Pt. Jandhu Lal and others v. The Thapar Industries Co-operative Housing Society, Ltd.

Tek Chand, J.

land, *which shall thereupon vest absolutely in the Government free* from all encumbrances;

* * * * * *".

Mr. Faqir Chand Mital rightly contends that the property having vested absolutely in the Government no effective decree could be passed in favour of the plaintiffs without impleading Punjab Government. Essentially this suit requires determination of the title in the land. The plaintiffs in order to succeed have to establish that the property does not vest in the Punjab Government but title to it is in them. The lower Appellate Court did not notice the provisions of section 17 of the said Act and of the notification No. 4850-S-LP-550/14144, dated 27th of May, 1955, which expressly provided that in exercise of the powers conferred by section 4, read with section 17 of the Land Acquisition Act, 1894, as amended, the Governor of Punjab was pleased to direct that on the ground of urgency, the provisions of section 5-A of the said Act shall not apply in regard to this acquisition.

I am, therefore, of the view that the Government was not merely a proper but a necessary party and the suit could not proceed without impleading it.

In view of what has been said above, the plaintiffs' appeal fails and is dismissed with costs.

APPELLATE CIVIL

Before Bishan Narain, J.

UNION OF INDIA,—*Defendant-Appellant.*

versus

BAKSHI RAM,—*Plaintiff-Respondent.*

First Appeal from Order 68-D of 1955.

1957

Feb. 7th

Arbitration Act (X of 1940)—Section 14—Award by Abritrator—Pleadings of the parties in the arbitration proceedings—Whether can be considered for holding that

there is an error of law apparent on the face of the award—Arbitrator awarding lump sum in respect of all items in dispute—Matters taken into account which he had no jurisdiction to consider—Whether vitiates the award—Arbitrator, whether bound to decide in accordance with law—Award not in accordance with law—Whether liable to be set aside.

Held, that when there are pleadings in an arbitration which are specifically referred to in the award and the award cannot be fully understood without reference to them, then those pleadings are deemed to be incorporated in the award and can be taken into consideration to find whether there is any error of law apparent on the face of the award or not.

Held also, that if a lump sum is awarded in respect of all the items in dispute instead of awarding separate amounts in respect of each item and it appears on the face of the award or is proved by extrinsic evidence that in arriving at the lump sum some matters were taken into account which the arbitrator had no jurisdiction to consider, the award is vitiated and is liable to be set aside.

Held further, that an arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The parties who make a reference to arbitration have the right to insist that the Tribunal of their choice shall decide their disputes in accordance with the law of the land. It is not necessary for an arbitrator to give reasons for his conclusions or to give separate findings on each and every issue involved in the dispute but every party that appoints an arbitrator has a right to expect an intelligible decision which determines the rights of the parties on the various important points which are at issue. If it is not done by the arbitrator then his award should not be allowed to stand.

Thawardas v. *Union of India* (1), *Hitchins and another* v. *British Coal Refining Processes Limited* (2), *Falkingham* v. *Victorian Railway Commissioner* (3), *Prince and Co.* v. *G. G. in Council* (4), and *A. M. Mair and Co.* v. *Gordhandas Sagarmull* (5), relied on.

(1) A.I.R. 1955 S. C. 468.
(2) (1936) 2 A.E.L.R. 191.
(3) 1900 A.C. 452
(4) A.I.R. 1955 Pnnj. 240.
(5) A.I.R. 1951 S.C. 9.

First Appeal from the order of the Court of Shri Jasmer Singh, Sub-Judge, Ist Class, Delhi, dated the 11th day of November, 1954, making the award a rule of the court and passing a decree for Rs. 54,500 in favour of plaintiff No. 1, i.e., Bakshi Ram against the defendant, i.e., Union of India on the basis of the award and granting two months' time to the defendant for payment.

BISHAMBAR DAYAL, for Appellant.

HANS RAJ SAWHNEY, for Respondent.

JUDGMENT

Bishan Narain, J.

BISHAN NARAIN, J.—This is an appeal by the Union of India against an order of the Subordinate Judge, 1st Class, Delhi, filing the award of the umpire and passing a decree for Rs. 54,500 on the basis of the umpire's award.

