

D.D. SHARMA
v.
UNION OF INDIA

APRIL 27, 2004

[V.N. KHARE, CJ., S.B. SINHA AND S.H. KAPADIA, JJ.]

Arbitration Act, 1940—Section 30—Conditional offer of rebates made by bidder in response to the Notice Inviting tenders—Bid accepted—Bidder referring disputed claims to arbitration—Arbitrator, by a non-speaking award, partially allowed the claims of the bidder—High Court reversing on the ground that the Arbitrator has not considered some documents—Correctness of—Held, a Court can interfere with the award of the Arbitrator only if he exceeds his jurisdiction or misconducted himself or the proceedings—On facts, the Arbitrator has considered all documents before granting the Award—Hence, the Interference of the Court in the Award was uncalled for.

Respondent-Union of India issued a notice inviting tenders for construction of six bridges with an arbitration clause. The appellant-contractor submitted his tender stipulating certain terms and conditions. In response to the alternative design proposed by the respondent, the appellant offered a suitable rebate if the work is allotted within 60 days of opening of the tender. On the request by the respondent for withdrawal of various terms and conditions specified in the tender, the appellant made another conditional offer of withdrawing all terms and conditions and granting a specified amount of rebate per bridge subject to the payment of interest free 10% advance over the tendered amount against bank guarantee. The appellant made a further conditional offer of granting further rebates of specified amount for each bridge subject to the condition that the work is allotted as a whole within a specified date and payment of the 10% advance to be adjusted proportionately along with the interim payment. The respondent accepted the offer and conveyed to the appellant stating that the advance would be adjusted fully by the time 50% of the work is completed.

The respondent could not hand over the site to the contractor within the stipulated period. The period of contract was extended from time to time.

The appellant referred four claims for arbitration. The Arbitrator, by a

A non-speaking Award, rejected one of the claims and partially allowed the remaining three claims. The appellant filed a suit before trial court for direction upon the Arbitrator to file a copy of the Award and to make the same rule of the Court. The respondent filed an objection before the trial court under Section 30 of the Arbitration Act, 1940 for setting aside the Award of the Arbitrator. The trial court rejected the objection of the respondent and made the Award rule of the Court. The High Court partly allowed the appeal of the respondent on the ground that the Arbitrator had not considered two offers of rebate made by the appellant. The appellant and the respondent filed cross appeals before this Court.

C The appellant contended that the Award of the Arbitrator is a non-speaking Award and that Arbitrator had stated in his Award that he had considered all documents before granting the Award; and that the respondent is not entitled for rebates as it has failed to fulfil the conditions stipulated in the two conditional offers of rebates.

D The respondent contended that the appellant is not entitled to any further claim since the appellant had already claimed a huge amount by way of escalation cost.

Allowing the appeal of the appellant and dismissing the appeal of the respondent, the Court

E HELD:1.1. A Court can set aside an award if the arbitrator has misconducted himself or the proceedings. The jurisdiction of the Court in interfering with a non-speaking award is very limited. It is also trite that correspondence exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the Arbitrator to determine, even if it gives rise to determination of a question of law. [774-G-H; 775-A-B]

F 1.2. The arbitrator was required to consider as to whether the contractor can substantiate his claim relying on or on the basis of non-compliance of the conditions precedent in relation to the offer of rebate made by it in his letters. The said contention evidently was a subject matter of determination by the Arbitrator. An Arbitrator being a judge chosen by the parties, his decision would ordinarily be final unless one or the other condition contained in Section 30 of the Arbitration Act, 1940 is 'satisfied for the purpose of setting aside his award. Once it is held that the construction of an agreement fell for consideration of the Arbitrator, the determination thereupon shall not

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ordinarily be interfered with. [775-D-E]

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1.3. The Court's jurisdiction in this behalf is merely to see whether the Arbitrator has exceeded his jurisdiction or not. The High Court did not point out any material on the basis whereof it could be said to have been established that the two documents in question had not been considered by the Arbitrator. Such a conclusion could be arrived at if the award was a speaking one. The award being not a speaking one, the averments made therein should be accepted at their face value unless contrary is proved by the party questioning the validity of the award.

