

Jai Singh Vs. Dda and ors.

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Court : Delhi

Decided On : Sep-04-2008

Reported in : 2008(3)ARBLR667(Delhi)

Judge : Rajiv Sahai Endlaw, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 28(2), 28(3), 30, 31(3), 34, 34(2) and 46; Telegraph Act - Sections 7B

Appeal No. : OMP No. 152/2002

Appellant : Jai Singh

Respondent : Dda and ors.

Advocate for Def. : Bhupesh Narula, Adv.

Advocate for Pet/Ap. : Bhuwan Gugnani, Adv

Disposition : Petition allowed

Judgement :

Rajiv Sahai Endlaw, J.

1. The questions which fall for consideration in this petition under Section 34 of the [Arbitration and Conciliation Act, 1996](#) are two folds. Firstly, whether the expressions-

(a) the claimants have failed to establish incontrovertibly the claim in terms of the agreement?

(b) the claim is not in terms of the agreement; besides was not established incontrovertibly?

used by an arbitrator for disallowing the claim can constitute reasons for disallowing the claims; and

Secondly, if in pursuance to such an award, the claimant accepts the amounts awarded by the arbitrator (mostly on admissions of the respondents), can the claimant be debarred from challenging the award.

2. The arbitration proceedings were governed by the 1996 Act. The Arbitration proceedings were in pursuance to an arbitration agreement which itself provided that 'in all cases where the amount of the claim in dispute is Rs. 50,000/- (Rupees fifty thousand only) and above, the arbitrator will give reason for the award.'

3. The counsel for the respondent contended that from the perusal of record of arbitration proceedings it will be found that the claims of the petitioner were not in terms of the contract and/or were not established and thus the award stating so amounted to giving reasons for rejection of the claim. Reliance was placed on *Gujrat Water Supply and Sewerage Board v. Unique Erectors(Gujrat) Pvt Ltd. : [1989]1SCR318* where record of arbitration proceedings was seen by the Apex Court to determine whether the arbitrator had committed an error or not and it was held that it is not obligatory for the arbitrator to give reasons for his decision, as long as the arbitrator has indicated his mind and where the award cannot be called unintelligible. The respondent has similarly relied upon the judgment of a Single Judge of the Patna High Court in *State of Bihar v. Shri Gopal Chandra Palit* 1996 (2) Arb LR 30 holding that the court cannot probe the mental process of the arbitrator and speculate.

4. Needless to state that both the aforesaid judgments, relied upon by the counsel for the respondent, are under 1940 Act. Section 31(3) of the 1996 Act, in contradistinction to the 1940 Act, requires the arbitral award to state the reasons

upon which it is based unless the parties have agreed that no reasons are to be given or the arbitral award is on agreed terms under Section 30 of the Act. Neither of the exceptions apply to the present case. On the contrary the contract expressly was to give reasons. Section 28(3) of the 1996 Act further provides that the arbitral tribunal shall decide in accordance with the terms of the contract. The terms of the contract, as aforesaid, also required the arbitrator to give reasons. The Apex Court in *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.* : [2003]3SCR691 has already held that an award which is contrary to the terms of the agreement between the parties is liable to be set aside under Section 34 of the Act. Thus, if it is found that the expression used by the arbitrator for rejecting claims does not tantamount to giving reasons, the award would be contrary to the terms of the contract between the parties.

5. The Oxford's English Dictionary defines reason as a cause, explanation or justification or as a good or obvious cause to do something or as logic or a premise of an argument in support of a belief. The Black's Law Dictionary defines reason as a faculty of mind by which it distinguishes truth from falsehood, good from evil and which enables the possessor to deduce inferences from facts or from propositions. Webster's Dictionary also defines reason as the cause that makes a phenomenon intelligible.

6. Reason is the foundation, explanation, consideration, rationale or a ground for an action. It is the statement of a fact employed as an argument to justify or condemn some act. It is a fact or circumstance forming a ground or motive leading or sufficient to lead a person to reject or adopt some course of action or belief.

7. What has to be examined is, whether the arbitrator saying that the claim is rejected because it is not in accordance with the agreement or that it has not been established fulfills the requirement of law of the Award stating reasons on which it is based. In my view, these expressions cannot constitute foundation or explanation and do not enable inferences to be drawn and do not make the phenomenon of rejection of claim intelligible and thus cannot be held to constitute 'Reasons'. They are at best conclusions based on reasons, which the Award does not state. Thus, there is no compliance of terms of contract or of law, requiring

reasons to be stated.

