RAJASTHAN HIGH COURT

Heera Singh

Vs.

State of Rajasthan

Civil Misc. Appeal No. 2013 of 2002
(R.S. Chauhan, J.)

13.04.2007

JUDGMENT

R.S. Chauhan, J.

1. Lost in the legal ocean, like Ulysses in the Odyssey, the appellant has been waiting for his compensation for the last twenty years. Having entered into a contract with the Government of Rajasthan in 1987 for remodeling of earthwork, the appellant has been drifting from one court to another: this case has traveled from the lowest to the highest rung of the judiciary. And the journey is still endless.

2. The appellant has challenged the order dated 28.2.2002 passed by the District & Sessions Judge, Karauli, whereby the learned Judge has set aside the Award dated 31.8.1995 passed by the Sole Arbitrator in favor of the appellant.

3. This case has a checkered history. In order to remodel the Panchana Canal, the Irrigation Department had invited tenders. On 16.7.1985, the Department granted a contract to the appellant for remodeling earthwork from Chain 71 to 87 of Panchana Irrigation, Sub-Division-I, Karauli for Rs. 5,76,352/- @ 40% of the G-Schedule. An agreement was executed between the appellant and the Department on 20.7.1987. According to the said agreement, the work assigned to the appellant was to be completed within six months from the date of the agreement, i. e by 30.2.1988.

4. In order to ensure that the work is completed within the stipulated period, it was the responsibility of the Department to ensure that the land is free of encumbrances and has been acquired from the concerned "Khatedar" (landowner). Immediately, the appellant commenced the work. However, to the great shock and dismay of the appellant, the land assigned to him, from Chain 71 to 87 belonged to one Nawal

Singh. Although the entire land measured 24 Bigha and 8 Biswa, but the Government had acquired only part of the said land, namely 7 Bigha and 5 Biswa. Since the entire land was not acquired, as soon as the appellant started working on the land belonging to Nawal Singh, he raised objections with the appellant. According to the appellant, on 18.9.1987 the Assistant Engineer sought directions for payment of compensation to Nawal Singh. On 9.10.1987, the appellant also received a threatening letter from Nawal Singh. Therefore, the appellant brought the conduct of Nawal Singh to the notice of the respondents. Because of the hindrance created by Nawal Singh, the appellant was unable to complete the work within the stipulated period. Considering the difficulties faced by the appellant, the respondent Department extended the time for completion of the project till 30.4.1988. However, despite the extension of time, Nawal Singh continued to interfere in the work by the appellant. On 29.9.1988, Nawal Singh filed a case under Section 212 of the Rajasthan Tenancy Act, 1955 and was granted a stay in his favor. Because of the constant interference of Nawal Singh and because of the stay, naturally the appellant still could not complete the work assigned to him. But, notwithstanding the difficulties faced by him, vide letter dated 26.6.1990, the Additional Chief Engineer terminated the appellant's contract and imposed a penalty of 10% in accordance with Clause 2 of the Agreement. The appellant filed a suit challenging the said order before the District Judge, Karauli. He also filed an application for appointment of an Arbitrator. Vide order dated 23.9.1993, the Additional District Judge, Karauli appointed Mr. C.L. Arora, Superintending Engineer, as the Sole Arbitrator.

5. The appellant filed his claim application, which was replied to by the respondent-Department. After considering the pleadings, the learned Sole Arbitrator framed nine issues. After going through the evidence, vide Award dated 31.8.1995, the learned Sole Arbitrator granted a compensation of Rs. 11,68,835/- along with an interest of 18% from 1.7.1988 to 31.8.1995, i.e. the date of the Arbitration Award and further, the interest of 18% per annum till the actual payment.

