MADHYA PRADESH HIGH COURT

Shivlal

Vs.

Union of India

Misc. (First) Appeal No. 99 of 1970
(A.P. Sen and M.L. Malik, JJ.)

06.09.1974

JUDGMENT

Malik, J.

1. The appellant is a Railway contractor. He entered into a contract with the South Eastern Railway for the performance of various works in connection with the Bhilai Marshalling Yard. Disputes having arisen on certain claims preferred by the appellant against the Railway Administration, they were referred to the arbitration of Sri S. K. Mitra, Deputy Chief Accounts Officer and Sri R. P. Basu Choudhury, Engineer-in charge (Bridge). Relevant extract from the letter of reference addressed from the Office of the General Manager, may usefully be reproduced here :

> "..... All disputes and differences between the parties to the aforesaid contract except disputes relating to matter specifically taken out of the purview of the Arbitration Clause contained in the aforesaid Agreement are referable to arbitration. Under the aforesaid Agreement, the General Manager is the person empowered to nominate and appoint arbitrator for deciding the disputes and differences between the parties to the aforesaid Contract as are referable to arbitration.

2. The General Manager has accordingly nominated and appointed you as Arbitrators in the above matter. You are, therefore, requested to enter into reference and pronounce your decision and publish your Award on the items of Claims/disputes as specified below. You are also requested before entering into reference, to nominate an Umpire to whom the case will be referred in the event of any difference between yourselves (i. e. the two Arbitrators) : items of claims :

Items of claims :

1. Lead @ Rs. 20/- per % 0 cft. on the quantity of 1,30,000 cft. of earthwork - Work Order No. SP/L.	Rs. 2,600/-
2. Lead on moorum for a distance of more than half a mile @ Rs. 20/- per % 0 cft. on the quantity of 1,20,000 cft. Rs. 2,040/- and such ten claims.	Rs. 2,040/-
Total amount	Rs. 2,00,370/-
Interest at 1% P. M. from 1-11-1962 to 30-4-1966	Rs. 83,315.04
Grand total	Rs. 2,83,685.04

The arbitrators gave a consolidated award for Rs. 24,160/- in favour of the appellant on 16-3-1968.

3. On 8-4-1968, the appellant moved the Court of the District Judge, Bilaspur, for getting the award filed. The arbitrators filed the award and the appellant raised various grounds under Section 30 of the Arbitration Act for setting it aside. The District Judge has rejected all those grounds by his order dated the 24th February, 1970. Aggrieved by the order, the appellant has come to this Court in appeal.

4. The appellant's first contention before us is that the reference specifically required the arbitrators to give their award on each item of claim separately. The arbitrators. instead of pronouncing their decision on each item, gave a consolidated award, which was in fact and law a neglect of duty and shirking of responsibility, amounting to legal misconduct. (Reliance is placed on *Union of India v. Firm J. P. Sharma and Sons,* [1]
5. In our reading of the letter of reference (which has been quoted), we find nothing mentioned therein which required the arbitrators to give their award itemwise. Unless the reference so specifically required, the arbitrators were not bound to deal with each claim separately. All the disputes and differences were referrable to the arbitrators, and; therefore, all the disputes were mentioned in the letter of reference and the arbitrators were asked to make their award. If the parties to the reference wanted

decision item wise, they should have so required of the arbitrators in express terms.

6. The basic principles to be borne in mind, when a challenge on the ground of incompleteness of the award a legal misconduct on that ground, is made, are enunciated by the Supreme Court in *Smt. Santa Sila Devi v. Dhirendra Nath Sen,* [2] thus :

> "(1) A Court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal; (2) unless the reference to arbitration specifically so requires the arbitrator is not bound to deal with each claim or matter separately, but can deliver a consolidated award. The legal position is clear that unless so specifically required an award need not formally express the decision of the arbitrator on each matter of difference; (3) unless the contrary appears the Court will presume that the award disposes finally of all the matters in difference; and (4) where an award is made de premises (that is, of and concerning all the matters in dispute referred to the arbitrator), the presumption is, that the arbitrator intended to dispose finally of all the matters in difference; and his award will be held final, if by any intendment it can be made so."

7. Having regard to these basic principles, a presumption does necessarily arise that the arbitrators had considered and disposed of every claim made and defense raised. There is a presumption in the completeness of the award when the award states that it is made in respect of all the disputes referred.

