SUPREME COURT OF INDIA

Rashtriya Chemicals & Ferts. Ltd.

Vs.

Chowgule Brothers

C.A.No.5286 of 2006

(Aftab Alam and T.S.Thakur JJ.)

07.07.2010

JUDGEMENT

T.S.Thakur J.

1. This appeal by special leave is directed against an order dated 5th April 2006 passed by the High Court of Bombay whereby Appeal No.884 of 1997 has been allowed, the order passed by a learned Single Judge of that Court set aside and the majority award passed by the arbitrators restored.

2. The appellant, a Government of India undertaking invited tenders for allotment of clearing, forwarding, handling and stevedoring jobs at Mormugao Port initially for a period of one year commencing from 15th January 1983 upto 14th January 1984 but extendable at the option of the appellant for a further period of one year on the same terms and conditions except statutory increases in the wages of Dock labourers referred to in Clause 2.03 of tender notice.

> "In response, the respondent submitted a tender which was accepted culminating in the issue of a work order dated 10th January 1983 in its favour. It is common ground that the appellant by its communication dated 13th October 1983 exercised the option available to it in terms of Clause 2.03 of the NIT and extended the contract for a further period of one year ending 14th January 1985."

3. The extension aforementioned was accepted by the respondent in terms of its communication dated 7th December 1983 in which it was inter-alia pointed out that statutory revisions in the wages of Mormugao Dock Labour Board (for short M.D.L.B.) that had come about during the period of one year need be considered while extending the contractual period. In response, the company by its letter dated 27th January 1984 pointed out that Clause 2.03 of Schedule II of N.I.T. provided for increases on account of statutory revisions made upto 15th January 1984 alone to be considered for purposes of granting rate escalation.

Increases in wages that may have been under negotiations or those granted on a later date with retrospective effect could not consequently be considered, said the appellant.

> "The respondent-Company was on that basis called upon to furnish documentary evidence regarding increase if any in wages allowed by the M.D.L.B. upto 15th January 1984 without waiting for issuance of any fresh circulars."

4. It is not the case of the respondents that any revision in wages effective as on 15th January, 1984 was demonstrated before the appellant at any time before the commencement of the extended contractual period. What was alleged by the respondent was that pursuant to a settlement between the M.D.L.B. and the Dock workers the respondent had incurred an additional amount of Rs.24.74 lakhs towards the increase in the wages payable to such workers. A claim for reimbursement of the said amount was accordingly made by the respondent-company in terms of a legal notice served upon the appellant on its behalf, which claim was refuted by the appellant on the strength of Clause 2.03 of Schedule II to the notice inviting tenders forming part of the contract between the parties. The appellant asserted that the rates at which the contract was initially awarded had to remain firm throughout the period of one year from the date of award and were not subject to any escalation whatsoever. Rates for the extended period were also similarly to remain firm throughout the extended period subject to any statutory revision upto 15th January, 1984 being taken into consideration. Any subsequent increase in the wages payable to the Dock labourers granted retrospectively by the M.D.L.B. was according to the appellant wholly inconsequential.

5. Denial of the claim made by the respondent thus gave rise to a dispute which was in terms of the contract referred to a panel of three Arbitrators for adjudication. Before the Arbitrators, the appellant disputed the claim on merits as also on the ground that the same was barred by limitation.

> "The Arbitrators examined rival contentions urged before them but failed to arrive at a unanimous decision on the true and correct interpretation of Clause 2.03. Two awards, therefore, came to be made, one by Shri R.P. Bhatt who dismissed the claim and the other by M/s R.C. Cooper and N.A. Modi who held the respondents entitled to recover from the appellant a lump sum amount of Rs.61,73,067.90. It is noteworthy that while the award made by Shri R.P. Bhatt was a reasoned Award that made by the other two Arbitrators was not."

6. Aggrieved by the majority Award, the appellant filed Arbitration Petition No. 19 of 1993 before the High Court of Bombay for setting aside the same. A Single Judge of the High Court of Bombay (S.N. Variava, J. as His Lordship then was) allowed that prayer and set aside the award holding that the same was contrary to clause 2.03 of the NIT forming part of the contract executed between the parties.

