

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) 1015/2001**

UNION OF INDIA

..... Petitioner
Through Mr. B.V. Niren, Advocate

versus

**M/S. SHREE VENTAKESHWARA
FLOUR MILLS & ORS.**

..... Respondents
Through Mr. Ajay Gaiind, Advocate for
R-1

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Date of Decision : FEBRUARY 23, 2010

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No. |
| 2. To be referred to the Reporter or not? | No. |
| 3. Whether the judgment should be reported in the Digest? | No. |

J U D G M E N T

MANMOHAN, J (ORAL)

I.A. 7374/2001

1. By way of present application, objections under Sections 30 and 33 of Arbitration Act, 1940 (hereinafter referred to as “Act, 1940”) have been filed by the respondent-objector challenging the arbitral Award dated 18th April, 2001 passed by Mr. B.L. Nishad, Sole Arbitrator.

2. Mr. Ajay Gaiind, learned counsel for respondent-objector submits that the impugned Award has been passed by the Arbitrator in violation of principles of natural justice and after perusing evidence behind the respondent-objector’s back. In this context, he refers to and relies upon

the observations made by the Arbitrator in the impugned Award wherein he stated that '*I have also perused the purchase files brought before me, on my direction.*' Mr. Gaind states that no direction has ever been given for production of record to either of the parties at any point of time, more specifically the record pertaining to purchase files as set out in the Award. According to Mr. Gaind, perusal of the petitioner-Union of India's files behind the respondent-objector's back constitutes misconduct on the part of the Arbitrator. In this context, Mr. Gaind refers to and relies upon the judgments in the cases of ***G.L. Textiles Co. Vs. Union of India*** reported in ***2004(3) R.A.J. 685 (Del)*** and ***Delhi Development of Authority Vs. Anant Raj Agencies*** reported in ***103 (2003) Delhi Law Times 730 (DB)***.

3. Mr. Gaind also contends that petitioner-claimant and respondent-objector had only executed a Milling Agency Agreement dated 3rd June, 1978 whereas petitioner-claimant has preferred claim for purchase of "defaulted quantity of wheat product (*atta*)" from Bareilly, Kanpur and Rohtak mills. He lays emphasis on the fact that though the agreement envisaged only milling, Arbitrator has awarded claims based on purchase price of wheat product (*atta*). Mr. Gaind also submits that petitioner-claimant has only placed on record rates quoted for purchase of wheat product (*atta*) and no break up of the purchase of wheat product (*atta*) was ever given, in particular the cost of milling.

4. On the other hand Mr. B.V. Niren, learned counsel for petitioner-claimant submits that the impugned Award is not violative of principles

of natural justice. In this context, he refers to the reply affidavit filed by petitioner-claimant to the present application wherein it has been stated as under :-

“5.....the related purchase files of the petitioner’s office were produced before the Ld. Arbitrator as per his oral instructions, as is the usual practice in matters of Arbitration and in order to facilitate the Ld. Arbitrator to arrive at a just and unbiased Award. The claim of the respondent that the act of the Ld. Arbitrator in asking for perusal of Purchase files amounts to misconduct on his part is totally false and baseless. The Learned Arbitrator is fully entitled to call for and see official records. It is not a misconduct on the part of the Ld. Arbitrator to see the official record.

It is very pertinent to mention here that in any case, the arbitrator has not relied upon any part of the files, which did not form part of the documents filed before the learned arbitrator. The award nowhere reflects that the learned arbitrator relied on the files perused by him. Files must have been perused by way of abundant caution.

As regards the Respondent’s statement that while publishing the Award, whatever information was gathered by the Ld. Arbitrator was never made available to the Objector or their Counsel, it may be stated that it was for the Respondent himself to ask for such information and it was not obligatory on the part of the Ld. Arbitrator to provide such information to the Respondent unless asked for.”

