

# PATNA HIGH COURT

Union of India

Vs

Premchand Satram Das

A.F.O.O. Nos. 252 and 253 of 1950

(Lakshmikanta Jha, C.J. and Chatterji, J.)

11.05.1951

## JUDGMENT

### **Lakshmikanta Jha, C.J.**

1. This is an appeal by the defendant (the Union of India) in a suit instituted by the plaintiff-respondent for the enforcement of an award given by an arbitrator appointed under an arbitration clause in an agreement between the parties which provided for settlement of all disputes arising between them.
2. The Central Public Works Department invited tenders for the manufacture and supply of four crores of bricks on the 23rd September, 1945, for what is known as the Sindri Fertiliser project. Seth Prem Chand Satram Das, the plaintiff in the present suit, was one of the persons who offered to manufacture and supply bricks at certain rates. His tender was accepted by the Superintending Engineer, Bihar Central Circle, by his letter dated the 1st November, 1945, and he was given a contract for the supply of 1 1/2 crores of bricks at his tender rates. A deed of agreement was executed and signed by the plaintiff and the Additional Chief Engineer, New Delhi, on behalf of the appellant, and a delivery schedule was appended showing the number of bricks to be supplied by the plaintiff month by month from January to May, 1946.
3. The case of the plaintiff is that he performed his part of contract and kept bricks in readiness for supply according to the schedule appended to the contract. But for certain reasons the bricks were not removed from the kiln sites, though they were manufactured and made ready for delivery, as required by the delivery schedule, and this caused, according to the plaintiff, serious dislocation in the manufacture of bricks. His case is that he had to acquire 10 bighas of land at the rate of Rs. 200/- per bigha which included the cost of preparing and leveling the land for the stacking of the bricks of which delivery could not be taken. It is not disputed that the plaintiff was paid, at the contract rate, the full price of the bricks which he was ordered to manufacture, but his case is that he suffered loss on various counts by reason of the defendant's failure to remove the bricks according to the agreement. He therefore submitted his claims under various heads and submitted a bill to the Chief Engineer for the reimbursement of the losses suffered by him. The Chief Engineer refused to make any payment on account of any loss. Thereupon the

plaintiff applied for arbitration according to the arbitration clause of the agreement. It appears from the Additional Chief Engineer's letter that he appointed Mr. Dixon, the Superintending Engineer of the Circle, as the arbitrator and the plaintiff was asked to submit his case to the arbitrator on the date to be fixed by him. The plaintiff accordingly submitted his claims in writing to Mr. Dixon, for his decision, and preferred his claims under eighteen heads. A sum of Rs. 1,65,893/- was claimed by the plaintiff before the arbitrator under different heads and a further sum was also claimed by way of interest at 6 per cent., per annum for two years; in all Rs. 2,01,371/- was claimed by the plaintiff before the arbitrator, including interest. No objection was filed in writing on behalf of the appellant, but the Executive Engineer appearing before the arbitrator on behalf of the Central Public Works Department objected to the claims orally. Mr. Dixon, after hearing the parties, awarded a sum of Rs. 1,20,560/9/- as against the plaintiff's claim of Rs. 2,01,371/-, by his order dated the 1st May, 1949, and directed the amount to be paid on or before the 1st June, 1949, failing which interest at 6 per cent per annum from the 1st June, 1949, was to be paid by the appellant.

4. The plaintiff filed the present suit for enforcement of the award and prayed that the award be accepted and a decree passed in terms of the award. The suit was contested and the objection of the Union was only in respect of claims Nos. 3, 4, 6, 8, 13 and 17. The award regarding claim No. 6 relating to sale tax was set aside; but the rest of the award was affirmed. With this modification the learned Subordinate Judge directed a decree to be made in terms of the award.

5. The dispute before us is now confirmed only to claims Nos. 3, 4, 8, 13 and 17, which are as follows:

" 'Claim No. 3 : Payment for the purchase of an additional ten bighas of land for stacking bricks. Rs. 1285 (i.e. Rs. 2000/- less Rs. 715/- already paid).

'Claim No. 4': Payment on account of additional wages paid to labourers because of non-availability of ration and cloth Rs. 37,215/-10-0.

'Claim No. 8': Payment for the loss of 47 lacks of kuchcha bricks which were destroyed by rain: Rs. 40,537/-

'Claim No. 13': Payment for loss sustained as the result of brick fields not being freed for lease to intending lessees and suspension for brick manufacturing business - Rs.25,000/-.