8. The same basic principles were reiterated by the Supreme Court in Firm *Mdanlal Roshanlal Mahajan v. Hukumchand Mills Ltd., Indore,* [3] and in *Bungo Steel Furniture (Pvt.) Ltd. v. Union of India,* [4] Their Lordships say that an arbitrator is not bound to give a separate award for each claim but can give a lump sum award.

> "If an arbitrator, in deciding a dispute before him, does not record his reasons and does not indicate the principles of law on which he had proceeded, the award is not on that account vitiated. It is only when the arbitrator proceeds to give his reasons or lay down principles on which he has arrived at his decision that the Court is competent to examine whether he has proceeded contrary to law and is entitled to interfere if such error of law is apparent on the face of the award itself."

9. The position of law is thus very clear and the first contention of the appellant must fail. The award was not required to be made item-wise. The arbitrators could give a lump sum award. The award must be presumed to be complete and final.

10. The second contention of the appellant is that the arbitrators deliberately omitted to file the minutes of the proceedings and the depositions along with the award, as enjoined by Section 14 (2) of the Arbitration Act. That the appellant could, with reference to these documents show how and where the arbitrators had misconducted; in respect of which item of claim they had misread the evidence or overlooked it, and in particular, how it was impossible to work out the aggregate award without deciding upon each item of claim separately. The appellant says that it is a deliberate case of suppression of documents and depositions so that their misconduct may not be brought to light. That being so, a presumption of misconduct would arise. Reliance is placed on *Yusuf Khan v. Riyasat AH*[5]

11. On perusal of the record, we have no reasons to suspect that the minutes of the proceedings and the depositions have been deliberately kept back by the arbitrators. The Railway Administration was called upon to make a discovery on oath and they said that those minutes and depositions could not be traced in their arbitration cell. One of the arbitrators was noticed to produce them and he also could not trace them out. He answered that all the papers, whatever they had, were remitted to the court. The question then was, should we readily infer misconduct on the part of the arbitrators? It does usually happen that an arbitrator takes down pencil notes or prepares formal minute of the evidence and proceedings for his own understanding of the case and destroys those notes after the calculations are done and the award is made. Was it that the arbitrators in the present case had taken down rough notes for working out their decision ? They were not obliged to retain them and file them along with the award once they contemplated to give a lump sum amount.

12. At any rate, mere omission to file the depositions and other documents, does not affect the validity of the filing of the award. Our pertinent query to the learned Counsel for the appellant was whether the counsel who represented the contractor before the arbitrators, had his own notes of the proceedings and depositions, and whether he had tendered those notes in Court as secondary evidence when the primary evidence was being withheld. If any such proceeding or document was of importance

to prove misconduct, it was reasonable to expect that the counsel retained a copy thereof and used it as secondary evidence.

13. Even supposing the documents and the depositions had been filed, this Court could not reappraise the evidence nor could it sit in appeal over the conclusions of the arbitrators. The scope of enquiry in the proceedings under Section 30 of the Arbitration Act was limited. The award could be interfered with only, when there was error on the face of the award, meaning thereby that some legal proposition which was the basis of the award was erroneous and such error was apparent in the award or the document actually incorporated thereto See *State of Madhya Pradesh v. Babulal Pathak,*[6] following. Firm *Madanlal Roshanlal v. Hukumchand Mills,* [7] and *Champsey Co. v. Jivraj Balloo Co.,* [8]

14. The second contention of the appellant must, therefore, fail. Non-filing of the minutes of the proceedings and depositions would not vitiate the award.

15. The third contention of the appellant was that the arbitrators being the employees of the Railway Administration were showing undue favor to the Department. In particular, Sri S. K Mitra, after his transfer to the post of Deputy F. A. and C. A. O. (Arbitration), should not have proceeded with the arbitration, because as head of the arbitration cell he was bound to be influenced by the advice and consultations of the Executive Engineer (Arbitration) and S. A. O. (Arbitration) who came in his contact almost every day in connection with arbitration matters against the Department.

16. And in so far as the other arbitrator Sri Basu Choudhury was concerned, the contention was that he was shortly due to retire, took no interest in the proceedings, was dominated by the co-arbitrator and acted almost like a dummy.

