# Rustees Of The Port Of Madras vs Engineering Constructions ... on 14 August, 1995

## Equivalent citations: 1995 AIR 2423, 1995 SCC (5) 531, AIR 1995 SUPREME COURT 2423, 1995 (5) SCC 531, 1995 AIR SCW 3584, (1995) 3 CIVLJ 702, (1995) 3 SCJ 571, 1995 (6) JT 48

## Author: B.P. Jeevan Reddy

## Bench: B.P. Jeevan Reddy, S.C. Agrawal

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           PETITIONER:
RUSTEES OF THE PORT OF MADRAS

        Vs.

RESPONDENT:
ENGINEERING CONSTRUCTIONS CORPORATION LIMITED

DATE OF JUDGMENT14/08/1995

BENCH:
JEEVAN REDDY, B.P. (J)
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JEEVAN REDDY, B.P. (J)
AGRAWAL, S.C. (J)

CITATION:
 1995 AIR 2423            1995 SCC  (5) 531
 JT 1995 (6)    48        1995 SCALE  (4)742


ACT:



HEADNOTE:



JUDGMENT:
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J U D G M E N T B.P.JEEVAN REDDY.J. The facts of this case remind us of what this Court observed in M/s.Guru Nanak Foundation V. M/s.Rattan Singh and Sons (1981 (4) S.C.C.634):

> "Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for

> resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 (Act for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the courts been clothed with legalese of unforseeable complexity.This case amply demonstrates the same ".

The facts speak for theselves.

The Board of Trustees, Madras Port Trust, invited tenders in the year 1957 for certain works at the port. Clause (4) of the Instructions for tender stipulated that the tenderer is required to indicate clearly in the letter forwarding the tender any deviation from the conditions and specifications mentioned in the Instructions. Clause (7) provided that until a formal agreement was entered into, the tender together with the Board's acceptance thereof shall constitute the binding contract between the parties, The respondent submitted its tender on November 11, 1957 along with a letter specifying certain deviations. The main deviation suggested was that the thirty months' period specified for completing the work shall be subject to such delays as are due to causes beyond their control. In case of such delays, the respondent claimed to be entitled to not only extension of time but also to compensation. It further specified that the Board should make available to it the requisite foreign exchange for importing the plant and machinery required for executing the work. Soon thereafter, it was realised by both the parties that foreign exchange would not be released to the respondent for purchasing machinery on its own account. Then parties then agreed that the Board should import the said machinery on its own account and should hire it out to the respondent for execution of the said work. The respondent's tender was accepted by the Board on October 6, 1958. A formal contract was sent by the Board to the respondent for its signature. The respondent suggested several modification and alternations which according to it were necessary to truly reflect the consensus arrived at between them. The modifications and alternations pertained mainly to the supply of imported plant and machinery and the spares. Certain correspondence passed between the parties but the Board refused to agree to any change in the draft agreement. On April 9, 1960 the respondent signed the agreement without incorporating the modifications suggested by it.

There were delays in importing the machinery. As against a period of about six months envisaged by the parties, it took about twelve months for importing the entire machinery. It was hired out to the respondent and it completed the work within the extended period, asked by it and granted by the Board. The total contract value was Rupees one crore and sixty three lakhs. After the work was completed, the respondent raised a dispute claiming additional amount on account of the delay in supplying the machinery and on certain other counts. It claimed a total amount of Rs.14,93,654.78p. In terms of the arbitration clause contained in the contract, the respondent nominated Sri W.S.Krishnaswamy Naidu, a retired judge of the Madras High Court as its arbitrator. The Board nominated another retired Judge of the Madras High Court, Sri Somasundaram, as its nominee. Since the arbitrators could not agree among themselves, they designated Dr. P.V. Rajamannar,

retired Chief Justice of the Madras High Court, as the umpire. The learned umpire heard both the parties, took the material adduced by them and made a speaking award on October 30, 1965.

