

**SUPREME COURT OF INDIA**

Cochin Shipyard Ltd.

Vs.

Apeejay Shipping Ltd.

C.A.No.9187 of 2015

(Dipak Misra and Prafulla C.Pant,JJ.,)

06.11.2015

**JUDGMENT**

**Dipak Misra,J.,**

SLP(Civil)No.34309 of 2014

1. In this Appeal, by special leave, the appellant calls in question the legal tenability of the order passed by the learned single Judge of the High Court of Kerala in O.P. (C) No. 482 of 2013 whereby he has granted liberty to the respondent to substantiate its objection preferred under Sections 30 and 33 of the Arbitration Act, 1940 (for brevity, “the 1940 Act”) by adducing evidence which would be considered within the ambit and scope of the aforesaid provisions.

2. The facts which are essential to be stated for the adjudication of this appeal are that an agreement was entered into between the parties on 29.11.1980. As per the terms and conditions of the agreement, the appellant, a Government undertaking, had agreed to build and deliver a cargo ship to the respondent for the price of Rs. 32.527 crores. Certain differences arose between the parties which led to an arbitration proceeding and a former Judge of this Court was appointed as the arbitrator/sole umpire to resolve the disputes between the parties. As facts would unveil, the learned arbitrator after holding series of sittings passed an award on 15.07.2009. After the award was sent to the civil court, the claimant-appellant moved the Court for passing a decree under Section 17 of the 1940 Act in terms of the award and the respondent filed O.P. (Arb.) No. 30 of 2009 under Sections 30 and 33 to set aside the award. During the pendency of the said petition, the respondent almost after expiry of two years filed an application, that is, I.A. No. 5625 of 2011 seeking permission to examine the learned arbitrator and the General Manager of the respondent as witnesses. The learned Additional Subordinate Judge, vide order dated 23.12.2011, rejected the application holding that there was no justification to examine the arbitrator; that the Court while considering the objections under Sections 30 and 33 of the 1940 Act does not sit in appeal over the arbitrator’s award; that the Court does not assess or re-appreciate the evidence; that the award passed by the learned arbitrator can only be assailed on the grounds

as engrafted under Sections 30 and 33 of the 1940 Act; and that no reason had been disclosed by the respondent, the applicant before the Subordinate Judge, to examine the witness No. 2, that is, the General Manager.

3. The aforesaid rejection of the application constrained the respondent to file a Writ Petition before the High Court which concurred with the view expressed by the court below opining that there was no necessity to examine the arbitrator as a witness as more than five years had elapsed since the award was passed. The High Court further appreciated the reasoning expressed by the rule making Court and ruled that even if umpire would be examined, no fruitful purpose will be served and, accordingly, gave the stamp of approval to the same. However, the High Court granted liberty to the writ petitioner to produce other available evidence to substantiate its claim and specifically permitted to examine its employee as a witness in the proceeding. The High Court further observed that his evidence would be appreciated bearing in mind the scope of Sections 30 and 33 of the 1940 Act and, accordingly, modified the order passed by the civil court. Be it noted, further liberty was granted to summon the entire record including the orders passed in the course of the arbitral proceeding.