6. The appellant filed the Award before the District Court for making it a rule of the court. For fifteen long months, the respondents did not file their objections against the said award. After fifteen months, on 16.11.1996, the respondents filed their objections. However, vide order dated 2.4.1998, the learned Judge dismissed the objections on the ground of limitation. Thereafter, the respondents filed a miscellaneous appeal before this court against the said order. However, vide judgment dated 25.8.2000, a learned Single Judge of this court dismissed the said appeal. Consequently, the respondents

filed a Special Leave Petition before the Hon'ble Supreme Court. Vide order dated 4.12.2001, the Apex Court directed the District Judge, Karauli to consider the objections as if they were filed within limitation. Resultantly, vide judgment dated 28.2.2002, the learned District Judge decided the objections and set aside the award dated 31.8.1995. Hence, this appeal before this court.

7. Mr. R.P. Singh, the learned counsel for the appellant, has vehemently argued that the scope of judicial review of an arbitral award is narrow. An award can be set aside only if there is an error on the face of the award. An error of fact or an interpretation of fact given by the Sole Arbitrator cannot be interfered with by court of law. Even a misinterpretation of law cannot be interfered by a court of law. Moreover, the learned Sole Arbitrator has meticulously examined the evidence produced on behalf of the parties. He has passed a detailed reasoned award. Thus, the learned Judge has erred in interfering with the said Award.

8. Secondly, Issue No. 1 before the learned Sole Arbitrator was with regard to payment of Rs. 1,03,611.75 on the ground that although the contract was for excavating the hard soil, but the appellant had to excavate hard soil mixed with pebbles and stones. In response to the said claim, the Department had not raised the plea of Clause 11 of the contract. Yet, still the learned Judge has set aside the award on the ground that the learned Sole Arbitrator had ignored the existence of the said clause. According to the learned counsel, since the Department before the learned Sole Arbitrator did not invoke the said clause, there was no need for him to notice the said clause. Therefore, the learned Judge had entertained a plea that was not raised before the learned Sole Arbitrator. Hence, the learned Judge has, invalidly held that the learned Sole Arbitrator has misconducted himself.

9. Thirdly, the learned Judge has not interpreted the contract as a whole, but has interpreted it in fragments. Such an approach is against the settle rules of interpreting a contract.

10. Fourthly, the learned Judge has misinterpreted the scope and ambit of Clause 45 of the Agreement. The learned Judge has failed to notice the rationale behind the said Clause.

11. On the other hand, Mr. S.N. Gupta, the learned Deputy Government Advocate, has supported the impugned judgment.

12. We have heard both the learned counsel and have perused the impugned judgment

and have also examined the Award dated 31.8.1995.

13. The scope of judicial review of the arbitral award is a narrow one. In order to escape the agony of a protracted trial, in order to save time and expenses, arbitration was developed as an alternate dispute resolution forum. In the commercial world, where time is of essence and large amount of money is involved, the parties prefer to go for arbitration rather than for civil suit. The long gestation period of a civil suit, which meanders through a labyrinth of procedures and, at times, climbs the judicial pyramid, has persuaded the parties to place an arbitration clause in the contract. The scope and ambit of judicial review over an award passed by an arbitrator are now well settled. The arbitrator is a Judge appointed by both the parties after reaching a consensus, or a Court appoints him under the provisions of the Act. Since the Arbitrator is a Judge appointed by the parties, the parties are bound by his decision even if the award is wrong either on law or on facts. Even an error of law on the face of the award cannot nullify the award. Thus, his decision is final unless the reasons given by him are totally perverse or the award is based on wrong proposition of law. But once it is found that the view of the Arbitrator is a plausible one, the Court cannot reverse it by interfering with the award. Moreover, the interpretation of a contract is a matter solely within the domain of the arbitrator. Therefore, the Court should be very weary of interpreting the contract. Similarly, the courts are precluded from reappraising the evidence produced before the arbitrator. The court does not sit in an appeal over the verdict of an arbitrator by reexamining and reappraising the materials placed before him. In case two views are possible, the Court is not justified in interfering with the award by adopting its own interpretation. Even if it could be proved that the arbitrator has committed some mistake while arriving at his conclusion, such a proof would not invalidate the award. Moreover, it is not "misconduct" on the part of the arbitrator to give a reasoned decision, where his error is one of the fact or of law. Furthermore, even if there is an error of construction of the agreement by the arbitrator, the same is not amenable to correction. Lastly the reasonableness of an award is not a matter for the Court of consider unless the award is preposterous or absurd. (Ref. to *M/s Engineers Syndicate v. State of Bihar & Ors.,* [1] *Maharashtra State Electricity Board v. Sterlite Industries (India) & Anr*[2] *Bharat Coking Coal Ltd. v. L.K. Ahuja,* [3] *Rajasthan State Electricity Board v. M/s. Gammon India Ltd.,* [4] *Indu Engineering & Textiles Ltd. v. Delhi Development Authority,* [5] *State of U.P. v. Allied Constructions,* [6] *Rajasthan State Mines & Minerals Ltd. v. Eastern Engineering Enterprises,* [7] and *D.D. Sharma v. Union of India,* [8]