Though the amount claimed by the respondent was under

> several heads, the main head - and with which alone we are concerned in these appeals - is the delay on the part of the Board in importing the machinery which according to the respondent has caused loss to it and for which, it says, the Board is bound to compensate. The Board denies that it undertook an obligation to import machinery within a particular period. According to them, the period of six months' was only a rough estimate or an expectation, as it may be called. They submitted that the extra payment of nine percent of the contract price agreed upon by the Board and the contractor was not only intended to cover delays caused due to causes such as suspension of work, failure to give possession of site, failure to supply in time primary material and services etc. but also the delays, if any, caused in supplying the imported machinery and spares. They denied their liability to compensate the contractor on any of the grounds claimed by it.
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> In view of the statements of claim filed by the parties, the arbitrators settled as many as fourteen issues. When the matter was referred to the learned umpire, he adopted the said issues and recorded the following findings:
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> (a) Issues 1 and 2: The offer of the Board to import the equipment and spares was not by way of gratuitous service to the contractor as contended by the Board.
>
> (b) Issues 3 and 7: There was no undertaking by the Board to supply to the respondent the imported machinery within a period of six months from the date of acceptance of the tender (from October 6, 1958). The Board was not responsible for the delay in the supply of plant and machinery.
>
> (c) Issue Nos.8 and 12: The reservations made by the contractor in respect of the disputed claims were unilateral but even so the said claims fall within the ambit of matters in dispute for arbitration. The contractors were not precluded from putting forward their claim for compensation on the ground of delayed supply of imported plant and machinery.
>
> (d) Issue No.13: The matters in dispute under reference fell within the scope of the arbitration clause contained in the agreement between the Parties.
>
> (e) Issue No.9: The grant of extension of time by the Board was only to relieve the contractor from payment of penalty under the contract and to enable it to draw its bills and obtain payments without audit objections.

(f) Issues 10,11 and 14: The contractor was not entitled to payment of any compensation.

(The learned umpire did not record any findings on issues 4 to 6.) The learned umpire further held that in case the respondent was found entitled to any compensation, a sum of Rupees five lakhs would represent a fair compensation for the delays in the supply of imported plant and machinery and that another sum of Rupees one lakh would be the reasonable compensation for the delay on other grounds like inclement weather, break-down etc. O.P.No. 276 of 1965 was filed by the appellant-Board for making the award a rule of the court. The respondent- contractor filed O.P.No. 213 of 1966 for setting aside the award under Sections 16, 30 and 33 of the Arbitration Act. The objections raised by the respondent fell under two heads, viz., (i) mis-conduct of the umpire in conducting the proceedings and (ii) error apparent on the face of the award. Both the O.Ps. were considered by a learned Single Judge of the Madras High Court, Palaniswamy,J., who substantially agreed with the reasoning contained in the award and made it a rule of the court over-ruling the objections raised by the respondent. The respondent carried the matter in Letters Patent Appeal to the Division Bench of the High Court which allowed the appeal, set aside the award and remitted the matter to the learned umpire for fresh consideration of the matter in the light of their judgment. Since the judgment of the Division Bench is questioned herein, it is necessary to notice first the several findings recorded by the Division Bench:

(i) the learned umpire was right in holding that the respondent-contractor was entitled to and was well within its rights in seeking a decision on their claim for compensation under the disputed heads by reference to arbitration.

(ii) The learned umpire was equally right in holding that the undertaking by the appellant_Board to import the machinery and parts was not a gratuitous one but an undertaking which had the effect of creating certain rights and obligations.

(iii) the learned umpire was also right in holding that the supply of imported machinery did not fall within the ambit of 'services' contemplated by the contract, though it is true that the learned umpire did not record a finding on the question whether the extra payment of nine percent over the contract price was relatable to the respondent's claim for compensation on account of the delay in supplying the imported machinery.

(iv) It is true that the claim of the respondent-

contractor did not arise from the contract but only from other correspondence that passed between the parties. Even so, "the undertaking by the Board to secure the plant and equipment from abroad was undoubtedly an obligation in the nature of a promise and was an event which had a material bearing on the completion of the project and the time-factor relating to the contract. So much depended upon the making available of the plant to the Contractors, as without such machinery, some of the items of the contract work could never have been executed by the Contractors. In such circumstances, the undertaking given by the Board to import and supply the plant cannot be left out

of reckoning when the rights and obligations of the contracting parties in terms of the contract arise for determination. Even so, it would be futile for the Board to contend that its undertaking was not related to any time-stipulation and its obligation was an unfettered one". The letter written by the Chief Engineer (Exh.33) did state "that it would take about six months from the date of intimation of order for procurement of .....machinery". In view of this letter, the Board cannot now contend that its undertaking "was an unfettered one and free of all time limit. Even if the time stipulation of six months is not to be rigidly construed, yet the rule in Section 46 of the Contract Act would govern the situation and the Board must be held obliged to make available the machinery within a reasonable time. A delay of 12-1/2 months in the supply of the machinery which, as already stated above, has been certified by the Chief Engineer of the Board, can never be construed as due compliance with the obligations within a reasonable time".