4. At the very outset, we are obliged to state that the respondent has not challenged the order passed by the High Court and, therefore, as far as examination of the umpire is concerned, it stands foreclosed. As far as liberty to examine the witness to substantiate the claim for the rule making Court is concerned, it is contended by Mr. Ranjit Kumar, learned Solicitor General for the appellant, that the respondent has been allowed to examine the employee as a witness to prove the misconduct of the learned arbitrator in conducting of the arbitral proceedings as the grounds had been raised pertaining to grant of adequate opportunity to the respondent and the recording of minutes. In essence, the stand of the respondent was that there had been violation of the principles of the natural justice by the learned arbitrator. It is urged by the learned senior counsel for the appellant that it is totally unwarranted to examine witnesses for the purpose of substantiating the claims before the Court which has the authority to accept the objection under Sections 30 and 33 of the 1940 Act or to pass a decree in terms of the award. In essence, the attack on the order by Mr. Ranjit Kumar is that the witness No. 2, General Manager, could not have been permitted by the High Court to be examined as a witness in the Court to prove any kind of legal misconduct, for the same has to be demonstrated from the records of the arbitral proceedings as well as the evidence adduced before the learned arbitrator. It is further contended that the witness sought to be examined had already been examined before the learned arbitrator and his evidence can be read by the trial court to discern and decide if there is any perversity of approach by the arbitrator. Learned Solicitor General, to bolster his submissions, has placed reliance on *Arosan Enterprises Ltd. v. Union of India and Another*<sup>1</sup>, *Inder Sain Mittal v. Housing Board, Haryana and Others*<sup>2</sup>, *State of U.P. v. Allied Constructions*<sup>3</sup>, *State Bank of India v. Ram Das and Another*<sup>4</sup>, *D.D. Sharma v. Union of India*<sup>5</sup>, *Hari Om Maheshwari v. Vinitkumar Parikh*<sup>6</sup>, *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd*<sup>7</sup>. and *Oil and Natural Gas Corporation v. Wig Brothers Builders and Engineers Private Limited*<sup>8</sup>.

5. Resisting the aforesaid submissions, Mr. Vivek Tankha, learned senior counsel for the respondent, would contend that adducing of oral evidence in a proceedings under Sections 30 and 33 of the 1940 Act is not prohibited and in the obtaining factual matrix the High Court has correctly exercised its discretion by granting the liberty to the respondent and, therefore, the order cannot be found fault with. It is urged by him that to establish the legal misconduct on the part of the learned arbitrator as asserted by the respondent, it is necessary to examine the General Manager so that he can throw light on the proceedings before the learned arbitrator and, in fact, that is the only way it can be proven. It is further propounded by him that this Court in *Fiza Developers and Inter-Trade Private Limited v. AMCI (India) Private Limited and Another*<sup>9</sup> while dealing with Section 34 of the Arbitration and Conciliation Act, 1996 (for brevity, “the 1996 Act”) has clearly held that evidence can be adduced. Learned senior counsel has drawn inspiration from the authorities in *K.P. Poulose v. State of Kerala and Another*<sup>10</sup>, *Union of India v. Jain Associates and Another*<sup>11</sup> and *Food Corporation of India v. Chandu Construction and Another*<sup>12</sup>.

6. We have already indicated hereinbefore that the rule making Court had declined the prayer to examine the learned arbitrator as well as the General Manager. The said order was the subject matter of assail in the Writ Petition under Article 227 of the Constitution. We have noted the submissions of the learned senior counsel for the appellant that the application preferred under Section 151 of the Code of Civil Procedure read with Order XVI Rule 1 of the Code of Civil Procedure was filed for substantiating the plea of legal misconduct alleged in the application. The learned senior counsel has drawn our attention to the various paragraphs of the petition and the relevant clauses to highlight the right to call for the learned arbitrator as a witness has been foreclosed. The purpose to examine the General Manager, serial No. 2 in the list, is to substantiate its stand/claim as has been observed by the High Court. Therefore, the thrust of the matter is whether on the basis of the allegations of legal misconduct the High Court should have allowed examination of the witness.

7. To appreciate the controversy in proper perspective, it is pertinent to refer to Sections 30 and 33 of the 1940 Act. They read as under :-

“Section 30. Grounds for setting aside award.- An award shall not be set aside except on one or more of the following grounds, namely:-

(a) that an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;

(c) that an award has been improperly procured or is otherwise invalid. Section 33. Arbitration agreement or award to be contested by application.- Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.”

8. In the present case, the issue that has travelled to this Court does not even remotely relate to Section 33 of the 1940 Act. It centres around Section 30 of the 1940 Act. Though certain grounds have been provided under Section 30, we only require to deal with the ambit and sweep of legal misconduct on the part of the learned arbitrator inasmuch as there are allegations as regards non-consideration of relevant documents, ascription of reasons of passing of the award which do not flow from the material on record and further the conduct of the arbitrator during the arbitral proceedings in recording of the minutes. The assail does not pertain to personal misconduct or moral misconduct of the learned arbitrator.