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Continental Construction Ltd. v. State of U.P., [2003] 8 SCC 4; *State of U.P. v. Allied Constructions*, [2003] 7 SCC 396; *H.P. State Electricity Board v. R.J. Shah & Company*, [1999] 4 SCC 214 and *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and Anr.*, [1999] 9 SCC 283, referred to.

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1.4. It has not been shown before us on behalf of the respondent Union of India that there exists any provision in the contract which precluded the arbitrator from deciding the dispute or there existed any specific bar in the contract precluding the contractor to raise such a claim. Once it is held that the Arbitrator had the jurisdiction, no further question shall be raised and the Court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award. There existed no material on records to show that the Arbitrator while making an award ignored any material documents. [778-A-B; F]

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Pure Helium India (P) Ltd. v. Oil & Natural Gas. Commission, [2003] 8 SCC 593 and *Union of India v. M/s Banwari Lal & Sons (P) Ltd.*, (2004) 4 SCALE 443, referred to.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6678 of 1996.

From the Judgment and Order dated 15.9.98 of the Gauhati High Court in F.A. No. 8 of 1993.

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Civil Appeal No. 1984 of 2000.

K.K. Rohtagi, Praveen Jain, Rakesh K. Sharma, Mrs. Anjani Aiyagari and Mrs. Anil Katiyar for the appearing parties.

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A The Judgment of the Court was delivered by

B **S.B. SINHA, J.** These appeals arise out of a common judgment and order dated 15.09.1998, passed by a Division Bench of the Gauhati High Court in FA No. 8 of 1993 whereby and whereunder an objection filed by the Union of India purported to be in terms of Section 30 of the Arbitration Act, 1940, was allowed in part.

C The parties hereto admittedly entered into a contract for construction of six permanent major bridges on Lekhabali Basar-Along Road in State of Arunchal Pradesh wherefor a notice inviting tender was issued by the Chief Engineer, Project Vartak, Director General (Border Roads). Shri D.D. Sharma, appellants in Civil Appeal No. 6678 of 1999, (hereinafter referred to as 'the contractor') pursuant thereto and in furtherance thereof made an offer. Negotiations admittedly took place between the parties in relation thereto.

D The notice inviting tender, *inter alia*, stipulated that the entire work was to be completed within 36 months from the date of handing over the site which would be within one month from the date of issue of acceptance letter. It was further stipulated that the notice of tender shall form part of the contract.

E It appears that the Union of India proposed an alternative design and in response thereto the contractor by his letter dated 25.8.1983, made an offer on the terms and conditions stipulated therein, clause 6 whereof reads as under:

F "All other terms and conditions will be as per NIT except that the tender is valid for all the 6 bridges and cannot be divided. To avail the coming working season if the work is allotted within 60 days of opening of the tender, we are ready to offer suitable rebate."

G The Union of India in response thereto show its inclination but requested the contractor to withdraw various stipulations/conditions specified in his tender in terms of a letter dated 30.09.1983, stating:

H "You are requested to withdraw various stipulations/conditions specified by you in your tender as brought out above. In case you consider that the withdrawal of the stipulation/conditions involve financial effect, you are requested to indicate the same for each withdrawal/modification of condition separate itemwise."

The contractor replied thereto stating :

“We are pleased to withdraw all our terms and conditions besides our condition no. 4 for design assumption and the interim payment schedule as the same has been prepared keeping conformity with the estimate. As such the same will form a part of contract. We are also pleased to inform you that if the work is allotted to us, we will offer a rebate of Rs. 90,000.00 only per bridge. For withdrawal of the above stated conditions and for offering rebate, the Department will have to give us 10% advance over our L.S. tendered amount against H.G. Bond of Industrial Cooperative Bank Ltd., Gauhati. This 10% advance will have to be adjusted proportionately along with the interim payment and the B.G. Bond for the adjusted amount will have to be released from time to time.”

From a perusal of the said counter offer made by the contractor, it will appear that one of the conditions laid down therein was to the effect that all withdrawal of conditions and rebate would be made subject to the conditions stated therein. It was, therefore, a conditional offer.