(v) "on an analysis of the situation, we are of the opinion that the undertaking given by the Board to import the plant and equipment and make them available to the Contractors was in the nature of an implied undertaking and though, in the very nature of things, the Board could not have supplied the machinery within a precise and accurate time limit, yet the Board was under a bounden duty to have supplied the machinery within a reasonable time. When the Board failed to supply the machinery within a reasonable time, the Contractors were left with no other alternatives but to complete the work and then call upon the Board to compensate them for the loss occasioned by it."

(vi) The respondent-contractor was in error in contending that the failure of the Board to supply the machinery within the prescribed time was a breach of an express provision of the terms of contract between the parties. It is really a breach of an implied promise which is indeed the stand taken by the counsel for the respondent- contractor before them (Division Bench). On the basis of implied contract theory, the stand of the respondent "is unassailable and the Board has necessarily to face the situation which developed on account of its inability to supply the machinery in time and the resultant loss to the Contractors".

On the basis of the above findings, the judgment of the learned Single Judge was set aside and the matter was remitted to the learned umpire for a fresh consideration in the light of the said judgment.

The findings recorded by the Division Bench clearly disclose that they set aside the award made by the learned umpire not on the ground mis-conduct on the part of the learned umpire but on the ground that the learned umpire did not correctly appreciate the nature of the obligation undertaken by the Board in the matter of importing and supplying the machinery to the respondent for completing the work. The Division Bench recognised that there was no firm commitment by the Board to import and supply the machinery within six months from the date of acceptance of the tender or from the date of intimation of order for procurement of the said machinery, as the case may be, yet it found, applying the principle of Section 46* of the

---------- *Section 46 of the Contract Act reads:"Where by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time .

EXPLANATION: The question what is a reasonable time is , in each particular case, a question of fact."Contract Act that the said obligation had to be performed within a reasonable time. It opined that since the machinery was not supplied within, what ins opinion was, the reasonable time, the contractor is entitled to compensation for the loss suffered by its opinion was, the reasonable time, the contractor is entitled to compensation for the loss suffered by it. The Bench opined that inasmuch the respondent was obliged to maintain his staff and other paraphernalia for some extra period on account of the said delay in supplying the machinery, he must have incurred extra expense, for which he must be reimbursed by the appellant.

We called upon the learned counsel for the respondent to tell us on which recognised ground did the Division Bench set aside the award. This was for the reason that the Division Bench did not itself specify the ground on which it was setting aside the award. The answer of the learned counsel was, "error apparent on the face of the award". This necessitates an examination of the parameters of the said ground particularly in the context of a reasoned award.

In the decision, frequently referred to in the later decisions both in England and in this country, Hodokinson v. Fernie (140 English Reports 712), Williams,j., observed:

> "I am entirely of the same opinion. The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, you have constituted your own tribunal; you are bound by its decision. The only exceptions to that rule, are cases where the award is the result of corruption or fraud, and one other,which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Thought the propriety of this latter may very well be doubted, i think it may be considered as established."

This decision was followed by the privy Council in yet another of_cited decision, Champsey Bhara and Company V. Jivraj Balloo Spinning and Weaving Co.Ltd (A.I.R. 1923 P.C.66). The Privy Council observed:

> "An error in law on the face of the award means, in their Lordship's 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 then 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 then, when examined, appears to be unsound."

Both the above decisions were cited with approval by the constitution Bench of this Court in Raipur Development Authority V. Contractors (1989 (3) S.C.R.144). The Constitution Bench clarified that "the ground arising out of an error of law apparent on the face of the award prima face appears to fall either under Section 16(1) (c) of the Act, which empowers the Court to remit the award to the arbitrator where an objection to the legality of the award if it is otherwise invalid'"Certain earlier decision of this Court supporting the said view were then referred to by the Constitution Bench, which it is unnecessary for us to re- produce.

The above decisions make it clear that the error apparent on the face of the award contemplated by Section 16(1) (C) as well as Section 30(c) of the Arbitration Act is an error of law apparent on the face of the award and not an error of low on the face of the award means an error of law which can be discovered from the award itself or from a document actually incorporated therein, A note of clarification may be appended viz., where the parties choose to refer a question of law as a separate and distinct matter, then the Court cannot interfere with the award even if the award lays down a wrong proposition of law or decides the question of law referred to it in an erroneous fashion, Otherwise, the well settled position is that an arbitrator "cannot ignore the law or mis-apply it in order to do what he thinks is just and reasonable". [See Thawardas Perumal v. union of India (1955 (2) S.C.R.48)].