"Claim No. 17': Payment of interest @ 6 per cent per annum for 2 years on account of delay in settling dues."

6. The contention of Mr. Lal Narain Sinha, for the Union, is that the award in respect of all these five items is illegal and ought to be set aside because the error in law is apparent upon the face of the award. He, however, concedes that the plaintiff is entitled to a decree according to the award for the claims in respect of which there is no illegality in the award apparent on the face of it. He does not want us to remit the award to the arbitrator for reconsideration in case we are satisfied that there is an error apparent on the face of the award in respect of any of the claims. Nor is it necessary to do so because the award in respect of each claim is self-contained and separable. Even if the award in respect of any claim be held to be bad, the rest of it can be maintained without any prejudice to either party. The point for our consideration, therefore, is whether the award is bad in law in respect of any of the five claims mentioned above.

7. Domestic tribunal was not unknown to India. Statutory recognition was given to it during the British rule and now the whole law on the subject has been incorporated in the Indian Arbitration Act, 1940. With the growth of trade in India it has become almost a regular practice with the businessmen to insert an arbitration clause in almost every agreement providing for settlement of all disputes by an arbitrator. Whenever a dispute is submitted to an arbitrator, his decision becomes final. The arbitrator is constituted the sole and final judge of all questions both of law and of fact. The decision of an arbitrator, though sacrosanct, can be challenged for his "judicial misconduct", which does not necessarily imply moral turpitude, but may consist "in making a mistake in law, and letting it be visible on the face of his award": *Saleh Mahomed v. Nathoomal*<sup>1</sup>). The test for the determination of judicial misconduct of the arbitrator has been laid down in number of cases.

8. In *Hodgkinson v. Fernie*<sup>2</sup>, which is a leading case on the point, Williams, J. stated the grounds on which an award can be successfully assailed. In that case the allegation of the plaintiff was that his ship had been run down owing to the negligent navigation of the defendant's ship. At the trial a verdict was entered for the plaintiff for damages. The amount of damages was referred to be assessed by an arbitrator. The arbitrator awarded a lump sum. The defendant sought to show by affidavit that the arbitrator had included an item which ought to have been rejected. It was held that the award could not be interfered with because there was no error on the face of the award. Williams, J. stated the law thus:

"The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law, and fact. .... The only exceptions to that rule are, cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established".

9. In *Champsey Bhara and Co. v. Jivaraj Balloo Spinning and Weaving Co., Ltd*<sup>3</sup>., which was a case under the Indian Arbitration Act, 1899, Lord Dunedin, on a review of the decisions of the English courts, stated the law thus:

"An error in law on the face of the award means, in their Lordships' 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". At another place he stated:

"The question of whether an arbitrator acts within his jurisdiction is, of course, for the court to decide, but whether the arbitrator acts within his jurisdiction or not depends solely upon the clause of reference. It is, therefore, for the Court to decide in his case whether the dispute which has arisen is a dispute covered by R. 13 of the

Association. It clearly is so, because it is undoubtedly a dispute arising out of or in relation to a contract made subject to the rules and regulations of the Cotton Trade Association. Now that clause refers to the arbitrator the whole question whether it depends on law or on fact, with the exception only of dispute as to quality". The principle enunciated in this case was followed and reaffirmed by the Privy Council in '*Saleh Mahomed v. Nathoomal*<sup>4</sup>', It is not profitable to examine other cases relevant to the point because the case law bearing on the question was examined by the Houses of Lords in '*F. R. Absalom, Ltd. v. Great Western (London) Garden Village Society, Ltd*<sup>5</sup>:', The learned law Lords on a review of the case law bearing on the point stated the law in clear and unambiguous terms. Lord Russell of Killowen observed at page 607:

"It is, I think, essential to keep the case where disputes are referred to an arbitrator in the decision of which a question of law becomes material distinct from the case in which a specific question of law has been referred to him for decision. I am not sure that the court of Appeal has done so. The authorities make a clear distinction between these two cases, and, as they appear to me, they decide that in the former case the court can interfere if any when any error of law appears on the face of the award, but that in the latter case no such interference is possible upon the ground that it so appears that the decision upon the question of law is an erroneous one". In the same case Lord Wright enunciated the law thus:

"The rule in truth applies to the ordinary case where, in the words of Lord Dunedin in '*Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd*<sup>6</sup>', the submission refers 'to the arbitrator the whole question whether it depends on law or on fact'. To be contrasted with such cases there is the special type of case where a different rule is in force, so that the court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question, whether involving both fact or law, but only some specific question of law in express terms as the separate question submitted; that is to say, where a joint of law is submitted as such, that is, as a point of law, which as all that the arbitrator is required to decide, not fact being, quoad that submission, in dispute".

