SUPREME COURT OF INDIA

BOC India Limited

Vs

Bhagwati Oxygen Limited

(Dr. AR. Lakshmanan and Tarun Chatterjee, JJ)

JUDGMENT

TARUN CHATTERJEE, J.

Leave granted.

This is an appeal from a judgment of a Division Bench of the Calcutta High Court dismissing an appeal which was filed against the judgment of a learned Judge refusing to accept the objection filed by the appellant under Section 30 read with Section 33 of the Arbitration Act, 1940 (hereinafter referred to as the "Act"). The brief facts of this appeal are as follow:

BOC Ltd. being the appellant herein and one Nippon Sansa K.K. (NSKK) entered into an agreement in order to facilitate the respondent to import components for setting up a 25 tons per day Oxygen plant at Ghatsila, Bihar (now in the State of Jharkhand). In the month of April/May 1990 the appellant and the respondent entered into a contract for erection, installation and commission of the aforesaid plant at Ghatsila, Jharkhand. On 5th June 1990 a tripartite meeting between the representatives of the appellant and the respondent and NSKK were held where the letter of intent was signed and purchase orders were issued by the respondent in favour of the appellant. The respondent awarded a turnkey contract on 6th June, 1990 to the appellant for manufacture, supply, erection and commission of the said plant. Vide letter dated 18th December 1990, the respondent had agreed to pay interest on margin money and reimburse the same to the appellant. The appellant thereafter on 31st March 1992 raised final invoices and subsequently on 13th April 1992 the respondent raised claims and sought refund from the appellant. By a letter dated 9th March 1993 the appellant informed the respondent indicating therein the interest payable by them to the respondent. Finally, when the prior invoice and letter were not responded to, on 13th September 1993 the respondent again raised claims and sought refund from the appellant. When the refund was not made by the appellant, the respondent made an application under Sections 8 and 33 of the Act for

the appointment of an arbitrator on 24th November 1995 in the High Court at Calcutta.

In the meantime, on 21st September 1995 the High Court directed the appellant to release the spares to the respondent on payment of Rs. 10, 19, 000/- by them. A lawyer was thereafter appointed as Arbitrator by consent of the parties and the said arbitrator subsequently was replaced on 12th February, 1996 by Late Arbitrator Shri P.K. Roy. On 29th July 2000, Late Shri Roy had passed his award in favour of the respondent for a sum of Rs. 24, 92, 165/- with an interest of 12 per cent on the amount. However, the counter claim of the appellant was rejected. On 30th October, 2000, the appellant filed an application for setting aside the award passed by the arbitrator under Section 30 of the Act before the High Court at Calcutta. In the said application, the appellant raised objection to the effect that the award in question suffered errors apparent on the face of it. It was alleged that the arbitrator erred in awarding the claim of the respondent for a sum of Rs. 17, 95, 710/- relating to claim no. 9 although the learned arbitrator held issue no. 4 in favour of the appellant. It was also alleged that since the appellant had not realised any sum in excess of Rs. 50 lacs against indigenous supply, the award of the learned arbitrator to the effect that the respondent was entitled to receive back from the appellant, the said sum of Rs. 17, 95, 710/-, was not only erroneous on the face of the award but also contradictory and inconsistent with the findings of the arbitrator against issue no. 4. It was further alleged by the appellant under Section 30 of the Act that the learned arbitrator committed error apparent on the face of the award and had acted in excess of his jurisdiction by awarding the aforesaid sum of Rs. 17, 95, 710/- in favour of the respondent as the award was contrary to the findings made by the learned arbitrator himself and therefore was liable to be set aside. We are not dealing with the other objections taken by the appellant in its objection under Section 30 of the Act as noted herein after. A learned Judge of the High Court by a detailed judgment had rejected the objection filed under Section 30 of the Act and had refused to set aside the award passed by the arbitrator on the ground that on the materials on record, the award was not liable to be set aside on such grounds.