By another letter dated 22.11.1983, the contractor offered further rebate on 10% mobilization advance, stating:

“In partial modification to our rebate offered by us vide our letter under reference at serial (2) we are pleased to offer the following final rebate if the department gives interest free 10% over our L.S. tendered amount against B.G. bond of Industrial Cooperative Bank Ltd., Gauhati. This 10% advance will have to be adjusted proportionately along with the interim payment and the B.G. bond for the adjusted amount will have to be released from time to time.

The Rebates of the Bridges are as follows: These rebates are over and above the rebates mentioned in our letter at Serial (2) under reference.

1. Nallah at 15.5 m	Rs. 9,18,000.00
2. Laiko at 20.442 Km	Rs. 6,21,000.00
3. Cane at 25.841 Km	Rs. 6,48,000.00
4. Saiki at 63.88 Km	Rs. 9,18,000.00
5. Kiddi at 96.542 Km	Rs. 9,18,000.00
6. Sipu at 148.3 Km	Rs. 6,66,000.00

Rs. 46,89,000.00

A Rupees forty six lakhs eighty nine thousand only.,

This rebate has been offered subject to our condition that the work is allotted to us by 31st December, 1983, and if the work is allotted to us as a whole, without breaking up the same partwise as referred to in para 5 of your letter no. 27537/DGBRE/VTK/72/E8 dt. 30th Sep. 1983.

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Hope this clarified all the points raised by you.”

The said offer was, thus, again a conditional one.

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The Central Government by a letter dated 1.3.1984, addressed to the Director General, Border Roads, conveyed the sanction of the President to the variation from the standard and special conditions of the contract, *inter alia*, stating:

“Mobilisation Advance

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After acceptance of the tender and at the time of placing the work order on the contractor, he shall be paid on demand 10% interest free mobilization advance of the contract value against the bank guarantee bond from a Scheduled Bank.

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The loan advance shall be recovered proportionately from his ‘on account’ payment made to him under the contract and in such a way that by the time 50% of the work is completed the entire advance would be recovered. The first instalment commencing from the first on account payment and Bank Guarantee Bond will be released for the adjusted amount. If the advance thus made is utilized by the firm for

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purpose other than for which it was provided, the entire advance together with interest at 12% p.m. would be recovered from the firm in one instalment.”

It is not in dispute that the Union of India could not hand over the site to the contractor within the stipulated period. The period of contract, however, was extended from time to time.

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Admittedly, the notice inviting tender contained an arbitration agreement. Disputes and differences having arisen between the parties, the matter was referred to the arbitration of Brig. S.B. Joshi, Chief Engineer.

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Before the learned Arbitrator, *inter alia*, four claims were raised by the

contractor which are:

"Claim No. 1(a)

Refund of payment of sum offered as rebate on account of placing Work Order for all the six bridges as a whole Rs. 5,40,000.00.

Claim No. 1(b)

Refund of rebate offered subject to the condition that 10% interest free mobilization advance is paid in one lump sum and the work is allotted as a whole Rs. 46,89,000.00

Claim No. 1(c)

Escalation as per terms of contract on claims 1(a) and (b) considering these as part of quoted lump sum as calculation Rs. 60,591.00 and Rs. 5,21,131.00

Claim No. 2

Extra infructuous/Uncompleted expenses, expenseds and loss of profit due to enlargement of period of performance Rs. 10,00,000.00."

The learned Arbitrator rejected the claim of the contractor in respect of Claim No. 1(c) but partially allowed Claim Nos. 1(a), 1(b) and 2 to the extent of Rs. 90,000, Rs. 6,48,000 and Rs. 5,00,000 respectively.

The contractor filed an application before the Court of the Assistant District Judge, Tezpur, which was marked as Money Suit (Arbitration) Case No. 12 of 1990, purported to be under Sections 14(2) and 17 of the Arbitration Act, 1940, praying therein for a direction upon the Arbitrator to file a copy of the award and to make the same rule of the Court.

The Union of India filed an objection thereto purported to be under Section 30 thereof. By reason of a judgment and order dated 26.8.1992, the learned Assistant District Judge at Tezpur : Sonitpur, rejected the application filed by the Union of India for setting aside the award and made the same rule of the Court.

