

Union Of India vs Jain Associates on 19 April, 1994

Equivalent citations: 1994 SCC (4) 665, JT 1994 (3) 303

Author: K. Ramaswamy

Bench: K. Ramaswamy, N Venkatachala

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
JAIN ASSOCIATES

DATE OF JUDGMENT 19/04/1994

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
VENKATACHALA N. (J)

CITATION:
1994 SCC (4) 665 JT 1994 (3) 303
1994 SCALE (2) 604

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by K. RAMASWAMY, J.- Special leave granted.

2. The respondent had entered into a contract on 7-1-1983 to construct 13 units of Type-V Quarters at the estimated cost of Rs 27,34,000. He was to complete the construction and hand over possession on 13-8-1984. Despite extension of the time on 7 occasions, finally up to 30-6-1988, the construction was not completed resulting in termination of the contract. As up to 34th bill the appellant paid to the respondent a sum of Rs 24,34,100.91 ps. towards the executed work. The contractor laid proceedings under Section 20 of the Arbitration Act, 1940 (for short 'the Act') for reference to arbitrate the disputes. The joint arbitrators appointed thereon entered upon reference

on 10-4-1989 and nominated Mr A. Biswas, the second respondent as an umpire. Since the joint arbitrators could not make and publish the award within the time, the umpire was called upon to enter upon the reference. Accordingly on 25-4-1990 the umpire had entered upon the reference and made an interim award on 26-7-1990 for a sum of Rs 6,02,000. The contractor laid his claim for a sum of Rs 37,37,885. The appellant laid counter-claim for Rs 9,49,701.50 ps. On 3-9-1990 the appellant requested the umpire to consider the counter-claim. On 4-9-1990, the umpire refused to consider the counter-claim on the ground of belated counter-claim. On request the time to make and publish the award was extended up to 31-1-1991. The umpire held finally sitting on 19-12-1990 (it is disputed across the bar by the contractor) and he made the award on 24-12-1990 for a sum of Rs 24,18,320 in favour of the contractor. The umpire also awarded interest at 18% up to 10-4-1989 and post-award interest. He did not grant any pendente lite interest. The appellant challenged the award on diverse grounds under Sections 30 and 33 of the Act. Ultimately the Division Bench of the Calcutta High Court in Appeal No. 453 of 1991 dated 16-9-1992 confirmed the award for a sum of Rs 20,07,320 and awarded pendente lite interest. On a review, it was held by an order dated 4-2-1993 that the Bench committed mistake in thinking that the umpire granted pendente lite interest and is a mistake of fact and law but had confirmed the pendente lite interest on its power. Thus these two appeals, with a delay of 137 days in filing the appeal against original judgment. The delay is condoned.

3. The learned Solicitor General contended that the Division Bench having held that the umpire committed illegality in awarding damages twice over on claims 11 and 12, though the contractor was entitled to damages only in respect of one claim, committed manifest error of law in upholding the entire award. The fact that the umpire had committed illegality in awarding damages twice over would indicate his non-application of judicious mind to the claims in an objective manner. In a non-speaking award it is difficult to decide how he adjudged the claims. Thereby he committed misconduct which entails the setting aside of the award as a whole and the doctrine of severability becomes inapplicable to the facts of this case. His next contention was that under clause 62 of the general conditions, certain matters were to be finally determined by the Railways and the arbitrator lacked jurisdiction to decide these claims and thereby the award gets vitiated by manifest illegality on its face. There was sufficient time for the arbitrator, even after the extended time to make the award in respect of the counter-claim. But was not done, which would also prove the non-application of judicious mind in an objective and dispassionate manner and thereby the award gets vitiated by misconduct committed by the umpire. The 3rd contention is that the court lacked power to award pendente lite interest by operation of Section 29 of the Act. Shri Soli Sorabjee, the learned Senior Counsel for the respondent-contractor contended inter alia that though the award is a non-speaking award since the umpire granted each claim separately, the claims on items 11 and 12 are severable from the rest of the award. The High Court upheld the highest of the two claims granted by the umpire. The claim for loss of profits on item 11 and for damages on item 12 are distinct and separate concepts. The umpire, therefore, was justified to grant separate amounts on each of the claims which would show active consideration and application of the mind. Hence it is not a misconduct. Even otherwise they are severable from the rest of the award, which could be sustained. The grant of pendente lite interest by arbitrator was not a settled principle till the Constitution Bench decision of this Court in *Secretary, Irrigation Department v. G. C. Roy* was rendered. Earlier Division Bench of this Court in *Executive Engineer (Irrigation) v. Abhaduta Jena* 2

where it was held that arbitrator had no power to award interest pendente lite, was overruled. In this twilight zone of law, the arbitrator did not award interest pendente lite. In view of the Constitution Bench judgment in G. C. Roy case, the grant of pendente lite interest by the court is legal. Even otherwise if this 1 (1992) 1 SCC 508 2 (1988) 1 SCC 418:(1988) 1 SCR 253 Court finds that the High Court committed illegality in granting interest pendente lite the matter requires remittance to the umpire, for fresh decision in this behalf. Similarly on the counter-claim, it was contended, that no counter-claim in fact was laid, although belatedly a counter-statement was made, as found by the umpire. This point was not argued before the Single Judge nor seriously disputed before the Division Bench. Even otherwise, this dispute also could be remitted to the umpire for reconsideration.