Feeling aggrieved by the judgment of the learned Single Judge, the appellant filed an appeal before the Division Bench of the High Court which was also dismissed against which the present Special Leave Petition was filed in respect of which leave has been granted.

We have heard Mr. Soli J. Sorabjee, learned senior counsel appearing for the appellant and Mr. Bhaskar P. Gupta, learned senior counsel appearing for the respondent. We have also considered the award passed by the Sole Arbitrator Late Mr. P.K. Roy and the objection raised against such award under Section 30 of the Act and also the judgment of the learned Single Judge as well as the Division Bench of the High Court in detail.

Before we proceed further, as noted herein earlier, we keep it on record that before the Division Bench of the High Court, the appellant restricted his grounds for setting aside the award in respect of Claim No.9 of the statement of claim only and prayed for the same. Before us, Mr. Sorabjee also restricted his submissions only in respect of Claim No.9 of the statement of claim and also prayed for setting aside the award restricted to Claim No.9 only. In view of this stand taken by the appellant, we need not dwell upon other questions and are concentrating only on the issue raised before us by the learned senior counsel appearing for the appellant.

As noted, we may reiterate that the respondent placed Purchase Order (P.O.) dated 6th of June, 1990 to the appellant for supply, installation and commissioning of oxygen plant at a lump sum price of Rs.347.40 lacs. This fixed price was, however, subject to variation only in respect of imported components of supply on account of exchange rate variation and customs duty variation. This would be evident from clause 1.1 of the P.O. as quoted herein after. It is not in dispute that the job was completed in June/July, 1992.

Due to variation in exchange rate and also in customs duty, the lump sum price of Rs.347.40 lacs increased to Rs.4, 62, 60, 543. The appellant submitted its bill inclusive of taxes as per the contract and the break up which is as follows:

"A. Annexure 1 Invoice No. 3224 - Rs.4, 62, 60, 543/-

B. Invoice dated 31.3.1992 Rs. 5, 91, 625/-

C. Taxes paid as per contract (as mentioned in Invoice No.3225 and 3227) - Rs. 6, 25, 984/-Total- Rs.4, 74, 78, 152/-"

As stated herein earlier, in view of the arbitration clause accepted by the parties, the respondent had raised a dispute after payment and the matter was referred to arbitration. The respondent submitted its claim before the arbitrator under 12 heads for a total amount of Rs.1, 79, 76, 716/-. The appellant also submitted its counter claim. The sole arbitrator Late Shri P.K.Roy passed an award on 29th of July, 2000, as noted herein earlier and allowed the claim of the respondent in respect of the following items:

"A. Claim No.1: Interest on margin money -Rs.1, 80, 000/-

B. Claim No.3: Bank charges and interest - Rs.3, 10, 932/-

C. Claim No.7: Refund on REP Licence Rs. 35, 000/-

D. Claim No.8 : Foreign Technician fees, Air fare, hotel expenses- Rs. 1, 70, 523/-

E.Claim No.9 Indigenous Supply- Rs.17, 95, 710/-

Rs.24, 92, 165/-"

As noted herein earlier, the arbitrator, however, dismissed all other claims of the respondent and also the counter claim of the appellant.

Mr. Sorabjee contended that since the award in question was contrary to the findings of the learned arbitrator himself, the learned arbitrator in passing the award had misconducted himself and accordingly the award was arbitrary and liable to be set aside in respect of claim No.9 of the respondent.

Mr. Sorabjee had drawn our attention to the purchase order, which contained price for manufacture and supply of plant and equipment comprising both imported and indigenous components for installation, erection and commissioning thereof. He had also drawn our attention to the fact that a lump sum of Rs.379.49 lacs was fixed as a price for doing the job. The 'basis of price' is mentioned in Clause 1.1. of the contract which is as follows :-

"Basis of price includes

1.1.1 -The value of the imported components will be 128.66 million YEN CIF Calcutta.

1.1.2 Customs duty @ 80% of CIF value based on 'Project Import".

1.1.3 Stevedoring, port handling, customs clearance, inland transportation and transit insurance from port to site @ 5% of CIF Value.

