Union of India

Vs

G. S. Atwal and Company (Asansole)

Civil Appeal No. 3679 of 1996

(K. Ramaswamy G.B. Pattanaik JJ)

22.02.1996

JUDGEMENT

K. RAMASWAMY J.

1.This appeal by special leave arises from the judgment and order dated February 12, 1992 of the Division Bench of the Calcutta High Court in F.M.A.T. No.1390 of 1991. The respondent had entered into an agreement in 1968-69 for excavation of Feeder canal from RD.68.00 to RD.97.00. During the course of the execution of the work certain disputes had arisen between the respondent and the appellant. The disputes were referred from time to time to arbitration. This is the 5th arbitration in the instalment. Details of previous four arbitration's are as under:-

S.No.	Name of the Arbitrator	Award I Rs.	Interest Rs.	Amount Rs.
1.	R.P.Ahuja	4,70,000.00	78,129.45	5,48,129.45
2.	O.P. Gupta	7,00,974.00	7,604.96	7,08,578.96
3.	T. Rajaram	23,78,100.00	23,34,501.00	47,12,601.60
4.	Brig.D.R. Kathuria	78,90,570.00	38,40,653.88	1,17,31,223.00

2. The dispute as regards hire charges of equipment loan by Farakka Barage Project was referred to Goyal Committee for rationalisation. On submission of its report and in furtherance thereof the respondent by letter dated August 8, 1984 had claimed for reference to the arbitration thus:

> "And whereas M/s. Tarapore & Company having long back been refunded the excess hire charges recovered earlier, but having became refundable on the basis of said Goyal Committee Report, in our case the excess recovered amount and now refunded to us despite repeated, written as well as oral requests and demands in this respect".

3. In furtherance thereof, by proceedings dated November 18, 1984, the General Manager, Farakka Barrage Project appointed T. Raja Ram as the sole arbitrator to settle the disputes. After entering into the reference on December 12, 1984, admittedly the respondent laid claim for the refund of hire charges which was disputed by counter-statement by the appellant. Later the respondent laid further claims on March 6, 1985 for Rs.1,68,000/- towards repairs on departmental equipments; Rs.1,38,600/- towards refund of expenses on security watch and ward; Rs.28,12,085.33 towards final bill of the firm; Rs.95,60,653.10 towards part interest and the amount of claim in addition to the refund of hire charges was Rs.32,45,538.27. The appellant in its statement had objected to unilateral enlargement of the reference. The arbitrator awarded by a non-speaking award dated August 18, 1987, a sum of Rs.35,72,550/- with interest at 15% per annum from July 1, 1976 or the date of the payment of decree whichever was earlier.

4. The appellant filed Misc. Case No.95/87 on April 8, 1988 under Section 30(c) of the Arbitration Act, 1940 (for short, the 'Act'), questioned the award contending that the claim was barred by limitation; the arbitrator had no power to enlarge the scope of the arbitration and he had no power to award interest at highest rate without any claim before it. The Assistant District Judge, Murshidabad by his order dated January 19, 1991 set aside the award upholding these contentions. On appeal, in the impugned order the High Court set aside the order of the Civil Court holding that there was no error apparent on the face of the award warranting setting aside of the award. It directed the civil Court to take steps for passing a decree in terms of the award as expeditiously as possible not later than four months. Thus this appeal by special leave.

5. Since Shri Goswamy, learned senior counsel appearing for the appellant has not pressed the bar of limitation for our consideration, it is unnecessary for us to go into that question. Only two questions have been canvassed, viz., the power of the arbitrator to unilaterally enlarge the scope of the reference and the power to award the amount in a non-speaking award and the rate of interest. The question, therefore, is: whether the arbitrator has jurisdiction and power to unilaterally enlarge the reference ? As extracted above, the specific demand and acceptance by the Manager of Farakka Barage Project was to refer the dispute of refund of hire charges pursuant to the report of the Goyal Committee. That was acceded to and reference to T.Raja Ram was made for arbitration on November 18, 1984 and claim in that behalf was duly made. On March 6, 1985 claims were laid by the respondent for arbitration. They were objected to by the respondent. The question emerges; whether the arbitrator has power to unilaterally enlarge the reference ad adjudicate the claims ? It is seen that impugned award is a non speaking award. Shri Soli J. Sorabjee, learned senior counsel for the respondent contended that the appellant having participated before the arbitrator and had an award unfavourable to them, could not question invalidity thereafter. The appellant had participated in the proceedings before the arbitrator with full knowledge of these facts. The conduct of the part of the appellant amounts to acquiescence to the power and jurisdiction of the arbitrator to make the award. Thereby the plea of lack of jurisdiction cannot be permitted to be raised by the unsuccessful party to the arbitration. In support thereof he placed strong reliance in N. Chellappam v. Secretary, Kerala State Electricity Board, (1975) 1 SCC 289 : (AIR 1975 SC 230); M/s. Neelkanthan Construction v. Superintending Engineering, National Highways, Salem, (1988) 4 SCC 462 : (AIR 1988 SC 2045); Russel on Arbitration, 17th Edition, page 215;3, Chowdhri Murtaza Hossein v. Mussumat Bibi Bechunnisa, (1876) 3 Ind App 209; Champsey Bhara & Company v. Jivraj Balloo Spinning and Weaving Company Ltd. (LR (1A) Vol.1 324); Champsey Bhara Company v. Jivraj Balloo Spinning and Weaving Company Ltd., (AIR 1923 PC 66) and Firm Madanlal Roshan Lal Mahajan v. Hukumchand Mills Ltd., Indore (1967) 1 SCR 105 : (AIR 1967 SC 1030).