4. The first question that arises for consideration is whether the court could award interest pendente lite. Section 29 of the Act says that insofar as award is, for the payment of money, the court may in the decree, order interest from the date of the decree at such rate as it deems reasonable, to be paid on the principal sum adjudged by the award and confirmed by the decree. In *Srikantia & Co. v. Union of India*³ it was held that Section 29 carries with it the negative import that it shall not be permissible to the court to award interest on the principal sum adjudged in the award for a period prior to the date of the passing of the decree. The same principle was reiterated in *Ram Singh v. Ram Singh*⁴. Section 29 of the Act empowers the court, that where the award is for payment of money, to grant reasonable rate of interest on the principal amount adjudged and confirmed in the decree, only from the date of the decree. Section 34 CPC empowers the court, where there is a decree for payment of money to grant interest pendente lite and future, till the date of realisation. Since Section 29 of the Act enables the court to grant interest on the principal amount adjudged in the award and confirmed in the decree only from the date of the decree, it carries a negative import with it that the court has no power to grant interest pendente lite. The High Court, therefore, was not right in granting interest pendente lite, which the arbitrator himself had not granted.

5. The second question relates to rejection of the counter- claim. It is seen that the point was taken before the Single Judge that counter-claims were laid before the arbitrator. The record also discloses that the appellant laid counter- claim. On 4-9-1990 the umpire refused to consider the counter-claim. It is further seen that the parties mutually agreed to extend time to enable the arbitrator to make and publish the award by 31-1-1991. Whether or not the final sitting was held on 19-12-1990, the fact remains that there was ample time for the umpire to consider the counter-claim of the appellant and pass appropriate award in that behalf. But he failed to do so. This would bear upon the finding on second question raised by the parties and shows that the rejection of counter-claim was unwarranted.

6. The crucial question is whether the umpire committed misconduct by non-application of mind to the claims and counter-claims and of its consequences. Claim 11 is founded upon the allegations of delay, laches, negligence and default on the part of the appellant, said to have resulted in loss of profits to the contractor in a sum of Rs 4,93,696 and the umpire 3 AIR 1967 Bom 347 4 AIR 1985 Raj 148 : 1984 WLN 572 awarded Rs 4,11,400. Claim 12 again founded upon the self same alleged laches and negligence of the appellant for the damages suffered by the contractor in a sum of Rs 12,00,000 and the umpire awarded Rs 6,00,000. The High Court found in its judgment that "there

is much substance in the submission of the learned counsel for the petitioner that the umpire has given damages twice over against the same claim though shown as two claims, namely, claims 11 and 12 and the claimant is not entitled to both the claims due to damages".

"There is an error of law as well as fact" but "in the interest of justice and fair play the lesser amount of Rs 4,11,400 against claim 11 is omitted and Rs 6,00,000 towards claim 12 is retained". Section 73 of the Contract Act provides that when a contract has been broken, the party which suffers by such breach is entitled to receive from the party which has broken the contract, compensation for any loss or damages caused to him thereby which naturally arose in the usual course of things from such breach. A perusal of both the claims would show that claim 11 is founded on loss of profits and claim 12 is founded for damages, based upon delay, laches and negligence alleged against the appellant, resulting in breach of the contract. In other words the contractor claimed compensation for breach of contract arising under Section 73 of the Contract Act. The respondent, it is held by the Division Bench, is given same type of damages twice over and that holding is not challenged by respondent. Yet the question is whether the umpire had applied his mind in a judicious manner so as to bind the parties by his award made on various claims. In Law of Arbitration, by Justice Bachawat, a former Judge of this Court at p. 316, it is stated that:

"An arbitrator is not a conciliator. His duty is to decide the question submitted to him according to the legal rights of the parties and not according to what he may consider fair and reasonable."

Russell on Arbitration, 20th Edn. at p. 318 also lays the same principle.

7. In K.P. Poullose v. State of Kerala⁵ this Court held that misconduct under Section 30(a) does not connote a moral lapse. It comprises legal misconduct which is complete if the arbitrator, on the face of the award, arrives at an inconsistent conclusion even on his own finding, by ignoring material documents which would throw abundant light on the controversy and help in arriving at a just and fair decision. It is in this sense that the arbitrator has misconducted the proceedings in the case. In that case the omission to consider the material documents to resolve the controversy was held to suffer from manifest error apparent ex facie. The award was accordingly quashed. In Dandasi Sahu v. State of Orissa⁶ this Court held that the arbitrator need not give any reasons. The award could be impeached only in limited circumstances as provided under Sections 16 and 30 of the Act. If the award is disproportionately high having regard to the original claim made and the totality of the circumstances it would certainly be a case of non- application of mind amounting to legal misconduct and it is not 5 (1975) 2 SCC 236 : 1975 Supp SCR 214 6 (1990) 1 SCC 214 possible to set aside only invalid part while retaining the valid part. In other words the doctrine of severability was held inapplicable in such a situation. It is, therefore, clear that the word 'misconduct' in Section 30(a) does not necessarily comprehend or include misconduct of fraudulent or improper conduct or moral lapse but does comprehend and include actions on the part of the arbitrator, which on the face of the award, are opposed to all rational and reasonable principles resulting in excessive award or unjust result or the like circumstances which tend to show non- application of the mind to the