1.1.4 Exchange rate has been taken at 100 yen Rs.10.9.

1.1.5 The price includes excise duty towards supply wherever applicable as on date, but does not include sales tax, entry tax, income tax on foreign technicians and other Govt. impositions, if any, which will be paid extra, as applicable.

1.1.6 Any variation in 1.1 to 1.1.5 except 1.1.3 indicated above will be adjusted.

1.1.7 The premium of Rs.5 lakhs towards purchase of REP Licences is the maximum amount payable by us. Any decrease below RS.5 lakhs will be passed on to us.

1.1.8 The above price is also subject to 'General Conditions of sale and installation of Plant and Equipment'. In the event of any conflict between the clauses, one mentioned herein shall prevail. Where General Conditions are not applicable, have been marked accordingly and initiated by competent authority."

Clause 4 of the contract contains Terms of Payment. Indigenous supply is included in clause 4.4 which reads as following-

"Supply Portion-Rs.50 lacs.10% advance against order.10% advance within 3 months.80% advance against proforma invoice before dispatch.4.5 For Erection and Rs.15 lakhs. Commissioning 10% advance against order 10% advance on opening of site 70% pro rata on monthly basis. 10% on completion of erection and commissioning."

In the statement of claim, as made by the respondent, the value of projected imported components worked out to Rs.264.44 lacs in the order shown below :-

"(i) CIF value of JY 128.66 million Rs.1, 40, 23, 940/-

(ii) Handling charges @ 5% of CIF- Rs. 7, 01, 198/-

(iii) Import Duty @ 80% (based on Project Import) Rs.1, 12, 19, 152/- (iv) REP Licence premium Rs. 5, 00, 000/-

Total - Rs.2, 64, 44, 290/-"

In the said statement of claim the total value of the order worked out as imported components (Rs.264.44 lacs) plus indigenous components (Rs.50 lacs) plus erection and commissioning (Rs.15 lacs) comes to Rs.329.44 lacs. But the value was kept at Rs.347.40 lacs, i.e., a cushion money of Rs.18 lacs approximately was provided for securing the forward cover for foreign exchange and other variations.

In paragraph 21 of the said statement of claim, the respondent stated that under the aforesaid order, the appellant was required to supply indigenous components plants and machinery as set out in Clause 2.1.2 to 2.3.4 of the order for a sum of Rs.50 lacs. The appellant further stated that the indigenous supply was not subjected to variation as per the order. The appellant contrary to and in breach of the said order raised invoices for a sum of Rs.67, 95, 710/- against indigenous supply and realized an excess amount of Rs.17, 95, 710/- from the respondent. Therefore, the respondent claimed refund of Rs.17, 95, 710/- from the appellant.

According to Mr. Sorabjee, the learned Arbitrator had misconducted himself in passing the award under Section 30(1)(a) of the Act and thus the award was liable to be set aside so far as Claim No.9 (Award No.9) of the Arbitrator is concerned. According to Mr. Sorabjee, the award in respect of Award No.9 is contrary to the findings of the learned Arbitrator and liable to be set aside as it amounted to judicial misconduct. As noted herein earlier, purchase order dated 5th June, 1990 provided for a lump sum price of Rs.347.40 lacs subject to variation of importation of the contract and exchange rates. He further submitted that since price was a lump sum amount no specific price

could be allotted to a particular item. He contended that the value of Rs.50 lacs and Rs.15 lacs mentioned against indigenous supply under Clause 4.4 of the P.O. and against erection and commissioning mentioned in Clause 4.5 of the P.O. was not appearing as a component of price but appearing as "terms of payment" (4.0 of P.O.). Accordingly, Mr. Sorabjee sought to contend that the Arbitrator had gone beyond his jurisdiction in awarding Rs.50 lacs and Rs.15 lacs, mentioned against indigenous supply and against erection and commissioning, as the same was not appearing as 'component of price'. Therefore, he had misconducted himself in awarding the amount in respect of Award No.9 (Claim No. 9 of the Statement Of Claim). In support of this contention, Mr. Sorabjee relied on a decision of this Court in K.P. Poulose vs. State of Kerala, Â . Mr. Sorabjee particularly relied on para 6 of the judgment and submitted that the Arbitrator was guilty of legal misconduct as he had gone beyond his jurisdiction to pass an award on Claim No.9.