9. In this regard, reference to a three-Judge Bench decision in *Firm Madanlal Roshanlal Mahajan v. Hu.kumch.and Mills Ltd*<sup>13</sup>, Indore would be apposite. In the said case, issue arose with regard to misconduct. It was contended before this Court that the learned arbitrator was guilty of misconduct as he had amended an issue behind the back of the appellants. Repelling the said submission, the Court opined :-

“Counsel then submitted that by amending an issue behind the back of the appellants, the arbitrator was guilty of misconduct. This contention has no force. The arbitrator had raised two issues. The second issue referred to the respondent's claim in respect of 46-1/2 bales a claim for loss in respect of the bales. At the time of the writing of the award, the arbitrator corrected this issue so as to show that the claim was for the price of the bales. By this amendment, the appellants suffered no prejudice. The parties well knew that the respondent claimed the price of 46-1/2 bales and fought the case before the arbitrator on that footing.”

10. In the said authority, the Court referred to the decision in *Champsey Bhara & Company v. Jivraj Balloo Spinning and Weaving Company Ltd*<sup>14</sup>. wherein it has been laid down :-

"An error in law on the face of the award means, in their Lordship's view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

Be it noted, the proposition laid down in *Champsey Bhara & Company (supra)* has also been followed in *Firm Madanlal Roshanlal Mahajan (supra)*.

11. In *K.P. Poulouse (supra)* while dealing with the concept of misconduct, a three-Judge Bench was dealing with the speaking award where the reasons had been ascribed by the learned arbitrator. A contention was raised that the learned arbitrator was guilty of legal misconduct in conducting the proceedings, for two very material documents were absolutely ignored by the arbitrator resulting in miscarriage of justice. The Court referred to the said two documents and took note of the finding recorded by the arbitrator in the award but made

an observation which was inconsistent with his conclusion that the contractor had no right to extra payment for the particular work. In that context, the Court proceeded to observe as follows:-

“We now come to the award. Although the arbitrator has held that “jetting, however, is not an authorised extra covered by the agreement”, he has made the following significant observation which is inconsistent with his conclusion that the contractor has no right for extra payment for the jetting:

“The Chief Engineer has rejected the claims of the contractor on grounds of non-inclusion of this (jetting) in the agreement which was executed subsequent to the direction issued by the department to adopt jetting. The Chief Engineer’s decision totally ignores the next sentence in that letter ‘Meanwhile you may execute the agreement’. By this sentence the issue of extra payment for jetting is left open even after the execution of the agreement.”

If the above is the conclusion of the arbitrator, rejection of the claim on the ground that “jetting, however, is not an authorised extra covered by the agreement” cannot be anything but rationally inconsistent. The award, therefore, suffers from a manifest error apparent ex facie.”

12. After so stating, the three-Judge Bench opined that under Section 30(a) of the 1940 Act an award can be set aside when an arbitrator has misconducted himself or the proceedings and misconduct under Section 30(a) has not a connotation of moral lapse. It further observed that it comprises legal misconduct which is complete if the arbitrator on the face of the award arrives at an inconsistent conclusion even on his own finding or arrives at a decision by ignoring the very material documents which throw abundant light on the controversy to help a just and fair decision. On that backdrop, the Court opined that there was a legal misconduct.

13. In *Jain Associates (supra)*, the Court referred to the authority in *K.P. Poulouse (supra)* and *Dandasi Sahu v. State of Orissa*<sup>15</sup> and observed thus:-

“... The arbitrator/umpire may not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. Misconduct is often used, in a technical sense denoting irregularity and not guilt of any moral turpitude, that is, in the sense of non-application of the mind to the relevant aspects of the dispute in its adjudication. In *K.V. George v. Secretary to Government, Water & Power Department, Trivandrum*, this Court held that the arbitrator had committed misconduct in the proceedings by making an award without adjudicating the counter-claim made by the respondent...”

