Indu Engineering & Textiles Ltd vs Delhi Development Authority on 11 July, 2001

Equivalent citations: AIR 2001 SUPREME COURT 2668, 2001 AIR SCW 2524, (2001) 5 JT 404 (SC), 2001 (7) SRJ 88, 2001 (2) ARBI LR 486, 2001 (4) LRI 132, 2001 (5) SCC 691, 2001 (3) COM LJ 325 SC, 2001 (4) SCALE 317, (2001) 2 ARBILR 486, (2001) 2 MAD LJ 624, (2001) 59 DRJ 481, (2001) 3 MAD LJ 111, (2001) 5 SUPREME 111, (2001) 3 RECCIVR 770, (2001) 4 ICC 702, (2001) 4 SCALE 317, (2001) 2 UC 259, (2001) 44 ALL LR 476, (2001) 3 CIVLJ 904, (2001) 3 CURCC 48, (2001) 92 DLT 485

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Bench: A.P.Misra, D.P.Mohapatra

CASE NO.:
Appeal (civil) 2881 of 1996

PETITIONER:
INDU ENGINEERING & TEXTILES LTD.

Vs.

RESPONDENT:
DELHI DEVELOPMENT AUTHORITY

DATE OF JUDGMENT: 11/07/2001

BENCH:
D.P.Mohapatro, A.P.Misra

JUDGMENT:

D.P.Mohapatra, J.

Whether the appellant, on the evidence on record, is entitled to the price of hard coke supplied by it to the respondent at the enhanced rate, is the controversy raised in this case. The dispute was referred to an arbitrator pursuant to the arbitration clause in the agreement entered by the parties. The arbitrator held in favour of the appellant and accepted its claim of Rs.234097.41. A single Judge of the Delhi High Court rejecting the objections raised by the respondent against the award, made it

rule of the court. On appeal, the Division Bench of the High Court reversed the order of the single Judge and set aside the award passed by the arbitrator. As such the claimant is in appeal before this court challenging the judgment of the Division Bench of the High Court.

The factual matrix of the case leading to the present proceeding may be shortly stated thus: The Delhi Development Authority (for short 'DDA'), respondent herein, floated a tender enquiry on 30th January, 1981 for supply of hard coke. M/s.Indu Engineering & Textiles Ltd., appellant herein, submitted its offer for supply of the material in response to the said notice on 12th February, 1981. The offer letter contained a price escalation clause to the following effect:

> "Our prices are based on the prevailing prices of pig iron, premium hard coke and ferro- silicon as announced by the Joint Plant Committee, Bharat Coking Coal Ltd., or any other agency authorised for this purpose, plus sales tax, cost of transportation and handling from main producers to our works at Agra. Any upward revision in the prices of pig iron, hard coke and ferro-silicon shall have corresponding effect on our prices as per formula given below.
>
> Such revision in prices shall be effective from all material in transit, or tendered for inspection immediately from the date of announcement of revised prices by J.P.C., Bharat Coking Coal Ltd., etc."

The tenders were opened by the respondent on 20th February, 1981. On 14th February, 1981 there was an escalation of the price of hard coke notified by Coal India Ltd. (a subsidiary of Bharat Coking Coal Ltd.). The price escalation was published in the newspapers on 1st March, 1981. On 16th April, 1981 negotiations were held with the parties who submitted offers, pursuant to which rates in respect of supply of ferro-silicon and the price escalation in respect of the same were reduced/dropped. However, the escalation clause with regard to premium hard coke and pig iron (no dispute in this proceeding) was maintained with certain modification. Regarding price escalation it was stated as follows :

> "Price Escalation: We agree to modify this clause to the same form as accepted by the Department in the previous tender with Indo- Swedish Pipes from whom this factory was bought by us. Under that escalation clause, escalation is payable only on statutory increase in prices of pig iron and premium hard coke."

On 6th May, 1981 the respondent communicated its acceptance with the following clause regarding price escalation:

> "Enhancement and deduction in pipes to be regulated on the basis of the pig iron and hard coke price of JPC and Bharat Coking Coal Ltd."