This submission of Mr. Sorabjee was contested by Mr. Bhaskar P. Gupta, learned Senior Counsel, appearing on behalf of the respondent. Mr. Gupta contended that considering the terms of the contract, it cannot be said that the Arbitrator had acted beyond his jurisdiction in passing the award in respect of Claim No.9. So far as the decision of this Court, relied on by Mr. Sorabjee, is concerned, Mr. Gupta submitted that this decision cannot be applied in the facts and circumstances of the present case. In that decision, according to Mr.Gupta documents produced before the Arbitrator were contrary to the award passed. In this connection, Mr. Gupta had also drawn our attention to the fact that the arbitrator in that case had ignored two very material documents resulting in miscarriage of justice. If we read para 6 of this decision carefully we will find that the principle which was laid down in the decision was that an award could be set aside on the ground that the arbitrator had misconducted himself when it was found that the arbitrator on the face of the record arrived at an inconsistent decision even on his own finding or arrived at a decision by ignoring very material documents which throw abundant light on the controversy to help in arriving at a just and fair decision. Keeping this principle in mind, this court held that the arbitrator had misconducted the proceedings in that case.

This is not the position in the present case. For deciding this question, it would be necessary for us to look into the P.O. Clause 4.0 contains "terms of payment". Clause 4.4 of the P.O. contains the indigenous supplies which clearly indicates Rs.50 lacs would be the advance at the rate of 10% against the date of order within 30 days and 10% advance within three months and 80% advance against proforma invoice before dispatch. Clause 4.5 of the terms of payment provides for erection and commissioning which indicates Rs.15 lacs in respect of which 10% advance against order, 10% advance on opening of site, 70% on pro rata on monthly basis, 10% on completion of erection and commissioning. The Arbitrator had taken into consideration the claim of the respondent on indigenous supplies. He had also taken into consideration the total value of the contract which was Rs.347.40 lacs.

A bare perusal of the award of the Arbitrator would show that he had considered the figure of 17, 95, 710/- which is included in the lump sum contract price as consideration payable to the respondent for services rendered by it towards importation of plants components. From the award it will also be evident that in respect of the claim of Rs.17, 95, 710/- against indigenous supply attention was drawn to the works given in para 10 [a], 10 [b] and 10 [c] of the statement of claim. If we assign individual value to the individual jobs, the total works out to Rs.3, 29, 44, 290/- leaving a balance of Rs.17, 95, 710/-. The learned Arbitrator in his award also considered that the break-up

was an admitted position which would appear from para 10[c] of the Statement of Claim and the sum of Rs.17, 95, 710/-, the appellant had recovered under the bill issued against indigenous supply and the respondent paid the amount without any objection. While the Arbitrator has considered the fact that the appellant had realised the differential amount of Rs.17, 95, 710/- from the respondent against indigenous supply, it cannot be said to mean that the value of indigenous supply had gone up from Rs.50 lacs to Rs.67, 95, 710/- as according to the terms of the contract the value of indigenous supply remained at Rs.67, 95, 710/- and the appellant realised the differential amount of Rs.17, 95, 710/- against indigenous supply. Accordingly the Arbitrator was justified in holding that the said sum of Rs.17, 95, 710/- was on account of expenses that might have been incurred by the respondent in executing the contract.

In the case of Trustees of the Port of Madras Vs. Engineering Construction Corporation Ltd. Â 0, while this Court dealing with a situation when an award can be set aside under Section 30 of the Arbitration Act, 1940 held as under:

"The above decisions make it clear that the error apparent on the face of the award contemplated by Section 16 (I) (c) as well as Section 30(c) of the Arbitration Act, 1940 is an error of law apparent on the face of the award and not an error of fact. It is equally clear that an error of law 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)'-) SCR 48: Â 1955 AIR(SC) 468."