Aggrieved by and dissatisfied therewith, an appeal was filed by the Union of India before the Gauhati High Court which was marked as F.A. No. 8 of 1993.

A The High Court allowed the appeal in part holding, *inter alia*, that having regard to the delay in handing over the site for Cane Nallah Bridge, the award of Rs. 5,00,000 for the damages caused to the contractor although justified but as the contractor made two offers of rebate in terms of its letters dated 25.8.1983 and 22.11.1983, which had not been considered by the learned Arbitrator, the award in respect thereof was not sustainable, and a part of the award could be served, it set aside the award for a sum of Rs. 7,38,000.

The parties are in appeals before us against the said judgment.

Mr. K.K. Rohtagi, learned counsel, appearing on behalf of the appellant, would, *inter alia*, submit that the award being a non-speaking one and having regard to the fact that the learned Arbitrator in his award categorically stated that he had taken into consideration all the documents, the High Court must be held to have committed a manifest error in interfering therewith. The learned counsel would contend that the two offers of rebate referred to by the High Court in the impugned judgment being conditional ones and the conditions precedent therefor having not been fulfilled, the contractor was entitled to make his claim on rebate. According to the learned counsel, one of the rebates was offered if the amount of 10% mobilization advance is given at a time which admittedly was not done, as has been noticed by the High Court itself in the impugned judgment. It was further contended that the second rebate was offered by the contractor on the condition that the mobilization advance of 10% should be proportionately deducted from the bills for the entire period of 36 months whereas the Union of India directed recover of the said amount within a period of 18 months.

Handing over of possession of site within the stipulated period, Mr. Rohtagi would contend, had a direct relationship with the requirement of deployment of heavy machinery and staff and as a result of non-compliance of the said condition of contract on the part of the Union of India, the contractor had suffered a huge loss as it had to keep machinery idle for a long time and bear other cost of establishment unnecessarily.

Mrs. Anil Katiyar, learned counsel, appearing on behalf of the respondent, on the other hand, would submit that as the contractor had claimed a sum of more than Rs. 6,00,000 as escalation cost and the same having been duly granted, no further claim by the contractor was admissible.

The jurisdiction of the court to set aside an arbitration is well-settled. The court, *inter alia*, can set aside an award if the arbitrator has misconducted

himself or the proceedings. The jurisdiction of the court in interfering with a non-speaking award is very limited. A

It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the Arbitrator to determine, even if it gives rise to determination of a question of law. B

The Arbitrator in his award dated 5.10.1990 categorically stated that "he had examined and considered the pleadings submitted by and on behalf of the parties and documentary and oral evidences were produced before him by the parties". C

It has not been disputed that the documents in question referred to in para 17 of the judgment of the High Court were filed before the learned Arbitrator.

The arbitrator was, thus, required to consider as to whether the contractor can substantiate his claim relying on or on the basis of non-compliance of the conditions precedent in relation to the offer of rebate made by it in his letters dated 25.8.1983 and 22.11.1983. The said contention evidently was, thus, a subject matter of determination by the Arbitrator. An Arbitrator being a judge chosen by the parties, his decision would ordinarily be final unless one or the other condition contained in Section 30 of the Arbitration Act is satisfied for the purpose of setting aside his award. Once it is held that the construction of an agreement fell for consideration of the Arbitrator, the determination thereupon shall not ordinarily be interfered with. D E

The court's jurisdiction in this behalf is merely to see whether the Arbitrator has exceeded his jurisdiction or not. The High Court did not point out any material on the basis whereof it could be said to have been established that the two documents in question had not been considered by the learned Arbitrator. Such a conclusion could be arrived at if the award was a speaking one. The award being not a speaking one, the averments made therein should be accepted at their face value unless contrary is proved by the party questioning the validity of the award. F G

The learned counsel, appearing on behalf of the Union of India, has failed to point out that any material was brought on records on the basis whereof the findings of the High Court could be justified. H

A In *Continental Construction Ltd. v. State of U.P.*, [2003] 8 SCC 4, it was, *inter alia*, held:

B "16. The award is a non-speaking one. It is trite that the court while exercising its jurisdiction under Section 30 of the Arbitration Act, 1940 can interfere with the award only in the event the arbitrator has miscondacted himself or the proceeding or there exists an error apparent on the face of the award.

