

Ambica Processing Inds Vs. Union of India

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Court : Delhi

Decided On : Mar-01-1996

Reported in : 1996IAD(Delhi)1008; 1996(36)DRJ668

Judge : S.K. Mahajan, J.

Acts : [Arbitration Act, 1940](#) - Sections 130

Appeal No. : Suit No. 2997 of 1989

Appellant : Ambica Processing Inds

Respondent : Union of India

Advocate for Pet/Ap. : Rajesh Banati and; K.C. Mittal, Advs

Judgement :

S.K. Mahajan, J.

(1) Under a rate contract dated June 6, 1984 for supply of fumigation covers, the Central Warehousing Corporation, (in short referred to as 'CWC'), placed two supply orders upon the petitioner for the supply of 1,353 fumigation covers at the rate of 8,374 per cover inclusive of excise duty, insurance, etc. but exclusive of sales tax For destination rail head. According to Cwc, there was delay in the supply of the said fumigation covers and it, thereforee, decided to recover liquidated damages at the rate of ten per cent. of the entire contract value from the

petitioner. The petitioner disputed this levy of liquidated damages and sought disputes to be referred to an arbitrator. Certain other amount was also claimed by the petitioner. These disputes, including the levy of liquidated damages were referred to the arbitration of Mr.B.S. Ramaswamy, respondent No.2. Cwc also preferred a counter claim of Rs.2,899.00 towards undercharges, wharfage, etc.

(2) The arbitrator, after hearing the parties, made and published his award on October 20, 1989 holding that clause X 7(i), as it existed in the contract, was vague and the quantum of pre- determined liquidated damages was arbitrary and unregulated and the same amounted to a penalty by any standard. The arbitrator, therefore, held the levy of liquidated damages as unjustified but awarded only a sum of Rs.39,679.18 paise as compensation for breach of the contract by Ambica for delay in the supply of material. The counter-claim of Cwc to the extent of Rs.2,889.00 was also allowed by the arbitrator.

(3) On the said award having been filed in the Court, Cwc has filed objections thereto challenging the same on the ground that the arbitrator had completely gone beyond his jurisdiction and reference while making the award and has thereby committed misconduct and error of jurisdiction in enlarging the scope of reference by making award contrary to the agreement. Though no specific objection has been taken by Cwc, however during the course of arguments, it was also argued by learned counsel for Cwc that the matter about levy of penalty under clause X 7(i) could not be made subject-matter of arbitration as the same was an excepted matter within the meaning of clause Xvi of the agreement. The contention is that decision of the Corporation for levy of penalty Under clause X has been made final and could not be made a subject-matter of reference before the arbitrator. As it was a purely legal question, I had allowed the parties to argue this point as well.

(4) To appreciate the rival contentions of the parties as to whether the levy of liquidated damages under clause X could have been made subject-matter of reference before the arbitrator, it will be useful to note the said clause as under:-

Clause 7(i)

'FAILURE and Termination: If the contractor fails to deliver the stores or any Installment thereof within the period fixed for such delivery in the schedule or at any time repudiates the contract before the expiry of such period, the Corporation may without prejudice to the right of the purchaser to recover damages for breach of the contract, may exercise either of following options:-

(1) Recover from the contractor, such percentage not exceeding 10% of the price of any stores which the contractor has failed to deliver within the period fixed for delivery which the delivery of such stores may be in arrears where delivery thereof is accepted after expiry of the aforesaid period....'

THE matters which has been excepted from the purview of the arbitrations agreement are those, decision of which has been expressly provided for in the contract. Clause Xvi of the agreement which provides for arbitration agreement reads as under- clause Xvi

'ARBITRATION

ALL disputes and differences arising out of or in any way touching or concerning this agreement whatsoever(except as to any matter the decision of which is expressly provided for in the contract) shall be referred to the sole arbitration of the Managing Director is unable or unwilling to act, to the sole arbitration of some other person appointed by the Managing Director, Central Warehousing Corporation, New Delhi willing to act as such arbitrator. It will be no objection to any such appointment that the person appointed is an employee of the Corporation that he had to deal with the matter to which the contract relates and that, in the course of his duties as such employee of the Corporation, he had expressed views on all or any of the matter in dispute or difference. The award of such Arbitrator shall be final and binding on the parties to this contract. It is a term of this contract that in the event of such Arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act, shall appoint another person to act as Arbitrator in accordance with the terms of this contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by this Managing Director, Central

Warehousing Corporation, New Delhi as aforesaid should act as Arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all. The Arbitrator shall give reasons for Award.'

(5) Mr. Mittal in support of his contention that the question of levy of penalty under clause X.7(i) cannot be a matter for arbitration, has cited the judgment reported as Vishwanath Sood Vs . Union of India : [1989]1SCR288

(6) In Vishwanath Sood v. Union of India, the question for consideration before the Court was whether a decision to which a finality has been attached under the agreement can be subject- matter of reference before the arbitrator. While the arbitration agreement in the said case was almost similar to arbitration agreement in the present case, the clause where the decision of an authority under the agreement was made final was as under : -

IN the event of the contractor failing to comply with this condition, he shall be liable to pay as compensation an amount equal to one per cent. or such smaller amount as the Superintending Engineer(whose decision in writing shall be final) may decide on the said estimated cost of whole work for every day that the due quantity of work remains incomplete, provided always that the entire amount of compensation to be paid under the provisions of this clause shall not exceed 10%, on the estimated cost of the work as shown in the tender.'

