

RAJASTHAN HIGH COURT

Behari Lal Sharma

Vs.

Union of India

Civil Misc. (Arbitration) Appeal Nos. 1037 to 1041 of 1999

(Shiv Kumar Sharma, J.)

07.05.2001

JUDGEMENT

Shiv Kumar Sharma, J.

1. Since identical questions of law and fact are involved in all these miscellaneous appeals, I propose to decide them by a common order.

2. These miscellaneous appeals have been filed by the appellants impugning the judgments dated May 10, 1999 of the learned Additional District Judge Neema Ka Thana (Distt. Sikar) rendered in civil miscellaneous cases No. 43/95, 44/95, 45/95, 46/95 and 47/95 whereby awards of the Arbitrator have been set aside.

3. In order to understand the nature of instant appeals, it is necessary to mention some introductory facts. On applications filed by the claimant appellants under Section 8 of the Arbitration Act 1940 (for short 1940 Act) learned Court below on August 5, 1995 appointed Shri Bhagwan Das Meena as arbitrator to resolve the disputes between the parties and declare the award within four months from the date of submission of claims by the claimants. Thereafter disputes of the claimants were referred to the Arbitrator, who pronounced the awards on the following dates-

Case No. Date of Award

43/95 10-1-96

44/95 10-1-96

45/95 10-1-96

46/95 10-1-96

47/95 29-7-96

Evidently in all the four claims submitted by the appellant Behari Lal Sharma the award was made on January 10, 1996 whereas in respect of the claim filed by the appellant M/s. A. K. Minerals, the award was declared on July 29, 1996.

4. The arbitrator thereafter filed the awards in the Court below. Respondents submitted objections to which the appellant filed reply. Learned Court below after hearing the parties set aside all the five awards. The reasons for setting aside the awards as indicated in the impugned judgments by the learned Court below are as under-

(i) Counter-claims of the respondents were not considered by the arbitrator on the ground that the same were not referred to him by the Court. The reason for non-consideration of counter claims assigned by the arbitrator was that he had no power to enlarge the scope of the reference. This observation of the arbitrator was illegal as the points of reference were not defined by the Court. Thus the error in not considering the counter-claims was apparent on the face of the record and arbitrator committed legal misconduct.

(ii) The arbitrator in his awards did not give details of the oral and documentary evidence considered by him failed to assign reasons as to on what basis he calculated the amount under the awards. The twelve points formulated by the arbitrator in the order sheets of the arbitration files, were not incorporated in the awards. When no ocular evidence was recorded how could the arbitrator consider the same in the awards. Thus the awards were mechanical and passed without application of judicial mind by the arbitrator.

(iii) The arbitrator had no power to award the interest of pre-reference period.

5. From the material on record it appears that the respondents had filed counter claim only in case No. 43/95 (S.B. Civil Misc. Appeal No. 1041/99) and 45/95 (S.B. Civil Misc. Appeal No. 1037/99). A look at the order sheet drawn by the arbitrator on January 3, 1996 demonstrates that both the parties had been heard in full and they put their signatures.

6. Mr. Bajrang Lal Sharma, learned Senior Counsel for the appellants canvassed that under Section 30 of 1940 Act legality in making appointment of arbitrator cannot be questioned. It is further contended that it was not obligatory for the arbitrator to give reasons on his awards. The Court below did not define the misconduct of the arbitrator. The Court below committed illegality in ignoring the well settled principle

of law of arbitration that Court should approach the award with a desire to support it if that is reasonably possible rather than to destroy it by calling illegal. It is also contended that respondent No. 1 was ready to act upon the award and issued instructions accordingly but legal proceedings with respect of filing objections under Section 30 were initiated of the Divisional Engineer (W.R.) without the sanction of General Manager in violation of para 1277 of Indian Railway Engineering Code. Judicial pronouncements on which reliance is placed by the learned Senior counsel shall be dealt with at appropriate juncture.

7. Per contra Mr. Alok Garg supported the impugned orders and cited various authorities in support of his contentions that shall be discussed in the latter part of this judgment.

8. I have given my anxious consideration to the rival submissions and carefully scanned the material on record.

9. In claim cases No. 43/95 and 45/95 the arbitrator rejected the counter-claims of the respondents on the ground that he cannot enhance scope of reference, therefore, counter-claims are beyond the scope of reference and the arbitrator has no jurisdiction to entertain the same. Learned Court below treated this findings as legal misconduct. In order to appreciate this findings I have considered various judicial pronouncements. In *K. V. George v. Secretary, Government, Water and Power Deptt.*¹ the arbitrator without considering the counter-claims, kept the counter-claims for subsequent consideration. It was held by the Hon'ble Supreme Court that the arbitrator was duty bound to consider the claims as well as the counter claim and in not doing so he had misconducted himself. In *Indian Oil Corporation Ltd. v. Amritsar Gas Service*,² it was held that where the arbitrator declines to consider the counter claims on the ground that only the dispute under reference is required to be determined and the counter-claim was made subsequently, refusal to consider the counter claim for the only reason stated in the award discloses an error on the face of the award, since the occasion to make a counter-claim in the written statement could arise only after the order of reference.