We may now refer to a few decisions to point out how the said concept of error of law apparent on the face of the award has been understood in the case of a reasoned award. In other words, we have to examine whether an erroneous interpretation placed by the arbitrator upon the relevant terms/clauses of the contract can be treated as an error of law apparent on the face of the award. In Raipur Development Authority, the Constitution Bench opined that an award cannot be set aside in India on the ground that it does not contain reasons therefor. But, at the same time,it observed, "of course, where reasons are given in support of the awards and those reasons disclose any error apparent on the face of the record people have not refrained from questioning such awards before the courts". The said principle was reiterated by a three judge Bench of which of one us (S.C. Agrawal, J.) was a member, in S.Harcharan Singh V. Union of India (A.I.R. S.C.945). Referring to Raipur Development Authority, the observed:

> "It has been held that an arbitrator or umpire is under no obligation to give reasons in support of the decision reached by him unless under the arbitration agreement or the deed of submission he is required to give such reasons and if the arbitrator or umpire chooses to give reasons insupport of his decision it is open to the Court to set aside the award if it finds that an error of law has been committed by the arbitrator or

> umpire on the face of the record on going through such reasons..."

The Court Further observed:

> "While considering the claim of the appellant the arbitrator was required to consider the terms of the contract and to construe the same. It was, therefore, permissible for the arbitrator to consider whether C1.12 of the contract enables the Engineer-in-charge to require the appellant to execute additional work without any limit or a reasonable limit should be placed on the quantity of the additional work, which the appellant may be required to execute at the rate stipulated for the main work under the contract .....The Arbitrator was entitled to do so (awarding additional amount to the contractor) on the construction placed by him on C1.12 of the contract and , and therefore, it cannot be said that in awarding the sum of Rs.52,800/- for the additional work, Arbitrator has exceeded his jurisdiction and the award is vitiated by an error of jurisdiction."

This was so observed in the context of the principle that "the jurisdiction of the arbitrator is limited by the reference and if the arbitrator has assumed jurisdiction not possessed by him, the award to the extent to which it is beyond the arbitrator's jurisdiction would be invalid and liable to be set aside".

In Hindustan Construction Co. Ltd. v. State of Jammu and Kashmir (1992 (4) S.C.C.217), a Three-Judge Bench comprising one of us (B.P. Jeevan Reddy, J.), dealing with a non-speaking award observed thus: "even if, in fact, the arbitrators and 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 interpreters 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". The above principle, of course, is subject to the proposition aforesaid, viz., that the Arbitrator being a creature of the contract must operate within the four corners of the contract and cannot travel beyond it either by mis-interpreting the terms of the contract or otherwise.

In Bijendra Nath Srivastava v. Mayank Srivastava and Ors. (1994 (6) S.C.C.117), it was held by us:

> "If the arbitrator or umpire chooses to give reasons in support of his decision it would be open to the court to set aside the award if it finds that an error of law has been committed by the arbitrator umpire on the basis of the recording of such reasons. The reasonableness of the reasons given by the arbitrator cannot, however, be challenged. The arbitrator is the sole judge of the quality of the evidence and it will not be for the court to take upon itself the task of being a judge of the evidence before the arbitrator. The court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal. [See Champsey Bhara and Co. v. Jivraj Balloo Spq. and Wvg. Co. Ltd. (AIR 1923 PC 66);

Jivarajbhai Ujamshi Sheth v.

Chintamanrao Balaji (1964 (5) SCR 480); Sudarshan Trading Co.v. Govt. of Kerala (1989 (2) SCC 38); Raipur Development Authority v. Chokhaman Contractors (1989 ((2) SCC 721); and Santa Sila Devi V. Dhirendra Nath Sen (1964 (3) SCR 410)."

Reference may also be made to the observations in Champsey Bhara, quoted hereinabove, holding that the arbitrators were entitled to place their own interpretation upon Rule 52 or any other article (of the Bombay Cotton Trade Association Limited) and that the award would still stand unless on the face of it, they have tied themselves down to some legal proposition which when examined appears to be unsound.