C 17. The learned Civil Judge and the High Court have not found that the umpire acted arbitrarily, irrationally, capriciously, or independent of the contract. No finding has been arrived at that the umpire has made conscious disregard of the contract which was manifest on the fact of the award."

This Court in *State of U.P. v. Allied Constructions*, [2003] 7 SCC 396, observed:

D "...Interpretation of a contract, it is trite, is a matter for arbitrator to determine (see *M/s Sudarsan Trading Co. v. The Government of Kerala*, AIR (1989) SC 890. Section 30 of the Arbitration Act, 1940 providing for setting aside an award is restrictive in its operation. Unless one or the other condition contained in Section 30 is satisfied, an award cannot be set aside. The arbitrator is a Judge chosen by the parties and his decision is final. The Court is precluded from reappraising the evidence. Even in a case where the award contains reasons, the interference therewith would still be not available within the jurisdiction of the Court unless, of course the reasons are totally preverse or the judgment is based on a wrong proposition of law. As error apparent on the face of the records would not imply closer scrutiny of the merits of documents and materials on record. Once it is found that the view of the arbitrator is a plausible one, the Court will refrain itself from interfering..."

G Yet again in *H.P. State Electricity Board v. R.J. Shah and Company.*, [1999] 4 SCC 214, it was held:

H "26. In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before an arbitrator. If the answer is in the affirmative then it is clear that the arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration

clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim then any decision given by the arbitration in respect thereof would clearly be in excess of jurisdiction. In order to find whether the arbitrator has acted in excess of jurisdiction the court may have to look into some documents including the contract as well as the reference of the dispute made to the arbitrators limited for the purpose of seeing whether the arbitrator has the jurisdiction to decide the claim made in the arbitration proceedings.”

In *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises and Anr.*, [1999] 9 SCC 283, this Court, opined:

“44. (a) It is not open to the Court to speculate, where on reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(b) It is not open to the Court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.

(c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the Court cannot interfere.

(e) In a case of non-speaking award, the jurisdiction of the Court is limited. The award can be set aside if the arbitrator acts beyond his jurisdiction.

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. Arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

(g) In order to determine whether arbitrator has acted in excess of his jurisdiction what has to be seen is whether the claimant could raise a particular claim before the arbitrator. If there is a specific term in the contract or the law which does not permit or give the arbitrator the power to decide the dispute raised by the claimant or there is a specific bar in the contract to the raising of the particular claim then

A the award passed by the arbitrator in respect thereof would be in excess of jurisdiction.”

B It has not been shown before us on behalf of the Union of India that there exists any provision in the contract which precluded the arbitrator from deciding the dispute or there existed any specific bar in the contract precluding the contractor to raise such a claim. Once it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission*, [2003] 8 SCC 593].

C While considering a speaking award, this court has, however, albeit in a different context in *Union of India v. M/s Banwari Lal and Sons (P) Ltd.*, (2004) 4 Scale 443, noticed:

D “17. It is now well settled that when a question of law is referred to the arbitrator the award cannot be set aside only if a different view is possible. However, it is also trite that if no specific question of law is referred, the decision of the Arbitrator on that question would not be final, however, much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. Only in a case where specific question of law touching upon the jurisdiction of the arbitrator was referred for determining his jurisdiction by the parties, then the finding of the arbitrator on the said question between the parties may be binding.

E 18. It is also trite that where the award contains reasons, the same may be interfered, *inter alia*, when it is based on a wrong proposition of law. However, when the view of the arbitrator is a plausible one, the Court would not normally interfere.”

F Furthermore, as we do not find that there existed any material on records to show that the Arbitrator while making an award ignored any material documents, the impugned judgment cannot be sustained, which is set aside accordingly.

G In the result Civil Appeal No. 6678 of 1999 filed by the contractor is, therefore, allowed and Civil Appeal No. 1984 of 2000 filed by the Union of India is dismissed. No costs.

B.S.

C.A No. 6678/99 allowed.

H C.A No. 1984/2000 dismissed