12.03.2007

(In Paragraph 20 Of The Said Decision This Court Also Held That The Proposition That Emerges Is That 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 and That The Erroneous Proposition Of Law Must Be Established To Have Vitiated The Decision. It Has Also Been Held In That Decision That The Error Of Law Must Appear From The Award Itself Or From Any Document Or Note Incorporated In It Or Appended To It. This Court Also Held That It Was Not Permissible To Travel and Consider Materials Not Incorporated Or Appended To The Award. So Far As The Facts Of The Present Case Are Concerned, We Do Not Think That The Award Of The Arbitrator Can At All Be Interfered With As The Award Was Not Based Upon Either A Proposition Of Law Which Is Unsound Or An Erroneous Proposition Of Law Was Established To Have Vitiated The Decision. As Noted Herein Earlier, The Arbitrator Had Considered All Aspects Of The Matter Including The Terms Of The Contract and All The Materials On Record and The Statement Of Claim and Has Come To A , JJ)conclusion of fact. Such being the position, we cannot but hold that the award was not based upon a proposition of law which is unsound or an error of law must have appeared from the award itself or from any document or note incorporated in the award or appended to it.

That apart, according to the Arbitrator, this figure was nothing but a mark up which the parties agreed to keep in the contract for rendering of service towards importation of plant components from Japanese supplies. The appellant had realized this difference amount of Rs. 17 lacs from the respondent against indigenous supplies. Therefore, it was not the case that the arbitrator had misconducted himself in passing the award by ignoring to consider material documents, which had thrown light on the controversy raised by the parties. As noted herein earlier, the arbitrator had looked into the terms of the contract, arbitration clause and the statement of claim of the respondent disputed by the appellant. It was not the case that the arbitrator had decided erroneously a question of law referred to him but on consideration of the terms of contract and statement of claim came to a conclusion that Claim No. 9 of the respondent should be awarded in its favour. Such being the position, we do not find any reason to interfere with the award of the arbitrator which was passed on consideration of all material put on record. In this view of the matter, it is not open to the court to set aside the award on the ground that the learned Arbitrator had, while continuing with the proceeding, acted beyond his jurisdiction and violated the contract while awarding Rs. 17, 95, 710/- in the form of Award No.9. In our view, this cannot be said to have an award, which is contrary to the contract entered into by the parties. It is also not the case where the learned Arbitrator had failed to consider material documents produced by the parties for arriving at a right decision. On the other hand as noted herein earlier, we are of the considered view that the Learned Arbitrator had duly considered the statement of claim and the terms and conditions of the contract and the material documents produced by the parties, which were available on record, and came to a conclusion rightly in favour of the respondent. The Learned Arbitrator also came to a conclusion that the aforesaid figure of Rs. 17, 95, 710/-, was included as lump sum contract price as consideration payable to the respondent for service rendered by them for importation of plants and components. In any view of the matter, when the Arbitrator had taken a plausible view on interpretation of contract, it is not open to the court to set aside the award on the ground that the Arbitrator had misconducted himself in the proceedings and therefore, the award was liable to be set aside.

In Indu Engineering and Textile Limited vs. Delhi Development Authority Â this court laid down a principal when the court could set aside an award in the exercise of its powers under Section 30 of the Act. This court in the said decision held that when a plausible view had been taken by the arbitrator and unless the award of the arbitrator was vitiated by a manifest error on the face of the award or was wholly improbable or perverse, it was not open to the court to interfere with the award within the statutory interpretation set out in Section 30 of the Act.

That apart, the amount of Rs.17, 95, 710/- was recovered by the appellant under the bill issued against indigenous supplies and amount were paid without any objection by the respondent. Such being the position we are unable to agree with Mr. Sorabjee that the award was liable to be set-aside on the aforesaid ground. We, therefore, do not find any merit in this appeal. The appeal is dismissed without any order as to costs.