(7) While interpreting this clause, the Court held as under:-

'THE Division Bench has construed the expression in clause 2 in parenthesis is that 'the Superintending Engineer's decision shall be final' as referring only to a finality qua the department; in other words, that it only constitutes a declaration that no officer in the department can determine the compensation levied by the Superintending Engineer shall not be changed without the approval of the Government. After referring to certain judicial decisions regarding the meaning of the word 'final' in various statutes, the Division Bench concluded that the finality cannot be construed as excluding the jurisdiction of the arbitrator under clause 25. We are unable to accept this view. Clause 25 which is the arbitration clause starts with an opening phrase excluding certain matters and disputes from arbitration

and these are matters or disputes in respect of which provision has been made elsewhere or otherwise in the contract. These words in our opinion can have reference only to provisions such as the one in parenthesis in clause 2 by which certain types of determinations are left to the administrative authorities concerned. If that be not so, the words 'except where otherwise provided in the contract' would become meaningless. We are therefore inclined to hold that the opening part of clause 25 clearly excludes matters like those mentioned in clause 2 in respect of which any dispute is left to be decided by a higher official of the Department. Our conclusion, therefore, is that the question of awarding compensation under clause 2 is outside the purview of the arbitrator and that the compensation, determined under clause 2 either by the Engineer-in-charge or on further reference by the Superintending Engineer will not be capable of being called in question before the arbitrator.'

(8) It is thus seen that the Supreme Court was interpreting a provision where a finality had been attached to the decision of the Superintending Engineer. In the present case what has been mentioned in clause X(7)(i) of the agreement is that Cwc shall have four options and Cwc will have a right to exercise any of the options mentioned therein, in case of the petitioner committing a breach of the contract. One of the options mentioned in the said clause is to recover from the contractor such percentage, not exceeding ten per cent of the price of the stores which the contractor has failed to deliver within the period fixed for delivery. No finality has been attached to, the said option which may be exercised by the purchaser. In my opinion, the judgment reported as Vishwanath Sood v. Union of India will not be applicable to the facts and circumstances of this case inasmuch as no finality has been attached to the decision of the purchaser when it exercised the option to recover compensation from the contractor. In certain other clauses of the agreement, finality has been attached to certain decisions of the authorities mentioned therein and these are the decisions which cannot be made a subject-matter of reference under arbitration agreement between the parties. I am, therefore, not in agreement with Mr. Mittal that the decision of the purchaser i.e. Cwc, in deciding to recover compensation from the contractor could not be a subject-matter of reference.

(9) The next contention of the objector is that the arbitrator has exercised the jurisdiction which was not vested in him by holding that clause X.7(i) was vague and the quantum of pre-determined liquidated damages was arbitrary and unregulated. Though the arbitrator has held the said clause to be vague, however, the arbitrator could have otherwise given his decision on the question as to whether the compensation which has been levied by the purchaser upon the contractor in terms of the said clause was justified or not. When this matter was referred to the arbitrator, it was within his domain to take a decision on the question of the justification of levy of penalty/compensation. As held in *M/s. Sudarshan Trading Company Vs . Government of Kerala* : [1989]1SCR665 the arbitrator is empowered to interpret the contract and the Court cannot substitute its own decision for the interpretation which has been given by the arbitrator. The arbitrator, after consideration of the entire matter in controversy, has come to a conclusion that the purchaser was entitled to a sum of only Rs.39,679.18paise as compensation for the breach of contract by the contractor and the Court will not substitute its finding for that of the arbitrator. The view which has been taken by the arbitrator was a possible view, though perhaps not the only correct view, however, the Court will not examine the award to find out as to whether the said view taken by the arbitrator is correct or not. The arbitrator has given the reasons for arriving at his decision and it is not for the Court to examine the reasonableness of the reasons given by him, nor the said reasons can be challenged unless there is an error apparent on the face of the award or the award is based upon no evidence. It is not the case of the objector that there was no evidence before the arbitrator. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of the 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.

(10) In *M/s. Hindustan Tea Company Vs . K. Sashikant & Co. & Another* : AIR 1987 SC81 , the Court held as under : -

'THE Award is reasoned one. The objections which have been raised against the Award are such that they cannot indeed be taken into consideration within the

limited ambit of challenge admissible under the scheme of the Arbitration Act. Under the law, the Arbitrator is made the final arbiter of the dispute between the parties. The Award is not open to challenge on the ground that the Arbitrator has reached a wrong conclusion or has failed to appreciate facts. Strong reliance was placed by the appellant's learned counsel on an old Madras decision in *Yogambal Bayee Ammani Ammal V. Naina Pillai Markayar* (1909) 33 Mad 15. In our view, on the facts of this case challenge to the Award is not permissible by taking the stand that the Arbitrator acted contrary to the provisions of S.70 of the Contract Act. In these premises the objection filed to the Award has to be rejected.'

(11) Mr. Mittal wants me look to the documents and find out as to whether the decision of the arbitrator was correct or not.

(12) In my view, the Court has no jurisdiction to investigate into the merits of the case and to examine the documentary and oral evidence on the record for the purpose of finding out whether or not the arbitrator had committed an error of law or fact. The award of the arbitrator can be set aside on the ground of error of law on the face of the award only when in the award or in a document incorporated with it there is found some legal proposition which is the basis of the award and which is erroneous. It is not permissible for the Court to examine any other document or evidence in order to ascertain whether the arbitrator has committed any error of law.

(13) For the foregoing, I see no reason to allow the objection petition or set aside the award of the arbitrator. The objections are, therefore, dismissed and the award of the arbitrator' dated 20th October, 1989 is made a rule of the Court and a decree in terms of the award is passed. The decree holder shall be entitled to interest on the amount wrongfully withheld at the rate of 12 per cent per annum from the date of this decree till the date of payment.

(14) In the facts and circumstances of the case, I leave the parties to bear their own costs.