

* **HIGH COURT OF DELHI : NEW DELHI**

FAO. No. 122/2006 & CM No.13861/2006

% Judgment reserved on: 25th August, 2009

Judgment delivered on: 07th October, 2009

UOI/National Gallery of Modern Art
R/o. Jaipur House, India Gate,
New Delhi-110003.

....Appellant

Through: Mr. N.S. Dalal with Mr.
S.N. Sharma and Mr.
R.A. Sharma, Advs.

Versus

K. Bikram Singh
S/o.Late. Shri Pitamber Singh,
R/o. 242, SFS Flats, Hauz Khas
New Delhi-110016

....Respondent.

Through: Mr. D.S. Chauhan with
Ms. Ruchi Singh, Advs.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

Appellant has filed present appeal under Section 37 of Arbitration and Conciliation Act, 1996, (for short as 'Act') against order dated 18th April, 2006 passed by Additional District Judge, Delhi.

2. Brief facts are that, parties entered into agreements dated 7th September, 2000 (for first film) and dated 1st May, 2003 (for second film). Respondent agreed to make a documentary film on behalf of the appellant. The terms and conditions were contained in the agreements. Since, payments were not made in time, therefore, respondent claimed interest at the rate of 18% per annum on those amounts, payment of which had been made late. When payment was not made respondent invoked arbitration clause and served notice dated 7th February, 2005 for nominating the arbitrator. However, Secretary, Department of Culture, did not nominate the arbitrator, compelling respondent to file a petition u/s 11 (6) of the Act. In

that petition, order dated 10th August, 2005 was passed and Sh. Sudhir Sharma, was appointed as sole arbitrator, who gave award dated 24th December, 2005.

3. The award was challenged on following grounds;

- (i) That respondent admitted that he had received all payments as per agreement;
- (ii) That there was no agreement between the parties to pay the interest, therefore, arbitrator had transgressed its jurisdiction.

4. Trial court, vide impugned order, dismissed the objections of appellant.

5. It is contented by learned counsel for appellant that there is no clause in both the agreements, regarding extra length of film. Further, as per clause 13 of the agreements, it is clearly stipulated that price of documentary shall not exceed cost indicated in clause 10 of the agreements, except for statutory levies

and duties. Moreover, as per admission made by respondent, he had received full payment and nothing remains to be paid.

6. Learned counsel for appellant in support of its contentions referred to a decision of Supreme Court, reported as ***Food Corporation of India Vs. M/s Chandu Construction & Anr***, JT 2007 (5) SC 305, in which it was observed;

“In our view, by awarding extra payment for supply of sand the arbitrator has out-stepped confines of the contract. This error on his part cannot be said to be on account of misconstruing of the terms of the contract but it was by way of disregarding the contract, manifestly ignoring the clear stipulation in the contract. In our opinion, by doing so, the arbitrator misdirected and misconducted himself. Hence, the award made by the arbitration in respect of claim No. 9 on the face of it, is beyond his jurisdiction; is illegal and needs being set aside”.

7. On the other hand, learned counsel for respondent contended that as per terms of the agreements, the films were to be of forty five minutes,

but same were made of longer duration and that is why respondent has claimed extra payment. As far as payment of interest is concerned, interest has been awarded for the delayed payment.

8. It is also contended that under Section 34 of the Act, award cannot be reopened. In support learned counsel has referred following judgments.

***(i) Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd;
(2003) 5 SCC 705;***

***(ii) DDA Vs. Bhagat Construction Co. Pvt. Ltd;
2004(3) Arb. LR 481 (Delhi) (DB);***

***(iii) DDA Vs. Sahdev Brothers;
97(2002) DLT 902 (DB);***

***(iv) Sharma & Associates Contractors Pvt. Ltd Vs. Progressive Construction Ltd;
2004 (3) Arb. LR 485 (Delhi);***

***(v) UOI Vs. Hakam Chand & Co.;*
*2002 (65) DRJ 400;***

***(vi) Ircon International Ltd. Vs. Arvind Construction Co Ltd.;*
*1999 (50) DRJ 769; and***

***(vii)National Highway Authority of India Vs. ITD
Comentation India Ltd.;
2008 (100) DRJ 431 (DB);***

9. Section 34 of the Act, read as under:-

“34. Application for setting aside arbitral award-(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub Section (3)

(2) An arbitral award may be set aside by the court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

- (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or
- (b) the court finds that-
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
 - (ii) the arbitral award is in conflict with the public policy of India.