The proposition that emerges from the above decision is this: in the case of a reasoned award, the court can interfere if the award is based upon a proposition of law which is unsound in law. The erroneous proposition of law must be established to have vitiated the decision. The error of law must appear from the award itself or from any document or note incorporated in it or appended to it. It is not permissible to travel beyond and consider material not incorporated in or appended to the award. Now let us examine the award concerned herein from the above point of view and see whether it suffers from any error or law apparent on the face of the award. We have gone through the award of the learned umpire- a man of great learning and eminence, Dr. P.V. Rajmannar - very carefully. All that the learned umpire has done is to refer extensively to the correspondence that passed between the parties and the other material placed before him and infer therefrom that the appellant- Board did never make a firm commitment nor did it ever undertake to import and supply the machinery within a particular period much less within a period of six months. The learned umpire remarked:

"There is no mention of this period of six months in the relevant minutes of the meetings of the Tender Committee; but it is fairly clear that this period was mentioned during the discussions. The Board's case which we find set out in some of their letters is that the period of six months was only an approximate time within which they expected the plant and machinery might be available. But the Board would not and did not undertake definitely to supply the plant and machinery not later than six months from 6.1.1058, the date of the order to commence work. There is no oral evidence relating to this matter and there is no sufficient material in the correspondence to warrant the conclusion that there was a term of the contract which bound the Port Trust to deliver to the Contractors the plant and machinery within six months. Even at the time when the two alternative proposals were placed before the Contractors, it was impressed on them that the proposals for the Board itself to import the plant and machinery would involve delay. Obviously, it was not for the Board to be certain of the extent of the delay. The Board might have thought that it would not take longer than six months for the arrival of the equipment. I am unable it find any default or remissness on the part of the Board in taking steps to get the equipment. It was as much to their interest as to the Contractor's that the plant should be available as early as possible. Otherwise, the completion of the work would

> be delayed. There is no suggestion of any malafide act or negligence on the part of the Board in the procurement of the equipment. It should also be mentioned that the Contractors themselves took some time before they could give detailed specifications. Taking all the circumstances into consideration, I hold that there has been no breach of any Board because of the late arrival of the plant and machinery."

The finding of the learned umpire is thus based upon the material placed before him by both the parties and was a pure finding of fact. Now, the Division Bench does not say that the correspondence that passed between the parties or that the materials placed before the arbitrator and referred to in the award establishes that the Board undertook a firm commitment to supply the machinery within six months from the date of acceptance of the tender (October 6, 1958) - assuming that it could say so. (We are, of course, of the firm opinion that it was not open to the Division Bench to re-appraise the evidence/material before the learned umpire and come top a different finding of fact.) What the Division Bench says is that though there was no such firm commitment, "the Board was under a bounden duty to have supplied the machinery within a reasonable time" applying the principle of Section 46 of the contract Act. The Bench finds that the delay that has occurred in supplying the machinery is unreasonable and on that basis holds that the contractor is entitled to compensation. With great respect, we are unable to agree with this approach. Apart from the fact that this theory of duty to supply within a reasonable time was not put forward before the learned umpire- it is neither referred to by the learned umpire, nor does it constitute the basis of his award - the finding recorded by the learned umpire (viz., that the period of six months was only a rough estimate, an expectation, within which the Board thought it could import the machinery) is inconsistent with the theory of obligation to import within a reasonable time. The learned umpire has also found that the contractors themselves took some time before they could give detailed specifications of the machinery and parts required for carrying out the work. The Bench did not also find - it was not even suggested by anyone - that the Board was guilty of any deliberate delay or of any negligence or that it was remiss in taking steps required for importing and/or importing and/or supplying the machinery. The master did not lay in its hands. In such a situation, there was no room for importing the theory of reasonable time and for punishing the Board for something of which it was not guilty. Secondly, the explanations to Section 46 makes it abundantly clear that "the question what is a reasonable time is, in each particular case, a question of a fact". The question whether the machinery was imported and supplied to the contractor within a reasonable time or not was thus a question of fact and not a question of law. No such contention was raised before the learned umpire nor did he record a finding on the said aspect. it was not open to the Division Bench to record the said finding of fact, for the first time, at the stage of letters patent appeal and hold on that basis that the Board is guilty of not performing its obligation within a reasonable time. In short, this is not a case where the Division Bench has interfered on the ground that the award suffers from an error of law apparent on the face of award. This is a case where a new ground - and that too factual in nature - was made out for the first time at the letters patent appeal stage for setting aside the award, a reading of the judgment of the Division Bench shows that the Bench approached the matter as if it was sitting in first appeal over the award. The judgment does not even indicate on which recognised ground is it setting aside the award. It does not say either that the award is vitiated by an error of law apparent on the face of it nor does it say that the learned umpire was guilty of any misconduct in conducting the proceedings or otherwise. We are of the firm opinion that this could not have been done.

For the above reasons, the appeals are allowed, the impugned judgment of the Division Bench is set aside and the judgment of the learned Single Judge is restored. The respondent shall pay the costs of the appellant throughout.