10. The law as to how far finality attaches to the decision of an arbitrator may be summarized thus: The award if baldly stated without giving reason for it, cannot be assailed even if it be against fact or repugnant to law. In other words the award is not open to judicial review. But if a reference to arbitration be made generally and not specifically, and the arbitrator enunciates a proposition of law and states his own view of the law as a ground of his award, such an award is open to attack in a court of law and is liable to be set aside if there be an error of law apparent on the face of it. So

also, if the arbitrator construes a document and gives his own construction or interpretation of the document as a reason for the award, it is open to the Court to examine the reason and set aside the award if the error in the construction is apparent on the face of the award. If, however, a reference is made specifically and a dispute relating either to fact or to law is submitted to the arbitrator for his decision, his award cannot be challenged even if there be an error of fact or law, or both, apparent on the face of the award: see '*Hodgkinson v. Fernie*<sup>7</sup>,

*'British Westinghouse Electric and Manufacturing Co., Ltd. v. Under ground Electric Rly. Co., of London Ltd.'*<sup>8</sup>, *'Government of Kelantan v. Duff Development Co., Ltd'*<sup>9</sup>, *'Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Company, Limited'*<sup>10</sup>, *'Saleh Mahomed Umer Dossal v. Nathoomal Kessamal'*<sup>11</sup>, and *'F. R. Absalom, Ltd. v. Great Western (London) Garden Village Society, Limited'*<sup>12</sup>,

11. Bearing in mind the principles already enunciated, we have to examine the legality of the award with reference to the arbitration clause and other relevant clauses of the agreement and see for ourselves whether there is any error in law apparent on the face of the award. In order to appreciate the argument at the bar on the question raised before us it is necessary to quote here in extenso the arbitration clause of the agreement which runs as follows:

"14. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specification and instructions herein before mentioned and as to quality of materials or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, specification, instructions, orders, or these conditions, or otherwise concerning the supplies whether arising during the progress of delivery or after the completion or abandonment thereof shall be referred to the arbitration of the Superintending Engineer of the Circle for the time being in the manner provided by law relating to arbitration for the time being in force who after such investigation as he may think proper shall deliver his award which shall be final, conclusive and binding on all parties to this contract".

'Claim No. 3.'

The dispute in respect of claim No. 3 involves a question arising out of or relating to the contract. It was, therefore, within the competence of the arbitrator to take cognizance of the point in question. He considered the argument on either side and recorded his finding in these terms: "I hold that Rs. 200/- per bigha was a reasonable price, the claim of the contractor for Rs. 2000/- less Rs. 715/- (already paid) is therefore awarded"

12. It does not appear that there is any error apparent on the face of the award. The arbitrator has held without assigning any reason in support of his award that the contractor is entitled 'to Rs. 2000/- less Rs. 715/-. Therefore, the award cannot be interfered with.

13. The arbitrator, while dealing with the argument on behalf of the contractor on this point, referred to the argument advanced on behalf of the parties with respect to claim No. 1 in which reference has been made to the agreement. It does not appear that he has referred to any term of the agreement as a matter of construction to fix the liability of the appellant. He seems to have referred to the agreement to understand the nature and origin of the dispute, and in so doing he has not committed any error of law. But even assuming that the arbitrator construed the agreement and has based his award on the construction of it, it does not appear that he committed any error. The appellant was in ordinary course of business expected to remove the bricks according to the schedule. The contractor was compelled to acquire the land for the stacking of the bricks on account of the non-removal of the bricks by the appellant. Therefore, the award on

this point is unassailable. The order of the learned Subordinate Judge is, therefore, confirmed and the award upheld.

'Claim No. 4'.