14. A bare perusal of the award dated 31-8-1995 clearly reveals that the award was passed after the learned Sole Arbitrator had inspected the site in dispute, had given the parties an opportunity to adduce their respective evidence and had meticulously examined the evidence brought on the record. In fact, the award is a detailed and well-reasoned one.

15. Since the learned Judge has concentrated only on two issues out of the nine issues decided by the learned Sole Arbitrator, we shall confine our discussions to only these two issues.

16. According to the agreement, the appellant was required to excavate only hard soil from Chain No. 71 to 87. According to Clause 7 of the Agreement, "the extra item would be paid on the BSR on which 'G' Schedule is based plus or minus tender premium". Since the appellant encountered hard soil with pebbles and stones, his task of excavating the earth became harder. He, therefore, raised a claim for Rs. 1,03,611.75 before the learned Sole Arbitrator. During the arbitral proceedings the department did not raise the contention with regard to the applicability of Clause 11 of the agreement on this issue. Clause 11 had stipulated that "Strata of E/W (Earth work) as specified in the 'G' Schedule will only be payable to the contract. In the case strata other than the specified is met during the execution of work, no excess payment on this account will be allowed to the contractor". However, before the learned Judge the respondents contended that the learned Sole Arbitrator has committed misconduct by ignoring Clause 11 of the agreement. The learned Judge has accepted this contention raised by the respondents.

17. It is, indeed, a settled principle of law that a contract has to be read holistically and not in piecemeal fashion. While the learned Judge has noticed Clause 11 of the agreement, he has ignored the existence of Clause 7 of the agreement. In case the two clauses are inconsistent, the learned Judge should have harmonized them. However, he has failed to do so. A contract should be so interpreted as to keep the requirements of the statutory and Constitutional law in mind. An interpretation that would lead to absurdity or violation of the constitutional mandate should be avoided at all costs. For, according to Section 23 of the Contract Act, an agreement, which is against the law, is void.

18. It is difficult for us to accept reasoning of the learned Judge with regard to Clause 11 of the agreement. For, firstly even in the contractual field the State is supposed to be fair, just and reasonable. The concept of "fairness" is not confined just to the

Administrative Law, but also permeates the contractual arena. In the case of *LIC of India & Anr. v. Consumer Education & Research Centre & Ors.,* [9] the Hon'ble Supreme Court has observed as under:

> In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined in a manner that is fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the pubic authority or those under pubic duty or obligation must be informed by reason and guided by public interest. It is the exercise of public power or action hedged by public element that becomes open to challenge. If it is shown that the exercise of power is arbitrary, unjust and unfair, it would be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens simplicities do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons.

19. Thus, while entering into a contract the State should be fair, just and reasonable with the appellant. After all, the State is not only 'a model employer'; it is also a model businessman in its modern avatar as welfare, socialist State. Hence, prior to entering into the agreement with the appellant, the State was duty bound to examine the land on which the work was to be carried out. Not only the State failed to do so, it also denied the existence of hard soil with pebbles and stones at the sight. But, when the learned Sole Arbitrator inspected the site, he discovered not only pebbles and stones, but also even "boulders" at the site. Hence, the State has not been honest with the appellant. For it had failed to reveal the actual nature of the soil to be excavated.