6. To constitute an arbitration agreement, there must be an agreement that is to say the parties must

be ad diem. Arbitrability of a claim depends upon the dispute between the parties and the reference to the arbitrator. On appointment, he enters upon that dispute for adjudication. The finding of the arbitrator on the arbitrability of the claim is not conclusive, as under Section 33 ultimately it is the Court that decides the controversy. In U.P. Rajkiya Nirman Nigam Ltd. v. Indure Pvt. Ltd. and others decided on February 9, 1996, a three-Judge Bench of this Court (to which one of us, K. Ramaswamy, J., was a member) was to consider the question whether the arbitrator had jurisdiction to decide the arbitrability of the claim itself. In that context, the question arose: whether there was an arbitration agreement for reference to the arbitrator ? It was held that the arbitrability of the controversy of the claim being a jurisdictional issue, the arbitrator cannot clothe himself with jurisdiction to conclusively decide, whether or not be had power to decide his own jurisdiction. Relying upon the passage in "Russel on Arbitration" (19th Edn.) at page 99, this Court had held that it can hardly be within the arbitrator's jurisdiction to decide whether or not a condition precedent to his jurisdiction has been fulfilled. The arbitrator had no power to decide his own jurisdiction. The arbitrator is always entitled to inquire whether or not he has jurisdiction to decide the dispute. He can refuse to deal with the matter at all and leave the parties to go to the Court if he comes to the conclusion that he has no power to deal with the matter; or he can consider the matter and if he forms the view that the contract upon which the claimant is relying on and from which, if established, he alone has jurisdiction, he can proceed to decide the dispute accordingly. Whether or not the arbitrator has jurisdiction and whether the matter is referred to or is within the ambit of clause for reference of any difference or dispute which may arise between the parties, it is for the Court to decide it. The arbitrator by a wrong decision cannot enlarge the scope of the submission. It is for the Court to decide finally the arbitrability of the claim in dispute or any clause or a matter or a thing contained therein or the construction thereof. It was, therefore, held that "arbitrators cannot clothe themselves with jurisdiction to decide conclusively the arbitrability of the dispute". "It is for the Court under Section 33 or on appeal thereon to decide it finally". There is no estoppel to challenge the action and to seek a declaration under section 33. It was further held that "mere acceptance or acquiescence to the jurisdiction of the arbitrator for adjudication of the dispute as to the extent of the arbitration agreement or arbitrability of the dispute does not disentitle the appellant to have the remedy under Section 33 through the Court". The remedy under Section 33 is "the only right royal way for deciding the controversy".

7. In Law of Arbitration by Justice Bachawat (2nd (1987) Ed.) at page 90 it is stated that jurisdiction of the arbitration is solely derived from the arbitration agreement. The arbitrator has jurisdiction to deal only with matters which on a fair construction of the terms of the contract the parties agreed to refer to him. Whether or not the arbitrator acts within the jurisdiction depends solely upon the clause of reference. The Court may grant a declaration that the party appointed by the defendants as the arbitrator has no jurisdiction. The submission furnishes the source and prescribes the limit of the arbitrator's authority. The arbitrator takes upon himself an authority which the submission does not confer on him (sic). The award must in substance and form conform to the submission. It must comply in point of form to the directions contained in the submission. If the award determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred, the award is invalid. It may be remitted to the arbitrator for reconsideration under Section 16 and if the arbitrator acts in excess of authority, the award should be set aside.