17. We regret to observe that the appellant has made too reckless an insinuation against the two high ranking officers of the Railway Administration without any foundation whatsoever. As soon as Sri S. K. Mitra was transferred to the Arbitration Cell, he informed the General Manager that he would not take charge of this case as he was an arbitrator and that an alternative arrangement for supervision of the case might be made. There is no evidence whatsoever that despite having written to the General Manager a letter to this effect, Sri S. K. Mitra had had consultations with the XCN (Arbitration) or the S. A. O. (Arbitration) relating to this case. The appellant's

affidavit makes no statement of material facts leading to this conclusion. The affidavit is then worthless. The very fact that the appellant participated in the proceedings and agreed to extend time for making the award, indicates that he had no suspicions whatsoever. It is only after the award was made for a much smaller sum than what was expected by the appellant that he came forward with insinuations against the arbitrators.

18. Integrity and rectitude in an arbitrator is a matter intimately personal to him and we have every reason to presume that though Sri S. K. Mitra was transferred as Head of the Arbitration Cell, he maintained judicious detachment insofar as this case was concerned.

19. Sri Basu Choudhury was an Engineer-in-charge (Bridge) and could not possibly be called a dummy-arbitrator if he was not very vociferous in the proceedings but was a quiet gentleman. His role was to give technical assistance in assessing the quality measurements of the work. Sri Mitra was a man of accounts and he rendered assistance in that branch.

20. We may usefully quote a passage from Law of Arbitration by S. D. Singh (6th Edition) at page 358 :

> "In agreements with the Government or Corporation relating to execution of works or supply of articles, there is very often an arbitration clause providing for arbitration, not by a stranger or a wholly unbiased person, but by an Engineer or Architect or Officer of the Government or the Corporation, who may, to some extent, be the Judge, so to say, in his own quarrel. Employers find it in their interest to impose such terms and the contractors accept these terms so that their tenders may be accepted, and it has been held that it is no part of the duty of Judges to approach such curiously coloured contracts with desire to upset them or to emancipate the contractor from the burden of such a stipulation. In all such cases the arbitrator would be, if not directly, indirectly, interested in the sense that it might affect other similar transactions, but it cannot be helped. The parties agree that they might have to go to such an arbitral tribunal, and they must stick to it. It cannot even be said in such a case that the arbitrator has a secret interest in the subject-matter, which may vitiate the award."

21. The author has noticed modification of this view to some extent in recent decisions on the principle of natural justice. In some cases, the Courts have interfered, if there was well founded apprehension of bias on the part of the arbitrator because of his knowledge of the special facts; or the role that he had to play in any negotiations pending the litigation. But it all depends, he says, on the circumstances of the case whether the apprehension is well founded and such bias can be inferred with reasonable possibility.

22. In the present case, we have nothing on record to show that the two arbitrators were favorably inclined towards the department, or prejudicially disposed towards the contractor, or that they had secret consultations with the people of the arbitration cell to dupe the contractor of his legitimate price for the work done. We, therefore reject the third contention.

23. The fourth contention of the appellant was that the award not being on a stamp paper could not be acted upon. This contention must fail in view of the authority of the Supreme Court reported in *Hindustan Steel Limited v. M/s. Dilip Construction Co.,* [9] This is what their Lordships observed in para 5 : -

> "The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments; it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon; Section 40 provides the procedure for instruments being impounded. sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped, and sub-section (2) of Section 42 enacts the consequences resulting from such certification."

24. Towards the end in para 6, their Lordships say that Section 42 (2) of the Stamp Act, expressly renders an instrument, when certified by endorsement that proper duty and penalty have been levied in respect thereof, capable of being acted upon as if it had been, duly stamped.

25. The Court below is following the course enjoined by the authority.

26. The fifth contention of the appellant is that the award, not having been made within the time prescribed by law after the arbitrators entered upon the reference, the time could not be extended by mutual agreement of the parties after the lapse of that time, the arbitrators having become functus officio.

27. We would firstly not allow this contention to be raised as it was not a ground taken before the lower Court. The question of limitation was a mixed question of law and fact and it necessitated the pleadings as to how and when the time was extended by the arbitrators with the consent of the parties; and whether the parties having taken part in the proceedings were estopped from challenging his jurisdiction.