20. Once a wrong impression was made by the Department that only hard soil existed at the site, the Department cannot take shelter under Clause 11 of the agreement and claim that it is not liable to pay extra money for the work done on a strata discovered under the hard soil. Such a stand would force the appellant to do labor for which he is

not being paid for. This would amount to "forced labor" - a practice forbidden by Article 23 of the Constitution of India. In case the clause is permitted to exist and is enforced, the agreement would become void under Section 23 of the Contract Act. Moreover, such a stand also reduces Clause 11 to an unconscionable term of a contract, or a "Henry VIII" clause. The courts have been weary of enforcing such term of a contract or of "Henry VIII" clause. (Ref to *Central Inland Water Transport Corp. v. Brojo Nath Ganguly* [10]

21. Therefore, keeping Clauses 7 and 11 in mind, the only interpretation possible is that in case during excavation new strata is discovered which would entail more work for the contractor, then the contractor shall be paid the higher remuneration for the work done by him. Thus, the learned Sole Arbitrator was justified in granting the compensation of Rs. 1,03,611.75 to the appellant.

22. Mr. Singh's second contention with regard to Clause 45 is also acceptable. Clause 45 is as follows:

> If during the progress of contract of value exceeding Rs. 5 lacs and where stipulated completion period is more than 12 months, the price of any materials incorporated in the works (not being materials supplied from the Department) and/or wages of labor increases or decreases and such increase/decrease exceeds 10% of the price and/or wages prevailing at the date of opening of tender for the work, the amounts payable to the contractor for the work shall be adjusted for increase or decrease in the rates of labor and materials excepting those materials supplied by the Department.

23. The learned Judge has held that since 'the stipulated period' was only for six months, the Clause 45 for enhance payment was not applicable. Since the learned Sole Arbitrator had given the benefit of the said clause to the appellant, the learned Judge held that the learned Sole Arbitrator had committed misconduct. Both the parties admit that the agreement can be extended and was extended by the Department. Considering the fact that the period for completion of the project can be extended, considering the fact that during the extended period the cost of material and cost of labor can increase, in order to compensate the contractor, the Clause 45 was placed in the agreement. Therefore, there is no cogent reason to limit the scope of the term 'the stipulated period' to mean 'the original period' for which the agreement was entered into. The term 'the stipulated period' would have to include 'the subsequently extended period' as well. For even the subsequently extended period is a period "stipulated" by the department. Therefore the interpretation given by the learned Judge is

unacceptable. Admittedly, the working period was extended by the Department; the period extended was beyond twelve months; the contract was for more than Rs. 5 lacs. Hence, the case squarely falls under Clause 45 of the agreement. Hence, the learned Sole Arbitrator was justified in granting the benefit of Clause 45 of the agreement to the appellant.

24. In the result this appeal is allowed and the order dated 28-2-2002 is quashed and set aside. The award dated 31-8-1995 passed by the learned Sole Arbitrator is confirmed. The State is directed to pay the implement the Award within the period of four months from the date of the receipt of the certified copy of this judgment. There shall be no orders as to cost.

Appeal allowed.

Cases Referred.

1. 2007(1) RCR(Civil) 776 : 2007(1) R.A.J. 414 : (2007 AIR SCW 985)
2. (2001(8) SCC 482)
3. 2004(3) RCR(Civil) 126 : (2004(5) SCC 109)
4. (1998 DNJ (Raj.) 680)
5. 2001(3) RCR(Civil) 770 : (AIR 2001 SC 2668)
6. 2003(3) RCR(Civil) 805 : (2003(7) SCC 396)
7. (1999(9) SCC 283)
8. (2004(5) SCC 325)
9. 1995(4) SCT 678: (1995)5 SCC 482
10. (1986)3 SCC 156)