(emphasis supplied)

5. Mr. Niren further submits that the Arbitrator has upheld the petitioner-claimant’s claim for ‘milling difference’ alone and has not awarded the purchase price of wheat product (*atta*). In this context, he refers to the rejoinder-affidavit filed by petitioner-Union of India before the Arbitrator. The relevant portion of the said affidavit reads as under :-

“The claim has not been prepared hypothetically but on actual basis. The claim represents the extra expenditure incurred in getting the outstanding Delivery Intents completed from other three mills namely Bareilly, Kanpur and Rohtak mills.

The contractors were duly informed about the proposed diversion of Delivery Intents at their risk and cost vide Department of Food telegram No. 13/11/1/78-Pur.I dated 15/12/79 followed by letter No. J-13011/1/78-Pur.I dated 18/12/79 as the mills was closed from 10/9/79 and they were again informed of diversion of Delivery Intents vide letter of even No. dated 7/4/80. Thus no violation of contract was made by Government. The claim is based on total additional extra expenditure incurred by the Government in procuring wheat product from other three mills. The diversion of Delivery Intents was done in terms of clause (27) of the Agreement and thus legally valid.”

6. Mr. Niren states that the ‘milling difference’ has been substantiated with documentary evidence before the Arbitrator. In this context, he refers to pages 379 and 387 of arbitral record wherein break up of detail of wheat product (*atta*) supplied by flour mills in Bareilly and Kanpur during the period December, 1979 to June, 1980 has been placed before the Arbitrator.

7. Having heard the parties at length and having perused the impugned Award, I am of the view that before I deal with the rival contentions, it would be appropriate to first outline the scope of interference by this Court with an arbitral award rendered under Act, 1940. The Supreme Court in *Arosan Enterprises Ltd. Vs. Union of India & Another* reported in (1999) 9 SCC 449 has clearly outlined the scope of interference by this Court in objections filed under Sections 30

and 33 of the Act, 1940. The relevant observations of the Supreme in the said judgment Court are reproduced hereinbelow :-

“36. Be it noted that by reason of a long catena of cases, it is now a well-settled principle of law that reappraisal of evidence by the court is not permissible and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings under Section 30 of the Arbitration Act. In the event of there being no reasons in the award, question of interference of the court would not arise at all. In the event, however, there are reasons, the interference would still be not available within the jurisdiction of the court unless of course, there exist a total perversity in the award or the judgment is based on a wrong proposition of law. In the event however two views are possible on a question of law as well, the court would not be justified in interfering with the award.

37. The common phraseology “error apparent on the face of the record” does not itself, however, mean and imply closer scrutiny of the merits of documents and materials on record. The court as a matter of fact, cannot substitute its evaluation and come to the conclusion that the arbitrator had acted contrary to the bargain between the parties. If the view of the arbitrator is a possible view the award or the reasoning contained therein cannot be examined.

(emphasis supplied)

8. In fact, upon a perusal of the impugned Award, I find that the Arbitrator has given cogent reasons for awarding petitioner-claimant’s claims. The relevant portion of the impugned Award reads as under:-

“CLAIMS OF THE CLAIMANT-UOI(APO)

Claim No.1.

The claimant claims a sum of Rs.10,24,267.11 (Rupees ten lakh, twenty four thousand, two hundred sixty seven and paise eleven only) for extra expenditure including sales tax.

AWARD

I allow this claim of the claimant to the extent of Rs.7,30,955.91 (Rupees Seven lakh thirty thousand nine hundred fifty five and paise ninety one only) for extra

expenditure and reject claim of sales tax of Rs.2,93,311.20 (Rupees two lakh ninety three thousand three hundred eleven and paise twenty only) for the following reasons:-

- i) The respondent had failed to do milling as per the stipulated terms and conditions and have in their letter dt. 27.5.80/2.6.80 stated that it is not possible to do milling at such less rate and that is the main reason for respondent not to perform the obligation.*
- ii) The evidence of Shri J.M. Gupta Officer Incharge (Defence Grinding) proves that respondent has committed breach of contract.*
- iii) It was not the responsibility of the claimant to arrange electricity and Clause 35 of the Agreement does not include electricity as cause of non-performance.*
- iv) The claimant is claiming not for purchase of 'atta' price but only milling difference and has filed documents in support of it and given the break-up.*
- v) The claim of sales tax is rejected since milling did not call for sales tax.*

Claim No.2.