> "Even the plea of limitation succeeded before the learned Single Judge who held that the claim made by the respondents was barred by time. Undeterred the respondents

assailed the said order before a Division Bench of the High Court in Appeal No.884 of 1997 which allowed the appeal, set aside the order passed by the Single Judge and restored the majority Award made by the two Arbitrators. The High Court took the view that the interpretation placed upon Clause 2.03 of the contract between the parties by the majority of the arbitrators was a logical interpretation which could provide a sound basis for the Award made by them."

7. Appearing for the appellant, Shri Shyam Divan did not pursue the challenge to the validity of the Award on the ground that the claim made by the respondent was barred by limitation. The solitary point that was urged by the learned counsel was that the High Court had committed an error while interpreting Clause 2.03 of the contract. Mr. Divan contended that a plain reading of Clause 2.03 made it amply clear that the rates stipulated under the contract were to remain firm for the first year notwithstanding any revision in the wages payable to the dock workers of M.D.L.B. For the second year also the rates were to remain firm, subject only to the condition that statutory revisions, if any, of the wages would be taken into consideration. What was according to Mr. Divan evident from a plain reading of Clause 2.03 was that only such statutory revisions as were ordered upto the date of commencement of the contractual period were relevant for the purpose of such consideration.

"Any revision made subsequent to the commencement of the contractual period even if retrospective in its application would have had no relevance for the extended period.

Inasmuch as the Division Bench had taken a contrary view and set aside the order of the learned Single Judge, it had not only committed a mistake that was evident but also ignored the principles governing the construction of documents."

8. Appearing for the respondents Mr. Ganesh, learned senior counsel on the other hand contended that the power of this Court to interfere in an Arbitral Award under Sections 30 and 33 of the Arbitration Act, 1940 was very limited. He contended that just because an interpretation different from the one given by the Arbitrators in support of their award was equally plausible did not make out a case for interference by the Court. Arbitrators being Judges chosen by the parties the view expressed by them would bind the parties no matter the same is found to be erroneous and no matter an alternative view was equally or even more plausible. He urged that Clause 2.03 of NIT was rightly interpreted by the Division Bench of the High Court which did not call for any interference by this Court.

9. The validity of the award made by the Arbitrators rests entirely upon a true and correct reading of Clause 2.03 of the Contract. That clause is in the following words:

"2.03: It is hereby agreed that if the Company gives one month's notice to extend the contract for a further period of one year from the expiry or the period mentioned in Clause 2.01, the contractor shall be bound to continue to do the work and render services on the same terms and conditions, as contained herein, during such extended

period, except for the statutory increase in the wages of Dock Labour allowed by the Mormugao Dock Labour Board, for which documentary evidence shall have to be furnished by the contractor..... .....

Note: The rates indicated against first and 2nd year above have been taken from MDLE'S Circulars from time to time. But the rates at which the contact is initially awarded shall remain firm throughout the period of one year from he date of award and shall not be subject to any escalation whatsoever.

Similarly, the rates allowed for the extended period of one year, if any, after considering the statutory increase, if any, in the wages of Dock Labour will also remain firm throughout the extended period of one year and shall not be subject to any escalation whatsoever, irrespective of any subsequent increase in the wages of Dock Labour allowed retrospectively by the Mormugao Dock Labour Board."

10. A careful reading of the above especially the Note appended to Clause 2.03 (supra) leaves no manner of doubt that the rate at which the contract was initially awarded was to remain firm throughout the period of one year from the date of the award of the contract. What is significant is that for the first year the said rate was unalterable regardless of any escalation, revision or other statutory increases made during that period. Shri Ganesh, learned counsel for the respondents also fairly conceded that insofar as the first year of the contract was concerned the rates were not subject to any revision and were to remain firm. If that be so, the question is how far is that principle altered by the later half of the Note which deals with the rates applicable during the extended period of the contract. There are three different aspects which stand out from a reading of that part of the Note to Clause 2.03. Firstly, the second part of the Note dealing with the rates applicable to the extended period starts with the word `Similarly'. By using that expression the Note draws an analogy between the firmness of the rates applicable during the first year and those applicable for the extended period of second year. The sentiment underlying the Note is that the parties intend to keep the applicable rates firm not only for the first year but also for the second year.