28. The contention otherwise is also of no avail in view of the decision of the Supreme Court in *Hari Krishna Wattal v. Vaikunth Nath Pandya,* [10]

29. In paras 11 and 13, their Lordships enunciate the law thus:

> Para. 11 : "Sub-section (2) of Section 28, however, indicates one exception to the above rule that the Arbitrator cannot enlarge the time, and that is when the parties agree to such an enlargement. The occasion for the Arbitrator to enlarge the time occurs only after he is called upon to proceed with the arbitration or he enters upon the reference. Hence, it is clear that if the parties agree to the enlargement of time after the Arbitrator has entered on the reference, the Arbitrator has the power to enlarge it in accordance with the mutual agreement or consent of the parties. That such a consent must be a post reference consent, is also clear from Section 28 (2) which renders null and void a provision in the original agreement to that effect. In a sense where a provision is made in the original agreement that the Arbitrator may enlarge the time, such a provision always implies mutual consent for enlargement but such mutual consent initially expressed in the original agreement does not save the provision from being void. It is, therefore, clear that the Arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the Arbitration the parties to the arbitration agreement consent to such enlargement of time."
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> Para 13 : "The above interpretation is in consonance with the fundamental principles of arbitration. The arbitrator gets his jurisdiction to make a binding

> award on an agreement between the parties to refer a dispute to him. The agreement between the parties is the foundation of the jurisdiction of the Arbitrator. Like any contract by mutual consent of the parties, the terms of the contract can be modified. Even in a case where the Arbitrator enters on the reference on an invalid agreement it is open to the parties to enter into a fresh agreement to refer the dispute to the Arbitrator while it is pending adjudication and in such an event the proceedings before the Arbitrator can be upheld as referable to that agreement and the award will not be open to attack as without jurisdiction. See *Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India) Private Ltd*, [11] at Pp. 97- 98). Such being the power of mutual consent of the parties in the sphere of arbitration one does not see why by mutual agreement the parties cannot enlarge the time for making the award when the Arbitrator has entered on the reference and is proceeding with the arbitration."

30. Another authority which needs mention, is the Judgment of this Court given in *Rambihari v. The State of Madhya Pradesh,* [12] , Sen, J., who delivered the judgment for the Court said in para. 6 :

> "The appellant is precluded by his conduct from objecting to the award on the ground that it was made out of time. There is a rule well recognized and established in the nature of an estoppel, that if the parties to an arbitration proceeding by their conduct lead arbitrators to think and believe, that even though the time of making their award has in fact expired that they should continue the proceedings and to which course, the parties must be deemed to have assented, by acquiescing in taking part in such proceedings, that then, though the time for making the award may have expired, the jurisdiction of the arbitrators would be deemed to continue, to validate and give effect to the award. See : Halsbury's Laws of England, Vol. 2, 3rd Edn., p. 42 : *Choudhri Murtaza Hossein v. Mst. Bibi Bechunnissa,* [13] *Pattoo Kumari v. Upendra Nath Ghosh,* [14] and *M/s. Bokaro and Ramgur Ltd v. Dr Prasun Kumar Banerjee.* [15]

31. The award in the present easel was made within the extended time which) was four months from the 27th November, 1967 and this enlargement of time was consented to by the parties. The fifth contention must, therefore, fail.

32. The appellant's sixth contention relates to the Advocate's fee awarded by the

Court. The schedule of costs appended to the order shows a figure of Rs. 2,967.75 Nps. having been added towards this item. According to the appellant, the matter was a miscellaneous proceeding and the Advocate's fee should have been taxed at 1/4th the rate at which it is assessed in a regular suit.

33. We have looked into the Rules of this Court. The filing of award and all proceedings consequent thereon have to be treated as a suit and not as miscellaneous proceeding, and the matter of Advocate's fee would, therefore, be governed as if a suit for setting aside an award of the value of Rs. 24,160/- were disposed of.

34. The Advocate's fee as per schedule then would work out to Rs. 900/- instead of Rs. 2,967/75 Nps. We order correction of the schedule of costs accordingly.
35. In the result, the appeal fails on all the contentions except one relating to correction of the schedule of costs prepared by the Court below.

36. We dismiss the appeal and direct that the appellant shall pay to the respondents their costs of the appeal. Counsel's fee shall be Rs. 900/-.

Appeal dismissed.

Cases Referred.

1, AIR 1968 Raj 99
2. AIR 1963 SC 1677
3. AIR 1967 SC 1030
4. AIR 1967 SC 378
5. AIR 1926 Oudh 307
6. 1974 MPLJ 191
7. AIR 1967 SC 1030
8. AIR 1923 PC 66
9. AIR 1969 SC 1238
10. AIR 1973 SC 2479
11. 1963-3 SCR 209 at p. 226: (AIR 1963 SC 90)
12. Misc. App No. 178 of 1968, decided on 27-11-1972 (Madh. Pra)
13. (1876) 3 Ind App 209 (PC)
14. AIR 1919 Patna 93

15. AIR 1968 Patna 150 (FB)