The claimant claims recoveries of Rs.1,63,441.59 (Rupees One lakh sixty three thousand four hundred forty one and paise fifty nine only) on account of details furnished in Annexure-III at Sl. No.1 to 19.

AWARD

I allow this claim of the claimant as claimant has filed the break-up of this claim with its list of documents.

Claim No.3.

The claimant claims interest on awarded amount.

AWARD

I allow interest @ 15% per annum on awarded amount from the date of publishing the award, till actual realisation or date of decree, whichever is earlier.

Claim No.4.

The claimant claims cost of the proceedings.

AWARD

I disallow this claim of the claimant being unjustified.

COUNTER CLAIMS OF THE RESPONDENT-CONTRACTOR.

Counter Claim No.1.

The respondent claims to refund the security deposit amounting to Rs.50,000.00 (Rupees fifty thousand only) together with interest @ 18% per annum with effect from 30.7.80, till the date of award.

AWARD

I disallow this claim of the respondent and award that security deposit amounting to Rs.50,000.00 which has been encashed by the claimant be adjusted.

Counter Claim No.2.

The respondent claims to pay all the withheld bills amounting to Rs.29,553.00 (Rupees twenty nine thousand five hundred fifty three only) together with interest @18% per annum with effect from 15.4.80 when the bills were submitted till the date of award.

AWARD

I disallow this counter claim of the respondent. However, the claimant can adjust this amount as they have admitted the withholding of bills amounting to Rs.29,553.00.

Counter Claim No.3.

The respondent claims cost of the proceedings.

AWARD

I disallow this claim of the respondent being unjustified and not proved.”

(emphasis supplied)

9. I must mention that no argument was ever advanced by respondent-objector to controvert or dispute the breach of milling agreement by the respondent-objector.

10. In fact, in my opinion, the objections raised by respondent-

objector can be broadly classified under two heads, namely, violation of principles of natural justice and award of computation of damages on account of difference in the purchase price of wheat product (*atta*) and not the difference in milling charges.

11. The test to be adopted for computation of damages is incorporated in Section 73 of the Contract Act, 1872 which reads as under :-

“73. Compensation for loss or damage caused by breach of contract.- *When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.-- *When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.*

Explanation.-In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused-by the non-performance of the contract must be taken into account.”

12. The aforesaid Section, in my view, is based on two rules, namely, compensation is recoverable for any loss or damage which naturally arose in the usual course of things from the breach, or which the parties knew at the time of contract, as likely to result from the breach. The explanation attached to Section 73 of the Contract Act, 1872 provides

for a duty to mitigate damages. In **A.K.A.S. Jamal Vs. Moolla Dawood, Sons & Co.** reported in (1916) AC 175, the Privy Council has held as under :-

“It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. Staniforth v. Lyall (1) is an illustration of this. But the fact that by reason of the loss of the contract which the defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the latter contract:.....”

xxxx xxxx xxxx xxxx

Their Lordships find that upon the appeal the officiating Chief Judge rested his judgment on a finding that the seller reduced his loss by selling the shares at a higher price than obtained at the date of the breach. This begs the question by assuming that loss means loss generally, not loss at the date of the breach. The seller’s loss at the date of the breach was and remained the difference between contract price and market price at that date. When the buyer committed this breach the seller remained entitled to the shares and became entitled to damages such as the law allows.....