By an agreement, dated the 24th June, 1950, Dharampal Chawla, hereinafter called the contractor, agreed to supply 17,430 cubic feet of teak planks to the Union of India. The price fixed ranged from Rs 6 to Rs 7 per cubic foot depending on the sizes of the planks. The delivery was to commence from July, 1950, and was to be completed by the 30th of November, 1950, in equal monthly instalments. The agreement was subject to the terms given in the printed form WSB 133, which contained clause 17 to the effect that the goods were to be tendered to the Inspector and were to be delivered only on his approval. WSB 133 is a pamphlet issued by the Union of India which contains general terms of the agreement between the contractor and the Union of India. In these general conditions there is an arbitration clause 21 according to which all disputes arising out of the contract were to be submitted to arbitration excepting any matter the decision of which was provided for by the general conditions. Time under the contract for delivery was extended from the 30th of November 1950, to the 30th of December, 1950, and then to the 15th of March,

1951. Admittedly, the contractor made no supplies towards the contract till the 15th of March, 1951. The contractor purported to rescind the contract on the 25th of April, 1951, and the Government did likewise on the 30th of April, 1951. Thus disputes arose between the parties and, in accordance with the arbitration agreement, were referred to the arbitration of Shri Shiv Charan Singh and Shri Satpal in early 1952. The arbitrators disagreed on the 30th of April, 1953, and the case was referred to Shri Prakash Narain, Advocate, who had been previously appointed to act as an umpire. The arbitrators fixed the umpire's fee at Rs. 1,000 payable in equal shares by the parties. The umpire entered on the reference on the 8th of June, 1953, and after recording some additional evidence gave his award on the 9th of February, 1954, by which he held the Government liable to pay Rs. 54,000 plus costs Rs. 500 to the contractor. About a week later on the 15th February, 1954, the contractor transferred his rights under this award to Shri Kanshi Ram, Advocate. The contractor and the transferee then filed an application under sections 14, 17 and 31 of the Indian Arbitration Act to get the award produced by the umpire and to get it made a rule of the Court. The umpire filed the award on the 31st of March, 1954. The trial Court has made the award rule of the Court and the present appeal is directed against this order.

It was urged on behalf of the Union of India that *inter alia* the award in question is vitiated by the fact that the umpire was biased against the Government as in spite of his repeated reminders the Government did not pay his fee before the award was made and it was then urged that because of this bias the umpire has decided the case against the Government. The umpire is an Advocate of this Court. It is true that before giving the award he wrote four

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letters from the 8th of June, 1953, to the 21st of January, 1954, calling upon the Government to pay his fees. After the award also he wrote three letters till the 16th of March, 1954, for this purpose The umpire produced the award in Court on the 31st of March, 1954, and then requested the Court to direct the Government to pay his fee and it was after that that the umpire sent a notice under section 80, Civil Procedure Code, to the Government on the 2nd of April, 1954. I have carefully gone through the letters. They are business like, polite but firm. The Government replied to these letters asking him to proceed with the case and promised that the fee would be paid in due course. At no stage were the *bona fides* of the umpire questioned by the Government in this correspondence or at any stage of the proceedings before him. There is nothing on the record to show that the contractor had paid his portion of the fees to the umpire. It may be that the contractor himself had also not paid the fee till after the award. In any case, the umpire has not been called into the witness box and questioned on this point. I see nothing objectionable in his endeavours to realise his fees from the Government and his efforts for that purpose do not even suggest that he was biased against the Government. The plea set up on behalf of the Government appears to me to be frivolous and wholly unjustified, and I am surprised that it has been at all set up in this case on this flimsy material. I have, therefore, no hesitation in rejecting this contention of the learned counsel.

The learned counsel for the Union of India then argues that the award should be set aside as its illegality is apparent upon the face of it " and is otherwise invalid" within section 30(c) of the Arbitration Act. Now, the award after certain introductory recitals proceeds to give the contractor's claim in these words:—

"And whereas the claimants have claimed:—

(a) Rs. 30,000 on account of advance paid and expenses incurred for about

15000 c.ft. of stores which were a dead loss to the claimants due to acts and omissions of the respondents.

(b) Rs. 14,000 on account of about 2,000 c. ft. of stores which were ready for delivery and offered for inspection but which were not taken delivery of and were lost or destroyed due to their having remained exposed to weather.

(c) Rs. 20,000 for the general expense incurred and commitments made by the claimants and the loss in profits which they would have made, had it not been for the breach on the part of the respondents."

And then the umpire proceeds to make the award in the following words—

"(1) That the respondents do pay to the claimants, Messrs Dharam Pal Chawla, a sum of Rs. 54,000 (rupees fifty-four thousand only) on account of advances paid and expenses incurred by the claimants which were a dead loss to them and the loss occasioned owing to the breach of the contract by the respondents.

* * * * * "

Now, the award does not mention the nature of the contract, nor does it refer to any evidence produced by the parties. The claimants claimed three distinct amounts under three separate headings. Each heading required different kinds of evidence and each heading was governed by different provisions of law. The umpire without adverting to the evidence produced in the course of arbitration proceedings and without adverting to the legal position that arose out of these claims has awarded Rs. 54,000 as a lump sum.