material facts placed before the arbitrator or umpire. In truth it points to fact that the arbitrator or umpire had not applied his mind and not adjudicated upon the matter, although the award professes to determine them. Such situation would amount to misconduct. In other words, if the arbitrator or umpire is found to have not applied his mind to the matters in controversy and yet, has adjudicated upon those matters in law, there can be no adjudication made on them. The arbitrator/umpire may not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. Misconduct is often used, in a technical sense denoting irregularity and not guilt of any moral turpitude, that is, in the sense of non- application of the mind to the relevant aspects of the dispute in its adjudication. In *K. V. George v. Secretary to Government, Water & Power Department, Trivandrum*⁷ this Court held that the arbitrator had committed misconduct in the proceedings by making an award without adjudicating the counter-claim made by the respondent. In *Indian Oil Corpn. Ltd. v. Amritsar Gas Service*⁸ the counter-claim was rejected on the ground of delay and non-consideration of the claim, it was held, constituted an error on the face of the award.

8. The question therefore is whether the umpire had committed misconduct in making the award. It is seen that claims 11 and 12 for damages and loss of profit are founded on the breach of contract and Section 73 encompasses both the claims as damages. The umpire, it is held by the High Court, awarded mechanically, different amounts on each claim. He also totally failed to consider the counter-claim on the specious plea that it is belated counter-statement. These facts would show, not only the state of mind of the umpire but also non-application of the mind, as is demonstrable from the above facts. It would also show that he did not act in a judicious manner objectively and dispassionately which would go to the root of the competence of the arbitrator to decide the disputes.

9. It is true that if the bad portion of the award is severable from the good part the court may set aside the bad part and uphold the rest of the award. But when it hinges upon the state of mind of the arbitrator or the umpire, the award being a non-speaking award, it is not reasonably certain as to what part of the award is good and vice versa. And if such a part cannot be separated then the whole award must be declared as invalid and it would be set aside on the ground of misconduct under Section 30(a) of the Act. 7 (1989) 4 SCC 595 8 (1991) 1 SCC 533, 544

10. In Russell on Arbitration at p. 485, it is stated thus:

"The bad portion however must be clearly separable in its nature in order that the award may be good or the residue. Where it is divisible is the faulty direction will alone be set aside or treated as null."

At p. 486 it is stated that:

"If the objectionable portion in the award is inseparable from the rest, on not so clearly separable that it can be seen that the part of the award attempted to be supported is not at all affected by faulty portion, the award will be altogether avoided."

In *Basant Lal Banarsi Lal v. Bansi Lal Dagdulal*⁹ this Court finding that the contract in question was illegal and prohibited by law and consequently the award made under the arbitration clause this Court held that the award was one and inseparable from the rest of the disputes covered by it and the disputes might not have legally and validly been referred, the whole award was rightly set aside. In *Jivarajbhai Ujamshi Sheth v. Chintamanrao Bala ill'* this Court found that it was impossible to sever the award since the arbitrator had committed not a mere error of fact or law in reaching its conclusion, the entire award was set aside. In *Mattapalli Chelamayya v. M. Venkataratnam*¹¹ this Court held that where a severable part of an award cannot be given effect to for a lawful reason, there is no bar to enforce the part to which effect could be justly given. The same principle was reiterated in *Upper Ganges Valley Electricity Supply Co. Ltd. v. U.P. Electricity Board*¹² holding (SCR at p. 115 : SCC pp. 260-61) that the mere error which occurred in the award of the umpire relating to matter which is distinct and separate from the rest of the award, the part which is invalid being severable from that which is valid, there was no justification for setting aside the entire award.

11. It is clear from the above facts and legal position that the arbitrator committed misconduct in non-application of his mind in deciding claims 11 and 12. It being a non-speaking award, it is difficult to find whether he had applied his judicious mind in deciding which of the two claims the respondent would be entitled to, in particular, on the finding of the High Court in this behalf. Therefore, the award in respect of claims 11 and 12 is set aside. The order of the High Court to award Rs 6,00,000 stands set aside, Since the counter-claim was not considered the matter requires determination. Accordingly the rejection of the counter-claim would be treated as a nil award of the counter-claim and for the above reasons it stands set aside and the matter is remitted to be adjusted afresh. The decree of the High Court granting interest pendente is also set aside.

12. The appeals are accordingly allowed to the above extent and the judgment of the Division Bench of the High Court stands modified and cited 9 (1961) 2 SCR 780: AIR 1961 SC 823 10 (1964) 5 SCR 480: AIR 1965 SC 214 11 (1972) 3 SCC 799 : AIR 1972 SC 1125 (para 12) 12 (1973) 1 SCC 254 : (1973) 3 SCR 107 award of the severable part stands confirmed accordingly. In the circumstances parties are directed to bear their own costs.