

V.G. GEORGE
v.
INDIAN RARE EARTHS LTD. AND ANR.

APRIL 8, 1999

[S. RAJENDRA BABU AND S.N. PHUKAN, JJ.]

Arbitration Act, 1940 :

Section 30(a)—Misconduct by arbitrator—Award beyond the scope of the agreement—Agreement provided that contractor would be responsible for negotiations with the land owner and local public whose land needed to be used for mining—Arbitrator awarding a sum on account of claim of the contractor for obstruction by the land owners and local public—Held, the award clearly beyond the scope of the agreement—Arbitrator misconducted with the proceedings and the High Court rightly set aside the award.

Section 30(a)—Escalation—There was no escalation clause in the agreement—Finding of the arbitrator that contractor was not pressurised to agree to a 10% hike in the wages of the mining worker and on the other hand he observed that the contractor acceded to a raise in the wages—Held, the arbitrator exceeded the jurisdiction—Case of misconduct existed when the award is contrary to the findings of the arbitrator.

Award—Findings when part of the award—Where the award contains not only the sum awarded but also the case of the parties, the issues framed and findings on each issue—Held, the findings on the issue are part of award and the court can look into the findings.

Award—When can be set aside—The arbitrator derives its jurisdiction from the contract and if he exceeds his jurisdiction the award can be set aside—In case of misconduct on the face of award, court can interfere—If the arbitrator has given reason disclosing an error apparent on the face of it, the award can be interfered.

The appellant-contractor entered into an agreement with Respondent No. 1 for mining, collection and supply of raw sand at the average rate of 920 tonnes per day. Out of an agreed supply of 2,02,000 tonnes of raw-sand, appellant supplied only 1,72,489.24 tonnes. The disputes between the parties were referred to the arbitration of Respondent No. 2.

A Before the arbitrator the appellant made claims under 10 heads. One of the grievances of the appellant was that he suffered due to obstruction by *Kudikidappukars* and the general public. However, Clause (c) of the tender notice stipulated that the appellant would be responsible for obtaining consent of the landowners concerned and entering an agreement with them and that Respondent No. 1 would not be liable to compensate against any claim by the landowners. The arbitrator gave a clear finding that the appellant was not responsible for settling problems created by strangers like *kudikidappukars* and the local public. However, a sum on this account was awarded by the arbitrator.

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C The claim of escalation was also awarded by the arbitrator although there was no escalation clause in the agreement. On the other hand, arbitrator recorded a finding that the contractor was not pressurised by Respondent No. 1 to agree to a 10% hike in the wages of the mining worker and on the other hand he observed that the contractor had acceded to a raise in the wages.

D

The objections filed by Respondent No. 1 was dismissed and the award was made rule of the court. On appeal, the High Court set aside the award except for the finding that the appellant was entitled to refund of the earnest money deposited by him. Hence this appeal by the contractor.

E It was contended by the appellant that the award was a non speaking award and the High Court erred in law in going into the facts of the case.

Dismissing the appeal, this Court

F HELD : 1.1. Law is well settled that if the award is non-speaking, court can look into the question as to whether arbitrator has travelled beyond the scope of the contract as he derives his jurisdiction from the contract and if the arbitrator exceeds his jurisdiction the award can be set aside . An award can also be set aside in case of misconduct apparent on the face of the award. It can also be interfered with if the arbitrator has given reasons for the award disclosing an error apparent on the face of it. [535-E-F]

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State of Orissa v. M/s. Lall Brothers, [1988] 4 SCC 15; *State of Andhra Pradesh & Ors. v. R.V. Rayanim & Ors.*, [1990] 1 SCC 433 and *Associated Engineering Co. v. Government of Andhra Pradesh & Ors.*, relied on.

H 1.2. An award contains not only the sum awarded but also the case of

the parties, issues framed, findings on each issue, and therefore, the findings of the arbitrator on the issues are part of the award and the court can look into the findings. [537-H] A

2.1. Claim No. 3 deals with the obstructions and in this respect the arbitrator has come to the finding that the entire mining area covered with tender was made available to the appellant but mining was not possible for some days on account of obstructions by *kudikidappukars* and local public. While awarding the amount the arbitrator did not take note of Clause (c) of the tender notice which is a part of the agreement and under which the respondent would not be liable for such obstruction. Therefore, the amount awarded under Claim No. 3 is beyond the scope of the agreement entered into between the parties and, therefore, the awarded amount in respect of Claim No. 3 cannot be sustained. [538-B-C] B C

2.2. Claim No. 9 is not in respect of escalation. It is not disputed that there was no escalation clause in the agreement entered into between the parties. The arbitrator has come to a clear finding that the appellant was pressurised by Respondent No. 1 to agree to 10% hike in the wages of the mining workers as recorded in the findings. The amount awarded under Claim No. 9 is not only beyond the scope of the agreement but also contrary to the findings recorded by the arbitrator. [538-D-E] D

2.3. Therefore, the arbitrator has misconducted himself in the proceedings and, therefore, the award is liable to be set aside on the ground of legal misconduct of the arbitrator under Section 30 of the Arbitration Act, 1940. [538-F] E

State of Andhra Pradesh & Ors. v. R.V. Rayanim & Ors., [1990] 1 SCC 433 and *Associated Engineering Co. v. Government of Andhra Pradesh & Ors.*, relied on. F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4273 of 1989.

