Hindustan Construction Co. Ltd. vs State Of Jammu And Kashmir on 28 August, 1992

Equivalent citations: AIR1992SC2192, 1992(2)ARBLR412(SC), 1992(II)OLR(SC)387, 1992(2)SCALE427, (1992)4SCC217, [1992]SUPP1SCR297, 1992(2)UJ750(SC), AIR 1992 SUPREME COURT 2192, 1992 AIR SCW 2647, (1992) 2 APLJ 17.2, (1992) 2 LS 23, (1992) 4 SCR 297 (SC), 1992 (4) SCR 297, 1992 (2) UJ (SC) 750, 1992 (2) ARBI LR 412, 1992 (4) SCC 217, 1992 UJ(SC) 2 750, (1992) 5 JT 325 (SC), (1992) 2 ARBILR 412, (1992) 2 ORISSA LR 387, (1992) 48 DLT 230

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Bench: S. Ranganathan, B.P. Jeevan Reddy

ORDER

S. Ranganathan, J.

1. 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.

2. 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 future 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.

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

---------- Amount
---------- Item
S u b j e c t C l a i m e d A w a r d e d N O . R s . R s .
---------- 2
Dewatering of piers 1,26,376.62, 1,26,376.62 by more than one pump 5 Refund of Toll Tax 2,49,595.39 2,39,204.67 payment 8 Interest on the total 9% p.a. 6% p.a. from date of amount of claim reference (6.12.68) remaining unpaid at to date of payment or decree, whichever is earlier.

4. 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 three issues before us.

5. 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 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 removing the stratum by putting men inside will be resorted to only if the wells can be dewatered by 1 No. 6" × 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" × 4" (sic) pump without blowing of sand is not possible, pneumatic sinking 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 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 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 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.

6. On the issues of interest (claim no.8) the Court held that the power to award future interest (i.e. from the date of the award to the date of payment) was available only to the Court and not the arbitrator.

7. 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 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 the post-award period is a matter of procedure. Section 34 of Code of Civil Procedure 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 Steel Furniture (P) Ltd. may be seen as also the decision in Gujarat Water Supply and Sewage Board v. Unique erectors 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.

8. 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 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, form part of the award and the lamed 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 award in respect of the claim relating to item No. 2.

9. 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 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 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 on its face the court is departed 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 think, be taken to be incorporated.
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> which represent a line of approach which has been specifically deviated from by our Courts.

10. 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 ground is extremely limited. The rule of limitation in this respect was enunciated by the Judicial Committee almost seven decades ago in Champsey Bhara and Co. v. Jivraj Balloo Spinning and 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.

11. 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 interpreted 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 award and that is found erroneous can the Court interfere.

12. 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 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 Trading Co. v. Govt. of Kerala . That decision, therefore, could not have been taken aid of to fault the award.

13. 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 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 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 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 Q B 8 at p. 10 and Dalmia Dairy Industries Ltd. v. National Bank of Pakistan [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 and Fitzpatrick [1958] 1 SLR 793. But, in the instant case the court had examined the deferent 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 damages 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.

14. 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. C1ause 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 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 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 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.

15. For the reasons discussed above we allow the appeals, set aside the 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.