10. In view of the aforesaid mandate of the Hon'ble Supreme Court I am satisfied that the arbitrator has committed legal misconduct in not considering the counter-claims of the respondents and the Court below was right in setting aside the awards in claim

cases No. 43/95 and 45/95 but the matters ought to have been remitted to the arbitrator for making a fresh award considering the claims and counter-claims filed by the parties.

11. In so far as claim cases No. 44/95, 46/95 and 47/95 are concerned admittedly no counter-claims were filed by the respondents. The awards in these cases were set aside on the ground that no reason was assigned by the arbitrator. The arbitrator in the awards stated thus-

"I have thoroughly considered claim statements, written replies, rejoinder, counter- claims and oral, documentary evidence."

According to Court below when no oral evidence was recorded how could the arbitrator consider the same in the awards. Thus the awards were made without application of judicious mind by the arbitrator. In some- what similar situation their Lordships of the Supreme Court in *Kundale and Associates v. Konkan Hotels (P) Ltd.*³ indicated in para 2 thus-

"The High Court appears to have emphasized the fact that no reasons are given in the award. However, under the law then in force, it was open to the arbitrator to give an award without giving reasons since the parties had not stipulated that the arbitrator should give a reasoned award."

In para 3 of the judgment it was observed that-

"In his award the arbitrator has stated that after carefully considering all the claims and counter-claims made by both the parties and after carefully considering the oral and documentary evidence produced by both the parties and the pleadings of both the parties and arguments advanced by the parties, he was making the award. The High Court said that the arbitrator had not applied his mind because the appellants had not led oral evidence. We fail to see how this conclusion can be deduced in the way it has been done by the High Court. Oral evidence was led before the arbitrator by the respondent. The arbitrator has made a general statement that he has considered oral as well as documentary evidence led by both the parties."

In para 5 it was held that-

"We fail to see how the High Court could come to the conclusion that there is any legal misconduct on the part of the arbitrator in giving the award. The Court cannot go into the merits or otherwise of the claims which were before the arbitrator. The decision of arbitrator is binding on both the parties."

(Emphasis supplied)

12. In *State of Rajasthan v. Puri Construction Co. Ltd.*,⁴ it was held by the Hon'ble Supreme Court that "Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record the finding made by the arbitrator may be held to be erroneous. An error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award."

13. In *National Fertilizer v. Puran Chand Nangia*⁵ it was indicated by their Lordships of the Supreme Court that in the case of non-speaking award, it is not permissible for the Court to probe into the mental process of the arbitrator.

14. In view of the ratio indicated by their Lordships of the Supreme Court in the aforequoted pronouncements, it can safely be observed that under the provisions of 1940 Act it was open to the arbitrator to give an award without giving reasons unless the parties had stipulated that the arbitrator should give a reasoned award. An error of law or fact committed by the arbitrator in making the award by itself does not constitute misconduct warranting interference with the award. The Court below thus committed illegality in setting aside the awards in claim cases No. 44/95, 46/95 and 47/95 on the ground that arbitrator had not given any reasons as to on what basis he calculated the amounts under awards. In *State of Rajasthan v. Puri Construction Co. Ltd.* (1994 AIR SCW 5061) (supra) it was propounded by the Hon'ble Supreme Court that it is not necessary to indicate in the award computation made for various heads and it is open to the arbitrator to give a lump sum award.

(Emphasis supplied)

15. I am also of the view that under Section 30 of 1940 Act the appointment of arbitrator cannot be questioned. In the instant cases the arbitrator was appointed under Section 8 of the 1940 Act by the Court and the order had attained finality. In so far as

the question of interest is concerned the Constitution Bench of Hon'ble Supreme Court in *Executive Engineer v. N. C. Budharaj*,⁶ held thus-

"The arbitrator appointed with or without the intervention of the Court, has jurisdiction to award interest, on the sums found due and payable for pre-reference period."

16. In this judgment I have only referred those judicial pronouncements which squarely apply to the facts and circumstance of the instant matters. I do not think it necessary to multiply all the authorities placed before me by the learned counsel for the parties.

17. In view of discussions made herein above I allow the appeals No. 1038/99, 1039/99 and 1040/99 and set aside the impugned judgments of the learned Additional District Judge Neem Ka Thana. The awards dated January 10, 1996 (Case No. 44/95) January 10, 1996 (Case No. 46/96) and July 29, 1996 (Case No. 47/95) are ordered to be made rule of Court. There will, therefore, be a decree in each claim case in terms of the award. The respondents shall also pay to the appellants further interest at the rate of nine per cent per annum from the date of the decree till payment and costs.

18. Impugned judgments of the learned Additional District Judge Neema Ka Thana in appeal No. 1041/99 and 1037/99 shall stand confirmed with the modification that claim cases No. 43/95 and 45/95 shall now be remitted by the Court below to the arbitrator for making a fresh award considering the claims and counter-claims filed by the parties. The parties are directed to appear before the learned Additional District Judge Neem Ka Thama in cases No. 43/95 and 45/95 on May 18, 2001 for seeking further instructions. The record of the cases be sent back forthwith. The appeals No. 1041/99 and 1037/99 stand disposed of accordingly.

Order accordingly.

Cases Referred.

1. (1989) 4 SCC 595
2. (1991) 1 SCC 533
3. (1999) 3 SCC 533

4. (1994) 6 SCC 485
5. (2000) 8 SCC 343
6. AIR 2001 SC 626