14. On account of certain restrictions local labour was not available to the contractor. He had to import coolies from the Central Provinces and the United Provinces for the manufacture of bricks and had to incur extra cost for procuring supply of food for the coolies. It appears that there was certain correspondence between the contractor and the Central Public Works Department in this connection, and the arbitrator seems to be of the view that the responsibility for making available controlled rations for the coolies was accepted by the Central Public Works Department. On account of this and other reasons the arbitrator decided that the appellant is liable to pay to the contractor Rs. 30,000/- to make good the loss which the contractor suffered. There is nothing in the agreement to show that the appellant was under any contractual obligation to supply rations for the coolies at controlled rates. In fact the arbitrator himself found that the appellant was not bound to compensate the contractor on this account. His finding is:

"From the point of view of contractual obligations therefore the department was not bound to compensate the contractor for any losses on this account".

In view of this finding the arbitrator misdirected himself in law in holding further that: "there was a moral and implied obligation on the part of the C. P. W. D. to see that the contractor was given the necessary facilities to purchase rations at the controlled rates, and that this should have been arranged prior to arrival of the contractor's men." and awarding compensation. The arbitrator's jurisdiction was to fix contractual and not moral liability. The illegality, therefore, is apparent in the face of the award and it is open to us to set aside the award under this head. It is accordingly set aside.

'Claim No. 8'.

15. The contractor preferred a claim for the price of 47 lacs of kuchcha bricks which had been destroyed by rain. His case was that the destruction of these kuchcha bricks resulted from the jamming of the kilns as a result of a breakdown in the brick removal arrangements which was the responsibility of the department. The Executive Engineer, on behalf of the appellant, maintained that the removal of bricks from kiln area was not a contractual obligation and that, in any case, only 45 lacs of bricks had been destroyed. The arbitrator on a consideration of the arguments on either side recorded his finding thus:

"I hold that the contractor is entitled to compensation and award payment for 36 lacks of bricks at 8/8 per cent i.e. Rs. 30,600/-". There is no illegality on the face of the award. Therefore, it cannot be assailed. The award in respect of this claim is, therefore, good and is accordingly maintained.

'Claim No. 13'.

16. The contractor claimed damage for the loss in his business arising on account of the non-removal of the bricks by the appellant from the kiln area within a reasonable time. The arbitrator

was satisfied on the merits of the case that the contractor was unable to manufacture any bricks and supply the same to his customers because the approaches to land surrounding his kilns were jammed with stacks of Government bricks, and his finding is "I hold that the contractor is entitled to compensation on this matter and award payment to him of Rs. 15,000/-." From the finding of the arbitrator it is clear that he has fixed the liability without giving any reason in support of his view. Therefore, there is no error of law apparent on the face of the award and it cannot be assailed.

'Claim No. 17'.

17. The arbitrator has allowed interest from the 31st March, 1947 to the 20th April, 1949, i.e. for a period of 24 months and 20 days, at the rate of 6 per cent per annum. The contractor did not include any claim for interest for this period in his bill originally submitted to the Chief Engineer, Central Public Works Department. The claim was preferred before the arbitrator for the first time during the progress of the arbitration proceeding, and the Executive Engineer, appearing on behalf of the Union, does not seem to have submitted to the jurisdiction of the arbitrator to decide this question. In the circumstances it cannot be said that the claim for interest was one of the matters referred to arbitration. The arbitrator, therefore, in my opinion, had no jurisdiction to entertain this claim and the award in this respect must accordingly be set aside.'Miscellaneous Appeal No. 253 of 1950.'

18. This appeal arises out of suit No. 34 of 1949. It was heard by us along with Miscellaneous Appeal No. 252 of 1950, which arises out of suit No. 27 of 1949. Both the suits were heard together by the trial court and are governed by the same judgment. We have also heard these two appeals together, but for the sake of convenience this appeal is dealt with separately.

19. The plaintiff, Seth Thawardas Pherumal, entered into an agreement with the Additional Chief Engineer, New Delhi, under which the plaintiff agreed to supply 2 1/2 crores of bricks to the Central Public Works Department for the Sindri Fertiliser project. The terms of this agreement are substantially the same as in the other suit. Owing to differences between the parties, the dispute was referred to Mr. Dixon, Superintending Engineer for his decision under the terms of the arbitration clause of the agreement which are identically the same as those of the other already quoted. The contractor claimed Rs. 4,76,138/12/- plus interest at 6 per cent for 16 months, that is, a total sum of Rs. 5,38,003/- under different heads. But the arbitrator allowed Rs. 2,35,346,/6/- only under his award dated the 8th May, 1949. The contractor thereupon filed the present suit for the enforcement of the award. The appellant objected to the award on various grounds. The learned Subordinate Judge overruled the objections of the appellant and accepted the award in its entirety and passed a decree in terms thereof. The award has been contested before us with respect to claims Nos. 2, 5, 8 and 17 only, which are as follows:

'Claim No. 2': Payment for loss sustained due to closeng of Kiln No. 3 ..... Rs. 8,443/12/-.