11. The second aspect which emerges from a plain reading of the Note is that the rates for the second year had to be fixed by taking into consideration the statutory increases, if any, in the wages payable to the Dock labourers which rate once fixed was also to remain firm and impervious to any escalation. The only difference between the first and the second year rates thus is that the rates were firm even for the second year but the same had to be fixed taking into consideration the statutory increases in the wages of the dock labourers.

12. The third aspect which in our opinion puts all doubts about the true intention of the parties to rest is that any subsequent increase in the wages of the dock labourers would not result in any escalation of the rates even when such revision is allowed retrospectively by the M.D.L.B. What the Note in our opinion envisages is that on the completion of the first year and at the beginning of the extended contract period, the rates applicable shall have to be determined by reference to the revisions that have already come into effect as on the date of

the commencement of the extended period. It is manifest from a reading of the Note that once an option is exercised the rate applicable to the extended period shall stand revised taking into consideration the revision of wages if any. Any such revision must of necessity be made as on the date of the commencement of the extended period. Once that is done the said rate would remain firm till the end of the second year. The contract does not, in our opinion, envisage settlement or revision of the rate by reference to any stage post commencement of the extended period. Even otherwise a contract for the extended period could become effective only if rates applicable to that period are settled or are capable of being ascertained. Rates actually determined or determinable by reference to 15th January, 1984 the date when the extended period commenced, could include revision in wages made upto that date. Any revision in the wages of the dock labourers which the M.D.L.B. may have ordered subsequent to 15th January, 1984 would have no relevance even if such revision was made retrospectively from the date of the commencement of the extended period. The Note makes it abundantly clear that revision granted retrospectively would be of no consequence whatsoever.

13. There is another angle from which the matter can be viewed. As to how the parties understood Clause 2.03 is also an important factor that needs to be kept in mind.

> "While accepting the extension of the contract, the respondent-contractor had simply referred to the statutory revision in the wages by M.D.L.B. during the `last year'.
>
> Since the letter of acceptance is of 7th December, 1983 the statutory revision which the contractor wanted to be taken into consideration were revisions before 1983 and not those made at any time after the extended period of contract.
>
> This position is clear from the following lines appearing in the letter of acceptance dated 7th December, 1983:
>
> "However, we would like to inform you that there are lot of statutory revisions in the wages of Mormugao Dock Labour Board during last 1 year which you will have to consider while extending our contractual period. In this connection, the undersigned will call on your office to discuss the same personally in near future and we expect your cooperation in this regard."

14. The appellant's letter dated 27th January, 1984 sent in reply to the above made it clear to the respondent that Clause 2.03 of the NIT did not envisage escalation on the basis of the revision subsequent to 15th January, 1984 even if such revisions were already being discussed or negotiated by the Dock Workers with the M.D.L.B. The following passage from the said communication makes the position abundantly clear:

> "A copy of clause 2.03 of Schedule II of N.I.T. is enclosed. From this, it will be very clear that whatever increases that have been allowed by M.D.L.B. upto 15.1.84, can only be considered for the escalation purposes, and not those increases in wages

which are under negotiations, for which M.D.L.B. circulars will be issued subsequently after 15.1.84, with retrospective effect."

15. The learned Single Judge of the High Court was, in the light of the above, correct in holding that the award made by the Arbitrators to the extent it directed payment of the additional amount was unsustainable. The Division Bench, however, fell in error in taking a contrary view and holding that the interpretation placed by the Arbitrators was a plausible interpretation.