From the Judgment and Order dated 25.5.87 of the Kerala High Court in M.F.A. No. 161 and 781 of 1986. G

T.L. Vishwanatha Iyer, Fazlin Anam and E.M.S. Anam for the Appellant.

G.B. Pai and Mrs. Meera Mathur for M/s. JBD & Co. for the Respondents.

The Judgment of the Court was delivered by H

A **S.N. PHUKAN, J.** This appeal is directed against the common judgment and order dated 25.05.1987 passed in M.F.A. No. 161 of 1986 and 781 of 1986 by the High Court of Kerala.

For the purpose of appreciating the points urged in this appeal we may briefly state the facts.

B The appellant herein, who is a mining contractor entered into an agreement with respondent No. I namely Indian Rare Earths Ltd. for mining, collection and supply of raw-sand during the period from 1.6.1979 to 31.5.1980. It was agreed between the parties that appellant would supply 2,02,000 tonnes of raw-sand at the average rate of 920 tonnes per day. The appellant failed to supply entire quantity and supplied only 1,72,489.24 tonnes. The disputes between the parties were referred to the arbitrator, who has been made a party in the present appeal namely respondent No. 2.

C Before the arbitrator the appellant claimed Rs. 24,02,272/under 10 heads along with interest. A counter claim was also filed by respondent No. I for Rs. 3,29,648.99 paise alongwith interest . The arbitrator framed as many as 51 issues and after recording his findings a sum of Rs. 5,40,191.10 paise with interest @ 15% per annum from 11.11.82 upto the date of decree was awarded in favour of the appellant. The award was made a rule of the Court on a petition filed by the appellant under Section 17 of the Arbitration Act, 1940 (for short the Act). The respondent No. I also filed a petition under Section E 30 of the Act which was dismissed.

Two appeals were filed before the High Court and the High Court by the common impugned judgment and order held that there was legal misconduct on the part of the arbitrator and accordingly set aside the award except the finding that the present appellant was entitled to refund of the earnest money deposited. Hence the present appeal.

F We have heard Mr. T.L. Vishwanatha Iyer, Sr. learned counsel for the appellant and Mr. G.B. Pai, Sr. learned counsel for the respondents.

G Before we enter into the contentions raised in the case in hand, we may refer to the decisions of this Court. The case in hand it has to be stated that we are concerned with Clause(a) of Section 30 of the Arbitration Act which empowers the Court to set aside an award on the ground that an arbitrator or umpire has misconducted himself or the proceedings.

H *In State of Orissa and others v. M/s. Lall Brothers*, [1988] 4 SCC 153

this Court inter alia held that an award may be set aside on the ground of error on the face of it but an award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion and it is also not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled him to arrive at his conclusions.

In *State of Andhra Pradesh and others v. R.V. Rayanim and others*, [1990] 1 SCC 433 it was held that in matter of challenging the award there are often two distinct and different grounds—one is an error apparent on the face of the record and the other is that the arbitrator has exceeded his jurisdiction. In the latter case the Court can look into the arbitration agreement but under the former it cannot.

In *Associated Engineering Co. v. Government of Andhra Pradesh and Another*, [1991] 4 SCC 93 it was held that the arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract and his sole function is to arbitrate in terms of the contract as his authority is derived from the contract. It was also held that if he has remained inside the parameters of the contract and has construed the provisions of the contract, his award cannot be interfered with unless he has given reasons for the award disclosing an error apparent on the face of it.

Thus, law is well settled that if the award is non-speaking, the Court can look into the question as to whether arbitrator has travelled beyond the scope of the contract as he derives his jurisdiction from the contract and if the arbitrator exceeds his jurisdiction the award can be set aside. An award can also be set aside in case of misconduct apparent on the face of the award. It can also be interfered with if the arbitrator has given reasons for the award disclosing an error apparent on the face of it.

Coming to the present appeal we find that in the impugned award the arbitrator has stated the case of the parties, issues framed by him, his findings on each issue and the amount awarded. We may also state here that in the counter affidavit dated 23rd May, 1983 filed by the present appellant before the learned sub-Judge it had been clearly stated that the contract is evidenced by three integrated documents namely: (i) Tender dated 3.5.79 (ii) Work order dated 15.5.79 and (iii) Agreement dated 24.3.79.

Out of claims under 10 heads the arbitrator awarded amount under claims nos. 3 & 9 of the appellant. Out of 51 issues framed by the arbitrator,

A issues nos. 15 to 18 were in respect of claim no. 3 and issues nos. 31 to 37 were in respect of claim no. 9. We quote below issues nos. 15 to 18 in respect of claim no. 3:

B “15. Whether six acres alone out of the mining area covered by the tender form were available for mining on account of obstruction of *kudikidappukars*, ex-workers of Associated Minerals Co. Ltd. and local public as alleged by claimant in paragraph 14 of State of claim?