Explanation- Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

- (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section

33, from the date on which that request had been disposed of by the arbitral tribunal; Provided that if the court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application with a further period of thirty days, but not thereafter.

- (4) On receipt of an application under subsection (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.”

10. Supreme Court in ***Grid Corporation of Orissa Ltd.& Anr. V . Balasore Technical School***, JT 1999(2) SC 480 observed;

“The award of the Arbitrator is ordinarily final and conclusive as long as the Arbitrator has acted within its authority and according to the principle of fair play. An Arbitrator’s adjudication is generally considered binding between the parties for he is a Tribunal selected by the parties and the power of the court to set aside the award is restricted to cases set out in Section 30 of the Arbitration Act. It is not open to

the Court to speculate where no reasons are given by the Arbitrator, as to what impelled him to arrive at his conclusion. If the dispute is 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. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award.”

11. Similarly, in ***Markfed Vanaspati and Allied Industries v. Union of India, JT 2007 (11) SC 141***, Supreme Court observed that scope of interference is extremely limited in a non speaking award. It held;

“15. The decided cases of this Court demonstrate that this Court has consistently taken the view that scope of interference in a non-speaking award is extremely limited. The Court cannot probe into the mental process of the Arbitrator. The court should endeavour to support a non-speaking arbitration award provided it adhered to the parties agreement and was not invalidated due to Arbitrator’s misconduct.

16. Russell on Arbitration 19th Edition at Pages 110-111 described the entire genesis of arbitration as under;
An Arbitrator is neither more or less than a private judge of a private court (called an

arbitral tribunal) who gives a private judgment (called an award). He is a judge in that a dispute is submitted to him: he is not a mere investigator but a person before whom material is placed by the parties, being either or both of evidence and submissions: he gives a decision in accordance with his duty to hold the scales fairly between the disputants in accordance with some recognized system of law and rules of natural justice. He is private in so far as (1) he is chosen and paid by the disputants (2) he does not sit in public (3) he acts in accordance with privately chosen procedure so far as that is not repugnant to public policy (4) so far as the law allows he is set up to the exclusion of the State Courts (5) his authority and powers are only whatsoever he is given by the disputants agreement (6) the effectiveness of his powers derives wholly from the private law of contract and accordingly the nature and exercise of those powers must not be contrary to the proper law of the contract or the public policy of England bearing in mind that the paramount public policy is that freedom of contract is not lightly to be inferred with."

12. In light of above principles, it is to be seen as to whether arbitrator has acted according to the principle of fair play or award goes beyond the reference and whether he has misconducted.

13. The Arbitrator has considered the claim with regard to extra films and observed;

“The claimant has mentioned that the agreed duration of the film was 45 minutes for a consideration of Rs. 8,34,383/-, but the final film which the respondent duly approved and accepted was of the duration of 50.54 minutes. Claimant has also mentioned that this total consideration was so precisely calculated, not being a whole figure, by the respondent keeping in view the inputs required. The figure itself is suggestive that it is arrived at after making calculations keeping in view the various aspects in making of the documentary. The claimant has also mentioned that the script, rough cut as well as the final print of the documentary was approved and accepted by the respondents without any reservations. Further no meeting of three expert artists was called to have a look, sitting together, to make suggestions for any deletions, additions or replacement in the script, in the rough cut or in the final print. The claimant has also referred to his letter, dated 21st May, 2001, exhibit CW 1/7, written to the Director NGMA in which he categorically stated that the completion of the film has been pending for want of a guideline from the NGMA. Issue to be decided is what element should be reduced or eliminated from the film to bring it down to the proposed length of 45 minutes as against the draft script length of 72 minutes. NGMA had given him the go ahead to shoot the film based upon this draft script after the

Committee of three Artists had broadly cleared the script. Claimant also referred to his letter dated 26.11.2004, exhibit CW 1/41 in which he has claimed interest for the delay payment as well as for the extra length of the film. Third para of this letter reads as under:-

“the agreed duration of the film was 45 minutes but you approved and accepted the film of duration of 50.54 minutes. While submitting the rough cut to you under my letter dated June 28, 2001, I had pointed out that the rough cut was of 56.15 minutes. This was also discussed in the meeting of the Advisory Committee held in your office on January 30, 2002. During this meeting while it was decided that the historical portion should be reduced, the committee at the same time directed that more artists should be shown at work, editioning of print should be properly explained and N. B. Joglerkar should be included in the film. Consequently, the length of the film had to be increased beyond the length as mentioned in the agreement. After this meeting I had pointedly mentioned to you that proportionate amount will have to be paid for additional length and you had agreed to consider this. However, you have taken no action so far to arrange the payment.”