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The parties are not agreed how the umpire has arrived at this figure. The Government's case is that the umpire has rejected claim '(b)' and has awarded Rs. 54,000 to the claimants under claims '(a)' and '(c)'. This means that the amount awarded exceeds the amount claimed. If this be so, then obviously the award is in excess of jurisdiction vested in the umpire. On the other hand, the respondent's case is that the claimants claimed Rs. 64,000 in all and the umpire has reduced the amount and has awarded only Rs. 54,000 under all the three headings.

I have carefully gone throught the award. It appears to me that in the operative portion the umpire reproduced claims' '(a)' and '(c)' and has given an award for Rs. 54,000. The first claim for Rs. 30,000 is on acount of advance paid and expenses incurred for about 15,000 c.ft. of stores, which were a dead loss to the claimants due to acts and omissions of the Government and the third claim is for Rs. 20,000 due to Government's breach of contract, and these two claims are reproduced in the disposing of portion of the award. There is no mention of claim '(b)', which is for Rs. 14,000 on account of about 2,000 c.ft. of planks which were offered for inspection and of which delivery was not taken by the Government. This omission in the operative portion means that the umpire had rejected the claim and, therefore, he has not mentioned it. Russell in his well-known Treatise on the Law of Arbitration has described the rule at page 211 (15th Edition) thus—

> "Whether there is a further claim made by the plaintiff * * * * *
> and the award professing to be made of and concerning the matters referred is silent regarding such further claim * * *
> the award amounts to adjudication that the plaintiff has no such further claim
> * * * * *."

Applying this rule it is clear that claim '(b)' must be considered to have been rejected by the umpire. If that be so, then the umpire has awarded Rs. 54,000 under the two headings of claims when the claimants themselves had claimed only Rs. 50,000. If this claim as put before the umpire is considered to limit the jurisdiction of the umpire to that figure, then the umpire has exceeded his jurisdiction. If it is considered only to be a matter of pleading before the umpire then this error is obvious on the face of the record and vitiates it.

The respondents, however, claim that Rs. 54,000 has been awarded under all the three claims. On the assumption that it is so, it has been argued on behalf of the Government that claim '(b)' relates to a matter which is not covered by the arbitration agreement and the umpire could not adjudicate upon this claim as it was beyond the scope of the reference. For this purpose reliance is placed on the statement of claim filed by the respondents before the arbitrators. The learned counsel for the respondents promptly objected reference to that document on the ground that it did not accompany and form part of the award and, therefore, it was not open to this Court to refer to it. When there is no direct reference to a document in the award, it is not always easy to determine whether that document forms part of the award or not. In the present case, however, the award mentions the last para of the statement of the claim and, in my opinion, if such a mention does not give all the details of the claim, then the Courts are entitled to look at the nature of the statement of claim to discover its basis. In similar circumstances the Hon'ble Judges of the Supreme Court discussed the statement of the claim on the assumption that it was open to the Court to do so,—*vide Thawardas* v. *Union of India* (1). It was

(1) A.I.R. 1955 S.C. 468.

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held in *Hitchins and another* vs. *British Coal Refining Processes, Limited* (1), that when there are pleadings in an arbitration and they are specifically referred to in the award so that it cannot be fully understood without reference to them, then those pleadings are incorporated in the award and they must be included in the consideration whether there is any error apparent on the face of the award or not. Therefore, the Courts are entitled in the present case to look at the claim made by the claimants before the arbitrators.

Now, it is clear from the statement of claim filed before the arbitrators that claim '(b)' for Rs. 14,000, is based on the allegation that the Inspectors raised objections to the stores offered for inspection and refused to accept them,—*vide* paragraph 3 of that claim. This being so, it is urged that whether the Inspector's refusal to accept the offered stores was justified or not, is not covered by the arbitration clause. Now, the relevant portion of the arbitration clause 21 reads—

> "In the event of any question or dispute arising under these conditions or any special conditions of contract or in connection with this contract (except as to any matter the decision of which is specially provided for by these conditions) the same shall be referred to the award of an arbitrator."

Then clause 13(iii) (b) reads—

> "13. Inspection and rejection * * *
>
> (iii) *Inspector.*—Final Authority and to certify performances:

(1) (1936) 2 A.E.R. 191.

(b) to reject any stores submitted as not being in accordance with the particulars."

Clause 13(v)(d) reads—

"13 (v)(d) The Inspector's decision as regards rejection as aforesaid shall be final and binding on the parties."

It is clear from these clauses of the contract that the decision of the Inspector is final and any dispute relating to his decision cannot be adjudicated upon by the arbitrators or umpire, as such a dispute does not fall within the scope of the arbitration agreement and the reference does not embrace the dispute relating to the Inspector's decision. This aspect of the matter I have already discussed in *Prince and Co.* v. *G.G. in Council* (1), and it is not necessary to discuss it again in this judgment. Thus it follows that the umpire had no jurisdiction to adjudicate upon the claim covered by item '(b)'. It is well established that if a lumpsum be awarded by an arbitrator, and it appears on the face of the award or be proved by extrinsic evidence that in arriving at the lumpsum matters were taken into account which the arbitrator had no jurisdiction to consider, the award is bad (*Falkingham* v. *Victorian Railway Commissioner* (2). On this argument of the learned counsel for the respondent, therefore, it is clear that the umpire in fact exceeded his jurisdiction and, therefore, this award cannot be made a rule of the Court as he has taken into consideration the claim '(b)'.