14. In this regard we may usefully refer to the authority in *Paradip Port Trust and Others v. Unique Builders*<sup>16</sup>. In

the said case, a contention was raised that the award was passed in violation of principle of natural justice inasmuch as, certain documents were received without notice to the Port Trust. Such a contention was raised before the High Court and the said stand was abandoned after perusal of the order sheet of the arbitrator which showed that at each stage adequate opportunity was given to both the parties. Thereafter the court referred to the principles stated in *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji*<sup>17</sup>, *Puri Construction Pvt. Ltd. v. Union of India*<sup>18</sup>, *State of Orissa v. M/s Lall Brothers*<sup>19</sup>, *Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. and Another*<sup>20</sup>, *Rajasthan State Mines and Minerals Ltd. v. Eastern Engineering Enterprises and Another*<sup>21</sup> and opined thus:-

“... It is not a case where the arbitrator has acted arbitrarily, irrationally, capriciously or independently of the contract. It is difficult for us to take a view that there has been a deliberate departure or conscious disregard of the contract to say that the arbitrator misconducted himself...”

15. In the case of *Ispat Engineering & Foundry Works, B.S. City, Bokaro v. Steel Authority of India Ltd., B.S. City, Bokaro*<sup>22</sup>, it has been held that reappraisal of evidence by the court is not permissible and as a matter of fact, exercise of power to reappraise the evidence is unknown to a proceeding under Section 30 of the Arbitration Act. The court as a matter of fact cannot substitute its own evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties.

16. At this juncture, we may refer to some other authorities as regards the scope of Section 30 of the 1940 Act. In *Allied Constructions* (supra), a three-Judge Bench after referring to earlier judgments has opined that an award passed by an arbitrator can be set aside only if one or other condition contained in Sections 30 and 33 of the 1940 Act is satisfied. The Court further opined that the term provided for setting aside an award under Section 30 is restrictive in its operation and unless one or other condition contained in Section 30 is satisfied, an award cannot be set aside, for the arbitrator is a Judge chosen by the parties and his decision is final. It has been further observed that even in a case where the award contains reasons, the interference there-with would still be not available within the jurisdiction of the court unless, of course, the reasons are totally perverse or the judgment is based on a wrong proposition of law and further an error apparent on the face of the record would not imply closer scrutiny of the merits of documents and materials on record.

17. In *Hari Om Maheshwari* (supra), the Court after referring to the decisions in *Arosan Enterprises Ltd.* (supra) and *Allied Constructions* (supra) opined thus:-

“From the above it is seen that the jurisdiction of the court entertaining a petition or application for setting aside an award under Section 30 of the Act is extremely limited to the grounds mentioned therein and we do not think that grant or refusal of an adjournment by an arbitrator comes within the parameters of Section 30 of the Act...”

18. In *Wig Brothers* (supra) while dealing with the challenge under Sections 30 and 33 of the 1940 Act, the Court opined that a court while considering a challenge to an award under

Sections 30 and 33 of the 1940 Act, does not sit as an appellate court and it cannot reappreciate the material on record. The Court further proceeded to state that an award is not open to challenge on the ground that the arbitrator had reached a wrong conclusion or had failed to appreciate some facts, but if there is an error apparent on the face of the award or if there is misconduct on the part of the arbitrator or legal misconduct in conducting the proceedings or in making the award, the court will interfere with the award. In the said case reference was made to Rajasthan State Mines and Minerals Ltd. (supra) and certain passages were quoted. We think it seemly to reproduce the said paragraphs:-

“22. ... The rates agreed were firm, fixed and binding irrespective of any fall or rise in the cost of the work covered by the contract or for any other reason or any ground whatsoever. It is specifically agreed that the contractor will not be entitled or justified in raising any claim or dispute because of increase in cost of expenses on any ground whatsoever. By ignoring the said terms, the arbitrator has travelled beyond his jurisdiction as his existence depends upon the agreement and his function is to act within the limits of the said agreement. 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.

23. It is settled law that the arbitrator is the creature of the contract between the parties and hence if he ignores the specific terms of the contract, it would be a question of jurisdictional error which could be corrected by the court and for that limited purpose agreement is required to be considered. ...”