Claimant thereafter sent reminders on 21st December, 2004 and 3rd February, 2005 in respect of payments due on increased length and payment of 18% interest thereon. Claimant has claimed Rs.1,09,396.88 towards extra length and Rs.57,186.00 being interest on the aforesaid amount from 12th October, 2002 till the date of filing of

present claim i.e. upto 5th September, 2005. The claimant has also claimed pendente lite and future interest on the aforesaid amount of additional payment @ 18 % p.a till the said payment is made by the respondents”.

14. Regarding interest for delayed payment, arbitrator gave followings reasons;

“Considering the facts and circumstances of the case and the material on record, I allow 12% interest in respect of the first film, on the last payment of 20% due on submission of final film as there was a delay of 148 days after giving an allowance of 30 days. So I allow Rs.8120.31 as interest for delay of payment in respect of last 20% payments and Rs. 16002.14 for the delay of third payment of 30% due on approval of rough cut for the second film. So far as the payments in respect of extra length are concerned, from the correspondence between the parties and a bare reading of clauses 5,6,7,10 and 13 make it abundantly clear that the claimant is entitled to extra length of the film which the respondents accepted and approved without any reservations. I, therefore, allow to the claimant Rs.1,09,396.88 towards extra length of 5.54 in the first film and Rs.1,58,810.17 towards extra length of 8.38 minutes in respect of the second film. I also allow an interest of 12% on both the amounts due in respect of extra length for a period from the date claimant submitted the final film after giving an allowance of 30 days for approval and making payment by the respondents. For the first film this amount

comes out to be Rs.38,124.06 for a delay of 1060 days and Rs.27,306.65 for a delay of 523 days for the second film.

15. Relevant findings of trial court on this issue are as under:

“The defendant has not claimed the principal amount. Admittedly, the payments were to be made to the defendant as per schedule. It is also the admitted case of the plaintiff that the payment had not been made in time. In the copy of the statement of defence (Annexure A-4) it has been mentioned in para-6 that the payment was to be made in installments. In para-9, the cause of delay in making the payment had been incorporated. The arbitrator had taken into account the pleas of the plaintiff. He has given cogent reasons for passing the award. Now so far as the awarding of the interest is concerned, although, there was no agreement between the parties about payment of the interest on the delayed payments, yet the law in this regard is now well settled. Our own Hon’ble High Court in **“Bharat heavy Electrical Ltd. Vs. Globe Hi Fabs Ltd”. 116 (2005) DLT 1 (DB)** has held that “it cannot be held that even if the appellant was at fault and the money was withheld unreasonably by the appellant, it will not be liable to pay any interest.” In this particular judgment there had been a term vide which the interest was not payable

by the employer on earnest money, security deposit etc. In **M. L. Mahajan Vs DDA and another 2005 IV AD (Delhi) 608** it was held by our own Hon'ble High Court that "the arbitrator has power to award pre suit, pendentelite and future interest till the award is made a rule of the court unless the contract prohibits that no interest what so ever is payable". In our case, the agreement does not say that the interest shall not be payable".

16. Appellant's Administrative Officer Sh. A. V. R. Pillai has appeared as RW-1, before Arbitrator. In cross-examination, he admitted that appellant had not called any meeting of the expert committee to approve the script. This witness also admitted that vide letter dated 6th February, 2003, appellant had requested the respondent to make certain changes in the final film even after the approval of the rough cut. He also admitted that respondent had specifically pointed out to appellant the length of the script, the length of the rough cut as well as the length of the final film but appellant at no stage told him to strictly adhere to the length as stipulated in the agreement.

17. In view of these circumstances, Arbitrator was fully justified in accepting the claim of the respondent for the extra length of the films and interest for delayed payment. Since, Arbitrator has given cogent reasons in his award, thus there is no force in the plea of the appellant. Even otherwise, appellant is not entitled to raise any plea with regard to the merits of the case in order to assail the findings of the Arbitrator. As Arbitrator is the sole judge of the quantity and quality of the evidence, he rightly accepted the claim of the claimant for extra length of the film and awarded interest for delayed payment. Thus, no infirmity and illegality can be found with the impugned judgment.

18. There is no merit in this appeal and same is dismissed.

19. No order as to costs.

CM No.13861/2006

20. Decreetal amount lying deposited in the fixed deposit be released to the respondent, only after expiry of period of appeal.

21. Application is disposed of accordingly.

22. Trial court record be sent back.

7th October, 2009
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V.B.GUPTA, J.