It was then urged on behalf of the Government that the umpire was in error in deciding that the Government was guilty of breach of the contract. The

(1) A.I.R. 1955 Punj 240.
(2) 1900 A.C. 452, 463.

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learned counsel took me through the evidence produced before the arbitrator in this connection and also referred to the correspondence that took place between the parties. It is, however, not open to me to go into the evidence produced in the case and then give my decision as to the correctness of the umpire's award. Even if the umpire has come to a wrong conclusion, that would not be any ground for setting aside the award as this Court is not sitting in appeal on the judgment of the umpire. It has been held authoritatively by their Lordships of the Supreme Court in *A.M.Mair and Co.*, v. *Gordhandas Sagarmull* (1), that once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the Court to enter into the merits of the dispute. It cannot be denied that this question was within the scope of the arbitration clause, and, therefore, it is not open to me to adjudicate upon the correctness or otherwise of the conclusion of the umpire. Therefore, this contention of the learned counsel fails.

Finally, it was argued that the award is obviously wrong in law. The argument is this. The contract was for delivery of planks by the claimants to the Government at a fixed price. Admittedly, the entire goods remained undelivered and the property therein and the custody and possession thereof always remained with the claimants. The umpire has held the Government to be guilty of breach of the contract. In these circumstances under section 56 of the Sale of Goods Act the Government is liable to pay damages and the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken. It is then urged that the claimants produced no evidence relating to the difference between the contract price and the market price before the arbitrators, and, therefore, the umpire erred

(1) A.I.R. 1951 S.C. 9.

in law in awarding any damages at all. On behalf of the respondents the reply given is that this matter is also within the scope of the arbitration clause and, therefore, it is outside the province of this Court to go into the merits of this question. It has been recently held in *Thawardas* v. *Union of India,* (1), that an arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. Their Lordships observed in para 12—

> "The arbitrator is a Tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the Courts provided his error appears on the face of the award.
>
> * * * * * *".

And then in para 14 of this judgment, it is laid down that the parties who make a reference to arbitration have the right to insist that the Tribunal of their choice shall decide their dispute according to law. This is also the policy of the Arbitration Act as it provides that Courts may refuse to pass a decree on the basis of the award on certain grounds that are specified in the Act, i.e., the award is open to scrutiny by Court of Law on specified grounds. The claim '(c)' relates to "loss of profits". It is not clear what this term means, but the claimants have claimed Rs. 20,000 under that head, and presumably the whole of the amount has been allowed by the umpire. It is possible to come to the conclusion that this term means the difference between the market price on which the goods were purchased by the claimants and the contract price at which they agreed to supply them to the Government. If this be so, then it is not understood how the claimants are entitled to receive the amount mentioned in claim '(a)' which is an advance made by the claimants to their suppliers, and I

(1) A.I.R. 1955 S.C. 468

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do not know of any provision of law under which this claim can be allowed as damages for breach of the contract. While it is not necessary for an arbitrator to give reasons for his conclusions or to give separate finding on each and every issue involved in the dispute, but I am definitely of the opinion that every party that appoints an arbitrator has a right to expect an intelligible decision which determines the rights of the parties on the various important points which are at issue. I think that if it is not done by the arbitrator, then his award should not be allowed to stand. If this test is applied to the present case, then the award cannot be made a rule of the Court and must be set aside.

It was then urged by the learned counsel for the respondents that the award may be remitted to the umpire for decision in accordance with law as laid down in section 16 of the Arbitration Act. This is, however, a discretionary matter and considering the type of objections made to the award and the nature of the allegations made against the conduct of the umpire, I do not think it fair to the parties to remit this award to the umpire.

For all these reasons I am of the opinion that this appeal succeeds and accordingly I accept it with costs throughout, set aside the order of the trial Court and dismiss the claimants' application under section 17 of the Arbitration Act.

LETTERS PATENT APPEAL

Before Bhandari, C.J. and Mehar Singh, J.

THE STATE OF PUNJAB,—*Appellant*

versus

S. SUKHBANS SINGH,—*Respondent*

Letters Patent Appeal No. 70 of 1954.

1957

Feb. 12th

Constitution of India—Article 226—Proceedings under—Whether Court will determine disputed questions of fact—Writ of mandamus—*Object of—Article 311—Intention of the Legislature in enacting it—Construction of—*