This was followed by a confirmation letter by the appellant in which it was specifically stated that the escalation clause shall be effective for any increase/decrease after the date of the tender i.e. 12th February, 1981. The agreement incorporating the price escalation clause was signed between the

parties on 14th May, 1981. When the appellant submitted bills for the hard coke and pig iron supplied to the respondent at the escalated price with effect from 14th February, 1981 the respondent denied its liability to pay the enhanced price for hard coke while admitting the liability for the escalated price in respect of pig iron. A dispute therefore, arose between the parties. The dispute was referred to the arbitrator - Shri Banarasi Dass, Superintendent Engineer by Engineer Member, DDA. The arbitrator, by a reasoned award passed on 16.5.1985, accepted the claim of the appellant in respect of the three items of claim including the claim in respect of hard coke (item no.2). The respondent raised an objection to the award only in respect of item no.2 i.e. hard coke. A single Judge of the High Court by the order passed on 7.4.1989 remitted the matter to the arbitrator for fresh decision after taking into consideration the effect of the letter dated 9.6.1982. Pursuant to the said decision the arbitrator passed the award dated 3.10.1989 after hearing both the parties. He gave detailed reasons in support of the award accepting the claim of the appellant in respect of item no.2. He gave reasons for not accepting the letter dated 9.6.1982 as binding on the appellant holding that it was obtained after an year of the agreement and under duress and that the offer dated 12th February, 1981 itself was sufficient to justify the claim of the appellant. By the order dated 20th February, 1995 a single Judge of the High Court rejected the objections filed by the respondent against the award and made the award dated 3.10.1989 rule of the court. The respondent filed the appeal, FAO(OS) 219/95, against the said order which was allowed by a Division Bench of the Court holding inter alia that the award of the arbitrator accepting the claim of the appellant for escalated price of hard coke was without evidence. The Division Bench held inter alia that in the negotiations held on 16.4.1981 between the parties the price of hard coke as quoted by the appellant was not increased. The Division Bench further held that the price escalation clause agreed to on 16.4.1981 would have prospective application i.e. increase in price after that date. Recording its finding that there was no evidence or material before the arbitrator whatsoever for grant of the escalation dated 14.2.1981 in price of hard coke the Division Bench declined to accept the contention raised on behalf of the appellant that it had no awareness of the increase dated 14.2.1981 when it submitted the tender on 12.2.1981 since the firm is very much in this line of business. It was further held that the price escalation clause which was modified did not include the enhancement made on 14.2.1981. On such discussion, the Division Bench held that the case was one of no evidence. The Division Bench rejected the contention raised on behalf of the appellant that the respondent in similar circumstances having accepted the escalation in price of pig iron should not decline to grant similar claim in respect of hard coke, holding that by conceding to the claim in respect of pig iron it could not be said that the respondent agreed to pay the escalated price for hard coke. The scope for interference by the court with an award passed by the arbitrator is limited. Section 30 of the Arbitration Act, 1940 (for short 'the Act') provides in somewhat mandatory terms that an award shall not be set aside except on one or more of the grounds enumerated in the provision. The three grounds set out in the Section are :

> (a) that an arbitrator or umpire has misconducted himself or the proceedings;
>
> (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under Section 35;

(c) that an award has been improperly procured or is otherwise invalid.

Interpreting the statutory provision Courts have laid stress on the limitations on exercise of jurisdiction by the Court for setting aside or interfering with an award in umpteen cases. Some of the well recognised grounds on which interference is permissible are :

1) Violation of principle of natural justice in passing the award;

2) Error apparent on the face of the award;

3) The arbitrator has ignored or deliberately violated a clause in the agreement prohibiting dispute of the nature entertained;

4) The award on the face of it is based on a proposition of law which is erroneous, etc. In U.P.Hotels and Others vs. U.P.State Electricity Board, (1989) 1 SCC 359, this Court in paras 17& 18 observed as follows:

"17. It appears that the main question that arises is : whether the decision of this Court in Indian Aluminium co.vs. Kerala State Electricity Board (1975) 2 SCC 414 case was properly understood and appreciated by the learned Umpire and whether he properly applied the agreement between the parties in the light of the aforesaid decision. It was contended that the question whether the sums payable under clause 9 included discounts. On the aforesaid basis it was contended that there was an error of law and such error was manifest on the face of the award. Even assuming, however, that there was an error of law in arriving at a conclusion, such an error is not an error which is amenable to correction even in a reasoned award under the law. Reference may be made to the observations of this Court in Coimbatore District P.T.Samgam v. Bala Subramania Foundry (1987) 3 SCC 723, where it was reiterated that an award can only be set aside if there is an error on its face. Further, it is an error of law and not mistake of fact committed by the arbitrator which is justiciable in the application before the court. Where the alleged mistakes or errors, if any, of which grievances were made were mistakes of facts if at all, and did not amount to error of law apparent on the face of the record, the objections were not sustainable and the award could not be set aside. See also the observations of this Court in Delhi Municipal Corpn. Vs. M/s.Jagan Nath Ashok Kumar, (1987) 4 SCC 497, where this Court reiterated that reasonableness of the reasons given by an arbitrator in making his award cannot be challenged. In that case before this Court, there was no evidence of violation of any principle of natural justice, and in this case also there is no violation of the principles of natural justice. It may be possible that on the same evidence some court might have arrived at some different conclusion than the one arrived at by the arbitrator but that by itself is no ground for setting aside the award of an arbitrator. Also see the observations in Halsbury's Laws of England, 4th edn., Vol.2, at pages 334 and 335, para 624, where it was reiterated that an arbitrator's award may be set aside for error of law appearing on the face of it, though that

jurisdiction is not lightly to be exercised. 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.