19. We have referred to series of decisions to appreciate the concept of misconduct and how a party is entitled to make it the fulcrum of assail in his objection under Sections 30 and 33 of the 1940 Act. Misconduct, as has been laid down, does not always have a moral connotation. To elaborate, it may not have any connection with the individual/personal conduct of the arbitrator. The said conduct would be in sphere of moral misconduct. As far as legal misconduct is concerned, as the authorities would demonstrate, the same must be manifest or palpable from the proceedings before the arbitrator. To elaborate, a person urging the ground of legal misconduct has to satisfy the court from the records of the arbitral proceedings that there has been a legal misconduct on the part of the arbitrator as a consequence of which the award gets vitiated. The question of adducing any kind of oral evidence to substantiate the plea or stand or stance does not arise. It has to be shown from the proceedings carried on before the arbitrator and the evidence adduced before the arbitrator. Evidence cannot be adduced in court to substantiate the challenge on the score of legal misconduct. We are not entering upon any discussion pertaining to moral misconduct as that is not the issue in the case at hand. The decision in Fiza Developers and Inter-Trade Private Limited (supra) has been rendered by this Court while interpreting Section 34 of the 1996 Act. The context being different, we are not inclined to apply the principles enumerated therein to the objection filed under Sections 30 and 33 of the 1940 Act, for the simple reason that the authorities are plenty to make it limpid that the issue of legal misconduct on the part of the arbitrator should be manifestly discernable from the record.

20. In the instant case, the High Court has granted liberty to the respondent herein to examine its General Manager to substantiate its claim and further opining that the said evidence should be considered within the parameters of Sections 30 and 33 of the 1940 Act. The learned senior counsels for the parties have pressed their argument relating to legal misconduct. Both the learned senior counsels for the parties have construed the order that the said liberty has been granted to establish the misconduct and precisely that is the subject matter of challenge before us. Therefore, we have clearly opined that to substantiate a stance of legal misconduct on the part of the arbitrator, examination of any witness in court is impermissible. It is because it must be palpable from the proceedings and the learned single Judge has already directed that the proceedings before the arbitrator to be requisitioned by the civil court. Least to say, it will be open for the respondent to establish the ground of legal misconduct from the arbitral proceedings. We may hasten to add that we have not said anything as regards legal misconduct pertaining to the present case, although we have referred to certain authorities as regards the legal misconduct.

21. In view of the aforesaid premises, the appeal is allowed in part as far as it grants permission/liberty to the respondent to examine any witness in court. The learned Civil Judge would requisition the records from the learned arbitrator, if not already done, and the respondent would be at liberty to advance its arguments for pressing the factum of misconduct from the said records. There shall be no order as to costs.

Judgment Referred.

<sup>1</sup>(1999) 9 SCC 0449

<sup>2</sup>(2002) 3 SCC 0175

<sup>3</sup>(2003) 7 SCC 0396

<sup>4</sup>(2003) 12 SCC 0474

<sup>5</sup>(2004) 5 SCC 0325

<sup>6</sup>(2005) 1 SCC 0379

<sup>7</sup>(2005) 6 SCC 0462

<sup>8</sup>(2010) 13 SCC 0377

<sup>9</sup>(2009) 17 SCC 0796

<sup>10</sup>(1975) 2 SCC 0236

<sup>11</sup>(1994) 4 SCC 0665

<sup>12</sup>(2007) 4 SCC 0697

<sup>13</sup>AIR 1967 SC 1030

<sup>14</sup>AIR 1923 PC 0066

<sup>15</sup>(1990) 1 SCC 0214

<sup>16</sup>(2001) 2 SCC 0680

<sup>17</sup>(1964) 5 SCR 0480

<sup>18</sup>(1989) 1 SCC 0411

<sup>19</sup>(1988) 4 SCC 0153

<sup>20</sup>(1989) 1 SCC 0532

<sup>21</sup>(1999) 9 SCC 0283

<sup>22</sup>(2001) 6 SCC 0347