8. In N. Chellappan v. Secretary, Kerala State Electricity Board (1975) I SCC 289 : (AIR 1975 SC 230), the facts therein were that the arbitrators nominated an umpire. The arbitrators did not make the award within the time limit which ultimately expired. Thereupon the appellant had invoked the jurisdiction of the civil Court to revoke the authority of the arbitrator under Sections 5 and 11 of the

Act. An application was made to appoint 'K' to enter upon the reference as an umpire and to proceed with the arbitration. Another application was made to appoint 'K' as the sole arbitrator in place of two arbitrators. The Court revoked the authority of the arbitrators and directed the umpire to enter upon the dispute in his capacity as an umpire and allowed the application of the appellant to appoint 'K' as the sole arbitrator. The umpire entered upon the reference in his capacity as an umpire. The party submitted to his jurisdiction, conducted the proceedings and when the award went against the respondent - Board umpire's jurisdiction was challenged. On those facts a three-Judge Bench of this Court had held that when the respondent-Board acquiesced to the jurisdiction of the umpire as the sole arbitrator, the Board was, by acquiescence, precluded from challenging the jurisdiction of the umpire. When the party consented to the appointment and took part in the proceedings with full knowledge of the relevant fact of appointment as the sole arbitrator it amounted to acquiescence. Same is the ratio in M/s. Neelakantan and Bros. Construction v. Superintending Engineer, National Highways, Salem (1988) 4 SCC462 : (AIR 1988 SC 2045), wherein a two-Judge Bench of this Court held that if the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence. The rest of the decisions are not directly on the point. Therefore, it is not necessary to burden the judgment with reference to those cases.

9. It would thus be seen that appointment of an arbitrator is founded upon the agreement between the parties. Once on his appointment either by consensus or by an order of the Court, the parties put forth their claim and participate in the proceedings, the parties acquiesce to the appointment of the arbitrator and the award made thereon binds the parties. The party who has suffered the award is precluded from questioning the power and jurisdiction of the arbitrator to make the award. The reason being that the parties have by contract consented to the forum to adjudicate their dispute and to give a decision, by a non-speaking or speaking award in terms of the agreement. This principle is inapplicable to the jurisdiction of the arbitrator to unilaterally enlarge his own power to arbitrate any of the disputes. It is seen that by express agreement between the parties, arbitrability of the claim for refund of the hire charges was referred to arbitration and T. Raja Ram came to be appointed as arbitrator and entered upon that reference. But when claim was made, he enlarged the dispute unilaterally without there being any agreement by the appellant. In fact they objected to the enlargement of the scope of the arbitration. Since arbitrator went on adjudicating the disputes, they were left with no option but to participate in the proceedings as the claims were pressed for and parties submitted to the jurisdiction of the arbitrator. Therefore, it did not amount to acquiescence. The jurisdiction of the arbitrator is founded upon the agreement between the parties. To the extent of the agreement, the parties are bound by the decision of the arbitrator. But the arbitrator cannot enlarge the scope of his arbitration and make in a non-speaking award, a lump sum amount of all claims, after enlarging his jurisdiction on non-accepted or objected claims. In Champsey Bhara Company case (AIR 1923 PC 66), (supra) Lord Dunedin, speaking for the Privy Council had held that "(t)he question of whether an arbitrator acts within his jurisdiction is, of course, for the Court to decide but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of the reference. It is, therefore, for the Court to decide ... whether the dispute which has arisen is a dispute covered by Cl. 13 of the Articles". In Gobardhan Das v. Lachmi Ram, AIR 1954 SC 689, this Court held that so long as the arbitrator acts within the scope of his authority there is no doubt that the decision must be accepted as valid and binding on the parties. In that case, the agreement entered into between the parties read as under :

> "that the arbitrators should sit together, take down the statements of the parties, hear

> and consider the arguments brought forward by the parties, inspect the documents of all descriptions and take other evidence and evidence of witnesses and whatever award they shall give, is and shall be, acceptable to the parties and whatever award the arbitrators may give unanimously or by majority of votes shall be treated as true and correct and valid in every Court and shall be binding upon all of us executants parties."

10. The arbitrators went out of their way to declare that whatever amount in addition to Rs. 3,500/- was found due from respondent No. 1 upon the bahikhata account was remitted having regard to his labour and poverty and the whole unspecified amount found due against respondent No. 2 was remitted in full in view of his labour and poverty. It was contended that the award was decided outside the authority of the arbitrators. It was held that the arbitrators had clearly misdirected themselves and had exceeded the scope of their authority and the award was, therefore, set aside.

11. Thereby, the arbitrator had misdirected himself and committed legal misconduct in making the award vitiating the entire award itself. It is difficult to decide as to what extent each of the claims was accepted or rejected. In that view, it is not necessary to go into the second question of the power of the arbitrator to award interest or excess rate of interest.

12. The appeal is accordingly allowed. The order and judgment of the High Court is set aside and that of the trial Court is restored, but in the circumstances, parties are directed to bear their own costs. Appeal allowed.