C 16. Whether it was respondent’s duty to see that the entire extent of mining area detailed in the tender form was available for mining and that the mining could be carried out without hindrance and respondent failed to discharge its duty?

Or

Whether it was claimant’s responsibility to settle all problems and objections which arose in the course of mining work?

D 17. Whether claimant suffered loss as mentioned in paragraph 14 of the State of Claim?

18. Whether respondent is liable to make good the loss mentioned in issue No. 17 and if so, to what extent?”

E In respect of the above issues the arbitrator has given his findings which are as follows:-

F “15—The allegation that six acres of land alone out of the mining area covered by the tender form was available for mining is not correct. In 243 acres of land covered by the tender form out of which 92 acres belonged to respondent, more than necessary area sufficient to mine and supply the contract quantity of 2,00,000 to 2,20,000 MT of raw sand was actually available for mining, but, on some days in April and except on one day, during the whole month of May 1980, mining of raw sand even in the available area and supply of raw sand from there were not possible, on some days partially and on other days wholly,

G on account of obstruction by *kudikidappukars* and local public.

H 16—Claimant’s right under the contract was purely personal, it did not amount to an interest in the 243 acres of land covered by the contract and he could not sue strangers in his own name in respect of that land, it was his responsibility to settle all problems and objections which

arose in the course of the mining work between him and his mining workers, but not with strangers like *kudikidappukars* and local public who claimed either rights in the land or rights and privileges against the respondent, and it was respondent's duty to see that the entire extent of mining area detailed in the tender form was available for mining and mining operations could be carried on there quietly and without hindrance, and whenever complaint regarding obstruction was received respondent tried to discharge that duty by appealing to public authorities for help, but without success.

17-18. Claimant suffered loss to the extent of Rs. 2,81,461.26 and respondent is liable to make good that loss."

The learned counsel for the respondent has brought to our notice Clause (c) of the tender notice which forms part of the contract between the parties. Clause(c) of the tender notice is stated as follows:

"(c) - The beach and inland deposits mentioned in Block Nos. 2,4 and 6 may or may not be situated in Company's lands and hence it shall be the responsibility of the Contractor to obtain the consent of the owners in whose registered holdings the beach or inland deposits appear, before the Contractor begins to collect the sea washings or inland deposits as the case may be. As Indian Rare Earths Limited will not be responsible for the payment of any compensation to any individual on account of any claims resulting from such scrapping of sea washings or removal of inland deposits, it shall again be the responsibility of the Contractor to enter into agreements with the owners of registered holdings whose lands the Contractor may be required to utilise for the purpose of his successful execution of this contract, and the Company will not in any manner be responsible or liable for all or any of the claims for compensation by the said land owners."

It has been urged on behalf of the appellant that as the award is non-speaking one the High Court erred in law in going into the facts of the case. On the other hand it has been urged on behalf of the respondents that the present award cannot be said to be a non-speaking one as the findings of the arbitrator on each issue form part of the award.

As stated above the award contains not only the sum awarded but also the case of the parties, issues framed, findings on each issue, therefore, we

A hold that the findings of the arbitrator on the issues are the part of the award and the court can look into the findings.

B The arbitrator has come to the findings that the entire mining area covered with tender was made available to the appellant but according to the arbitrator mining was not possible in some days in the month of April, 1980 and whole month of May, 1980 on account of obstructions by *kudikidappukars* and local public. The above finding of the arbitrator is in respect of the issue No. 15 which forms part of the award. While awarding the amount the arbitrator did not take note of the above Clause (c) of the tender notice which is a part of the agreement and under which the respondent would not be liable for such obstruction. Therefore, we hold that the amount awarded under Claim No. 3 is beyond the scope of the agreement entered into between the parties and, therefore, the awarded amount in respect of Claim No. 3 cannot be sustained.

C Claim No. 9 is in respect of escalation. It is not disputed at bar that in D the agreement entered into between the parties there was no escalation clause. The arbitrator has come to the clear finding that the present appellant was not pressurised by respondent No. 1 to agree 10% hike in the wages of the mining workers as recorded in the findings in respect of issue No. 34. In issue No. 35 the arbitrator has recorded that the present appellant acceded to for raise in the wages of mining workers.

E The amount awarded under Claim No. 9 is not only beyond the scope of the agreement but also contrary to the findings recorded by the arbitrator.

F Therefore, we hold that the arbitrator has misconducted himself in the proceedings and, therefore, the award is liable to be set aside on the ground of legal misconduct on the part of the arbitrator under Section 30 of the Act. The above being the position the present appeal has no merits and accordingly dismissed. Considering the facts and circumstances of the case parties to bear their own costs.

R.K.S.

Appeal dismissed.