cannot touch the award as it is within the jurisdiction of the arbitrators to interpret the contract. Whether the interpretation is right or wrong, the parties will be bound; only if they set out their line of interpretation in the
B award and that is found erroneous can the Court interfere.

In going further and proceeding to consider the terms of the contract and their interpretation, the High Court was influenced by the decision in *Absalom Ltd.* v. *Great Western (London) Garden Village Society Ltd.,* (1933) A.C. 592. The ratio of this decision has been discussed and explained by
C the Court of Appeal in *Glacoma Costa Fu Andrea* v. *British Italian Trading Co. Ltd.,* (1962) 2 A.E.R. 53 and more recently by this Court (in a decision to which one of us was a party) in *Sudarsan Tarading Co.* v. *Govt. of Kerala,* [1989] 1 S.C.R. 665 at p.687. That decision, therefore, could not have been taken aid of to fault the award.

D

There is, however, apart from the existence of an "error apparent on the face of the award", another angle from which a non-speaking award can be considered by the Court and, if necessary, interfered with. This ground for impeaching a non-speaking award and its limitations have been
E explained by this Court in the *Sudarsan Trading Co,* case earlier referred to. Sabyasachi Mukherjee J. (at p. 685 of [1989] 1 S.C.R.) enunciated the rule and its limitation thus:

> "An award may be remitted or set aside on the ground that
> F the arbitrator in making it, had exceeded his jurisdiction and evidence of matters not appearing on the face of it, will be admitted in order to establish whether the jurisdiction had been exceeded or not, because the nature of the dispute in something which has to be determined outside
> G the award - whatever might be said about it, in the award or by the arbitrator. See in this connection, the observations of Russell on *The Law of Arbitration,* 20th Edn. 427. Also see the observations of *Christopher Brown Ltd.* v. *Genossenschaft Oesterreichischer etc.,* [1954] 1 QB 8 at p.10 and *Dalmia Dairy Industries Ltd.* v. *National Bank of Pakistan,*
> H [1978] 2 Lloyd's Rep. 223. It has to be reiterated that an

arbitrator acting beyond his jurisdiction - is a different ground from the error apparent on the face of the award. In Halsbury's *Laws of England* (4th Edn. Vol.2 para 622) one of the misconducts enumerated, is the decision by the arbitrators on a matter which is not included in the agreement or reference. But in such a case one has to determine the distinction between an error within the jurisdiction and an error in excess of the jurisdiction. See the observations in *Anisminic Ltd.* v. *Foreign Compensation Commission,* (1969) 2 AC 147 and *Regina* v. *Noseda, Field, Knight & Fitzpatrick,* [1958] 1 SLR 793. But, in the instant case the court had examined the defferent claims not to find out whether these claims were within the disputes referable to the arbitrator, but to find out whether in arriving at the decision, the arbitrator had acted correctly or incorrectly. This, in our opinion, the court had no jurisdiction to do, namely, substitution of its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. Whether a particular amount was liable to be paid on damges liable to be sustained, was a decision within the competency of the arbitrator in this case. By purporting to construe the contract the court could not take upon itself the burden of saying that this was contrary to the contract and, as such, beyond jurisdiciton. It has to be determined that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be exercised....."

The learned Judge further proceeds to point out that Courts are sometime persuaded to rely on this ground to set aside an award when, actually, what they were embarking upon was in interpretation of the contract and a criticism of the arbitrator's approach thereto. It is clear that this is what has happened in the present case also. We have already mentioned that the High Court has not rested its decision on any question of the arbitrator having exceeded his jurisdiction or travelled beyond the contract; it has clearly held it to be a case of "error apparent on the face of the award". In our view, the case cannot be brought within the scope of the "excess of jurisdiction" rule either.

A We would like to add that we have also heard arguments on the scope of the relevant clauses of the contract. It seems to us that the clauses are not so clear or unambiguous as to warrant an inference that the interpretation placed on them by the arbitrators is totally unsustainable. Cl.19 does not, as the High Court has said, seem to prohibit the use of more than one pump for dewatering the well. It permits the pneumatic B sinking of well in addition to sinking of wells by dredging methods and we are not aware whether any dewatering would have been necessary in this process. This is purely a technical matter and we have no material to hold that the arbitrators' interpretation was erroneous. The contractor has also contended that the dewatering with more than one pump was authorised C by the officials on the spot and, if the arbitrators had accepted this plea, the Court cannot interfere therewith. Likewise in Clause 1.28 and condition 32, the import of the words "tender amount shall exclude" is very ambiguous and indeed we find that the arguments at various stages indicate that the parties were themselves not clear as to whether they wanted "toll tax" to be within this clause or outside its purview. We do not consider it necessary D to discuss the matter further. We only wish to say that, even reading the clauses and the award side by side, it is difficult to say that the arbitrator's interpretation is erroneous on the face of it.

For the reasons discussed above we allow the appeals, set aside the E orders of the learned Single Judge and Division Bench of the High Court and direct the passing of a decree in terms of the award. We, however, make no order regarding costs.

N.P.V. Appeal allowed.