18. It was contended by Mr.F.S.Nariman, counsel for the appellant, that a specific question of law being a question of construction had been referred to the Umpire and, hence, his decision, right or wrong, had to be accepted. In view of Clause 18, it was submitted that in this case a specific reference had been made on the interpretation of the agreement between the parties, hence, the parties were bound by the decision of the Umpire. Our attention was drawn to the observations of this Court in M/s.Hindustan Tea Co. v. M/s.K.Sashikant & Co.,1986 Supp SCC 506, where this Court held that under the law, the arbitrator is made the final arbiter of the dispute between the parties, referred to him. The award is not open to challenge on the ground that the arbitrator has reached a wrong conclusion or has failed to appreciate facts. Where the award which was a reasoned one was challenged on the ground that the arbitrator had acted contrary to the provisions of Section 70 of the Contract Act, it was held that the same could not be set aside."

This Court, while dealing with the power of courts to interfere with an award passed by arbitrator, had consistently laid stress on the position that an arbitrator is a Judge appointed by the parties and as such the award passed by him is not to be lightly interfered with. In the case on hand the only question that arose for consideration was whether the appellant was entitled to claim the enhanced price of hard coke for the quantity supplied by it to the respondent. Under the contract a specific quantity of the material was to be supplied during the period fixed under the agreement. Right from the beginning while submitting the tender the appellant had included a price escalation clause in which it was stipulated that any escalation of the price after submission of the tender will entitle the supplier to claim higher price from the other party. This clause was subsequently revised only to the effect that the price escalation will be applicable when there is statutory enhancement in the price of the commodity. No dispute was raised before the arbitrator or the court that the escalated price claimed by the appellant was not the statutorily enhanced price of hard coke. It was also not in dispute that even accepting the appellant's claim for escalated price of the commodity, it was entitled to the claim only in respect of a part of the quantity supplied and not the entire quantity. In these circumstances, the arbitrator had not attached importance to the non-mention of the enhanced price of hard coke in course of negotiations between the parties. The view taken by the arbitrator, in the circumstances of the case, was a plausible one and the same could not be said to be suffering from any manifest error on the face of the award or wholly improbable or perverse one. As such it was not open to the court to interfere with the award within the statutory limitations laid

down in Section 30 of the Act. The single Judge, therefore, rightly declined to interfere with the award passed by the arbitrator and made it rule of the court.

As noted earlier, the Division Bench in appeal filed under Section 39 of the Act, reversed the order passed by the single Judge and set aside the award holding that there was no material before the arbitrator for accepting the claim of the appellant. The Division Bench exceeded the limits of its jurisdiction in entering into the facts of the case and in interpreting the agreement between the parties and correspondence which was a part of the said agreement. What was the price of the commodity to be paid by the respondent to the appellant was essentially a question of fact. Even assuming that the arbitrator had committed an error in coming to the conclusion that the appellant was entitled to the claim of the escalated price of the commodity (hard coke) under the terms of the agreement and the Division Bench felt that the conclusion should have been otherwise, it was not open to it to interfere with the award on that score. Another fallacy committed by the Division Bench in the judgment is recording the finding that the escalation clause in the agreement had prospective operation with effect from 14.5.1981 i.e. the date on which the agreement was entered into by the parties. As noted earlier, under the agreement a specified quantity of the commodity was to be supplied by the appellant to the respondent within the period specified in the agreement and the appellant, while submitting its tender, had made it clear that any subsequent upward change in price of the commodity will entitle it to claim at such rate and subsequently the price escalation clause was modified in a manner not relevant for deciding the dispute referred to the arbitrator, the question of the price escalation clause having prospective effect was of no consequence. If the claimant was entitled to the enhanced price the respondent was liable to pay the same for the entire stock supplied. If the position was otherwise, the claim of the appellant was to be rejected in toto.

On the discussions in the foregoing paragraphs, we are clearly of the view that the Division Bench of the High Court erred in setting aside the award passed by the arbitrator which was made rule of the court by the single Judge. In the result, the appeal is allowed. The judgment dated 15.5.1996 in FAO (OS) 219/95 is set aside and the order of the single Judge dated 20.2.1995 in Suit No.944 of 1985 is confirmed. No costs.