(emphasis supplied)

13. In **M/s. Murlidhar Chiranjilal Vs. M/s. Harishchandra Dwarkadas and Anr.** reported in (1962) 1 SCR 653 the Supreme Court has clearly laid down the test of measure of damages as under:-

“The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take

such steps : (British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London [1912] A.C. 673). These two principles also follow from the law as laid down in s. 73 read with the Explanation thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be re-imbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things."

(emphasis supplied)

14. Consequently, in a case like the one in hand, measure of damages is the difference in market price and contract price on the date of breach. In the present instance, I find that the Arbitrator has awarded only the milling difference and break up of the said milling difference is available on the arbitral record (pages 379 and 387) as pointed out by learned counsel for petitioner-claimant. In fact, during the course of hearing, it was not disputed that from the details in the said two documents, the milling difference between the market price and contract price can be determined by 'backward calculation'. However, Mr. Gaind pointed out that the said documents were denied by the respondent-objector due to lack of evidence. But I find that there is no specific ground in the objection petition denying the validity of documents filed at pages 379 and 387. Moreover, the Supreme Court in

State of Rajasthan Vs. Puri Construction Co. Ltd. & Anr. reported in (1994) 6 SCC 485 has held that “if the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of evidence. The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the court to take upon itself the task of being a judge on the evidence before the arbitrator”.

15. I am also of the opinion that as the Arbitrator has come to a conclusion on the basis of material before him, it is not possible for this Court in Sections 30 and 33 proceedings to upset the same. This Court neither sits as a Court of appeal over the decision of Arbitrator nor does it assess the quality or quantity of evidence before the Arbitrator to find out whether Arbitrator's decision is correct or not. In fact, it has been repeatedly held that even if an erroneous decision is given by the arbitrator, it would not be set aside in case there is some material before the arbitrator. Consequently, as there is a break up of milling difference available on record on the basis of which difference in market price and contract price can be arrived at, the impugned Award is not liable to be set aside.

16. Further, as rightly pointed out by learned counsel for petitioner-claimant the Award nowhere reflects that the Arbitrator has relied upon the Union of India's files while passing the Award. Files must have been perused by the Arbitrator by way of abundant precaution. In any

event, perusal of official record, which has been contemporaneously mentioned, cannot be termed as either misconduct or violation of principles of natural justice, especially when the said record does not form the basis of the impugned Award. Accordingly, the judgments relied upon by Mr. Gaind have no application to the facts of the present case.

17. As far as the award of interest is concerned, I deem it appropriate to reduce the rate of interest to 9% per annum simple interest. In this connection, I may refer to observations of the Supreme Court in cases of *State of Rajasthan & Anr. Vs. M/s. Ferro Concrete Construction Pvt. Ltd.* reported in 2009 (8) SCALE 753 and *Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr.* reported in (2007) 2 SCC 720 wherein the Supreme Court has held as under :-

A. State of Rajasthan & Anr. Vs. M/s. Ferro Concrete Construction Pvt. Ltd.

36. In regard to the rate of interest, we are of the view that the award of interest at 18% per annum, in an award governed by the old Act (Arbitration Act, 1940), was an error apparent on the face of the award. In regard to award of interest governed by the Interest Act, 1978, the rate of interest could not exceed the current rate of interest which means the highest of the maximum rates at which interest may be paid on different classes of deposits by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act. Therefore, we are of the view that pre-reference interest should be only at the rate of 9% per annum. It is appropriate to award the same rate of interest even by way of pendent lite interest and future interest upto date of payment.”

B. Krishna Bhagya Jala Nigam Ltd. vs. G. Harischandra Reddy & Anr.

“11. here also we may add that we do not wish to interfere with the award except to say that after economic reforms in our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%.”

18. With the aforesaid modification in the rate of interest, the impugned Award dated 18th April, 2001 is made rule of the Court and Registry is directed to prepare a decree in terms thereof. Accordingly, present application and petition stand disposed of.

MANMOHAN, J.

FEBRUARY 23, 2010

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