'Claim No. 5': Payment for 88 lacs of kuchcha bricks destroyed by rain ..... Rs. 75,900/-.

'Claim No. 8': Payment on account of additional wages paid to labourers because of non-availability of rations and cloth ..... Rs. 51,495/-.

'Claim No. 17': Payment of interest on money blocked ..... Rs. 27,665/-.

'Claim No. 2'.

20. The contractor claimed Rs. 8443/12/- for the loss sustained due to closing of kiln No. 3. His case was that the Executive Engineer wrote to him a letter to the effect that he would not pass any bricks coming out of this kiln. The Executive Engineer on the other hand, contended on behalf of the appellant that the letter could not be interpreted to mean an order to close the kiln. The arbitrator on the construction of the Executive Engineer's letter held as follows:

"I hold that the Executive Engineer's letter was tantamount to an order to close the kiln which in my opinion was not justified as it was not the kiln that was at fault. I, therefore, award that the contractor be paid the cost of making the additional kiln, i.e. Rs. 6400/-."

21. The Executive Engineer's letter has not been placed before us. Mr. Lal Narain Sinha was unable to show that the interpretation of the arbitrator was wrong. We cannot, therefore, interfere with the award with respect to this claim. It is accordingly upheld.

'Claim No. 5.'

22. Claim No. 5 in this appeal is similar to claim No. 8 of Miscellaneous appeal No. 252 of 1950 which we have upheld on the ground that there was no illegality upon the face of the award. But in the present case the award with respect to this claim cannot be supported because it is based upon an erroneous interpretation of clause 6 (additional) of the agreement and the error in the construction is apparent on the face of it. Clause 6 of the agreement is to the effect that:

"the department will not entertain any claim for idle labour, or for damage to unburnt bricks due to any cause whatsoever." The arbitrator on the interpretation of this clause has held:

"This clause is not, in my opinion, meant to absolve the department from carrying out their part of the contract. It is impossible not to admit this without offending the rudiments of commonsense reasoning".

The language of this clause is general and subject to no limitations and is not open to the construction put by the arbitrator. Therefore, even if there was any contractual obligation on the part of the appellant to remove the bricks from the kiln area and the damage was due to non-removal thereof, the contractor is precluded by the said clause from claiming any damage on that account. The award is, therefore, bad on the face of it. It is accordingly set aside.

'Claim No. 8.'

23. This claim corresponds to claim No. 4 in Miscellaneous Appeal No. 252 of 1950 which I have disallowed. For the reasons given therein, the award in respect of this claim is set aside.

'Claim No. 17.'

24. Claim No. 17 of this appeal corresponds to claim No. 17 of Miscellaneous Appeal No. 252 of 1950, which has been disallowed for the reasons given therein. For the same reasons the award in respect of this claim is disallowed.

25. In the result, the appeals are allowed in part. In appeal No. 252 the decree of the lower court will be modified by excluding claims Nos. 4 and 17, and in appeal No. 253 the decree of the lower court will be modified by excluding claims Nos. 5, 8 and 17. In the circumstances, the parties will bear their own costs in each case.

**Chatterji, J.**

26. I agree.

Appeals partly allowed.

Cases Referred.

<sup>1</sup>54 Ind. App. 427 at p. 430

<sup>2</sup>(1857) 3 C. B. (N. S.) 189: 140 E. R. 712

<sup>3</sup>50 Ind App 324

<sup>4</sup>54 Ind App 427

<sup>5</sup>1933 A. C. 592

<sup>6</sup>(1923) A C 480, at p. 489

<sup>7</sup>(1857) 3 C. B. (N. S.) 189: 140 E. R. 712

<sup>8</sup>(1912) A C 673

<sup>9</sup>(1923) AC 395

<sup>10</sup>50 Ind App 324

<sup>11</sup>54 Ind App 427

<sup>12</sup>(1933) A C 592