16. That brings us to the question whether an Arbitrator can make an award contrary to the terms of the contract executed between the parties. That question is no longer res integra having been settled by a long line of decisions of this Court. While it is true that the Courts show deference to the findings of fact recorded by the Arbitrators and even opinions, if any, expressed on questions of law referred to them for determination, yet it is equally true that the Arbitrators have no jurisdiction to make an award against the specific terms of the contract executed between the parties. Reference may be made, in this regard, to the decision of this Court in *Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor*[1] where this Court observed:

" ..... that it is settled law that the arbitrator derives authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one; that this deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action....."

..... It is true that interpretation of a particular condition in the agreement would be within the jurisdiction of the arbitrator.

However, in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the court.

The arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error...."

17. It was further observed:

> ".....Further, the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existence depends upon the agreement and his function is to act within the limits of the said agreement....."

18. In *W.B. State Warehousing Corporation & Anr. v. Sushil Kumar Kayan & Ors.*[2] again this Court observed:

> "..... If there is a specific term in the contract or the law which does not permit the parties to raise a point before the arbitrator and if there is a specific bar in the contract to the raising of the point, then the award passed by the arbitrator in respect thereof would be in excess of his jurisdiction...."

19. In *Bharat Coking Coal Ltd. v. Annapurna Construction*[3] this Court reiterated the legal position in the following words:

> "There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record."

20. In *MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.*[4] also this Court took the similar view and observed:

> "An Arbitral Tribunal is not a court of law. Its orders are not judicial orders. Its functions are not judicial functions. It cannot exercise its power ex debito justitiae. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject- matter of reference."

21 Reference may also be made to the decisions of this Court in *Associated Engineering Co. v. Government of Andhra Pradesh & Anr.*[5], *Jivarajbhai Ujamshi Sheth & Ors. v. Chintamanrao Balaji & Ors.*[6], *State of Rajasthan v. Nav Bharat Construction Co.*[7], *Food Corporation of India v. Surendra, Devendra & Mahendra Transport Co.*[8], which sufficiently settle the law on the subject.

22. That leaves us with the question whether the valid part of the award can be saved by severance from the invalid part. Before the Arbitrators the respondent-Chairman had quantified the claim at Rs.27,91,984.29 on account of escalation of the rates consequent upon statutory increases in the wages of M.D.L.B. during the extended period of contract. A further sum of Rs.9,88,713.20 on account of escalation in the wages of other categories of workers such as Tally Clerks, Stichers, Foreman, Asst. Foremen, Supervisors etc. was also made on the same basis. In addition, a claim for the recovery of Rs.8,63,953/- towards the

final payment due and payable to the claimant with interest @ 18% p.a. on the same was also made.

23. In the light of the discussions in the earlier part of this order the entitlement of the respondent to claim any amount on account of escalation consequent upon the increase in the wages of M.D.L.B. workers is not established. The first two claims mentioned above on account of escalation could not, therefore, have been allowed by the Arbitrators nor could the incidental claim for payment of interest on that claim be granted. The question then is whether there is any lawful justification for disallowing the only other claim made by the respondents representing the balance amount due to the claimant towards its final bill. The only defence which the appellant had offered to that claim was based on the law of limitation. That defence having been withdrawn by Mr. Divan, we see no real justification for disallowing the said claim especially when the counter-claim made by the appellant has been rejected and the said rejection was not questioned before the High Court. In fairness to Mr. Divan we must record that he did not seriously oppose the severance of the award made by the Arbitrators so as to separate the inadmissible part of the claim based on an interpretation of Clause 2.03 from the admissible part.

24. In the result we allow this appeal but only in part and to the extent that the award made by the Arbitrators shall stand set aside except to the extent of a sum of Rs.8,63,953/- which amount shall be payable to the respondent-contractor with the interest @ 9% p.a. from 1st April, 1985 till the date of actual payment thereof.

25. The parties to bear their own costs through out the proceedings.

[1]*(1999) 8 SCC 122*
[2]*(2002) 5 SCC 679*
[3]*(2003) 8 SCC 154*
[4]*(2004) 9 SCC 619*
[5]*(AIR 1992 SC 232)*
[6]*(AIR 1965 SC 214)*
[7]*(AIR 2005 SC 4430)*
[8]*(2003) 4 SCC 80*