8. Reliance can be placed on the Division Bench Judgment of this Court in *College of Vocational Studies v. S.S. Jaitely* AIR 1987 Delhi 134 holding that in the reasoned award what is expected from the arbitrator is that he should indicate his mind whereby it can be ascertained as to how he arrived at a particular conclusion; the arbitrator is required to indicate the trend of his thought process but not his mental meanderings. It was further held in the said judgment that mere conclusion and verdict would not be sufficient and reasons are the links on the material, documentary or oral evidence, adduced before the arbitrator on which certain inferences are drawn and conclusions are made and that there must be some rational nexus between the two indicated in the award. The counsel for the petitioner has also relied upon *Jajodia (Overseas) Pvt. Ltd. v. Industrial Development Corporation of Orissa Ltd* : [1993]1SCR229 where also it was held that mere giving of answers to the issues in the award would not constitute a speaking and a reasoned award.

9. The reliance by the counsel for the respondent on *Gujarat Water Supply and Sewerage Board* (supra) is misconceived. In that case the arbitral record was looked into to determine whether an issue, on account of non decision whereof the award was sought to be set aside, had been given up or not and not to find out the reasons. Moreover, when the 1996 Act requires the award to state the reasons, the said requirement cannot be said to be fulfilled by arguing that though the award gives conclusions only, the reasons for such conclusions can be deciphered from the arbitral record.

10. It cannot also be lost sight of that the arbitration arises from standard form contract between the respondent as one of the largest employers and the petitioner as contractor. Generally such contractors are at the same time awarded several or successively awarded contracts by the respondent. Such contractors work in close contact with the officials of respondent. The arbitration is also of officers/nominees of the respondent. To my mind, the awards in claims of Rs. 50,000/- or more are required to give reasons so as to give a finality to the award, if the parties are satisfied with the reasons. From the award in the present case,

there is no scope for the petitioner to satisfy himself as to the correctness of the conclusions reached by the arbitrator and the advisability of challenging the same.

11. There is yet another aspect of the matter. The arbitral awards are subject to challenge before the court. The scope of challenge has now been laid down in *Saw Pipes Ltd (supra)*. The award on the face of it ought to enable the court to determine whether it is in accordance with law. However, if the arbitrator merely states that the claim is not in accordance with agreement or has not been established, in the name of 'stating reasons', the court will be compelled to peruse the records to determine whether the conclusions reached by the arbitrator are in accordance with law or not. This is not the scope of enquiry while entertaining challenges or objections to arbitral awards.

12. The requirement to state reasons in the award cannot be undermined. The Apex Court in *S.N. Mukherjee v. Union of India* : 1990 CriLJ2148a included the recording of clear and explicit reasons by authorities exercising quasi judicial function in the principles of natural justice. Again, notwithstanding constitution Bench judgment in *Raipur Development Authority v. Chokamal Contractors* (1989) 2 SCC 721 (holding that till the legislature amends the law, arbitrators are not required to give reasons), in *M.L. Jaggi v. MTNL* : [1996]1SCR25 without even amendment of law, the Apex Court held that the arbitrator under Section 7B of the Telegraph Act is enjoined to give reasons in support of his decisions. Now, the law has been amended and the arbitral award is required to state reasons, the importance of which even the constitution bench of Apex Court had emphasized. The said important requirement cannot be permitted to be whittled down by allowing conclusions in the garb of reasons, in the arbitral awards.

13. The expressions used by the arbitrator for disallowing most of the claims of the claimant are to be interpreted in the light of the aforesaid position. Can they be stated to the reasons for not allowing the claims. The counsel for the respondent contends that the same does constitute reasons inasmuch as the arbitrator has disallowed the claim on two grounds/reasons - firstly that it is not in terms of the agreement and secondly that it was not established incontrovertibly by the petitioner/claimant. He contends that this Court cannot go into the sufficiency of

the reasons. In my view, merely stating that the claim is not in terms of the agreement or has not been established does not link the material before the arbitrator to the conclusion and does not make the phenomenon of such conclusion intelligible. The counsel for the respondent contends that the entire voluminous record which is now before this Court was before the arbitrator and the award itself discloses about 50 hearings which were held and, in the circumstances, it ought to be held that the arbitrator, on perusal of the entire material/record before him, has found the claims not to be in terms of the agreement and/or having not been established by the petitioner.

14. In my view, holding so would tantamount to allowing the arbitrator to act as an amiable compositeur without the parties having agreed to do so. Section 28(2) provides that the arbitral tribunal shall decide *ex aequo et bono* or as amiable compositeur only if the parties have expressly authorized it to do so. Russell on Arbitration 21st Edition at page 163 reads as under:

The Tribunal has a duty to decide a dispute in accordance with the legal rights of the parties, rather than in what the tribunal considers a fair and reasonable way, unless there is specific agreement between the parties to the contrary. The tribunal may be specifically instructed by the arbitration agreement to decide the disputes on some basis other than the law; an agreement to this effect has generally become known as an 'equity clause'. For example, the parties may agree that the tribunal is to decide the dispute in accordance with concepts variously known as 'honourable engagement', 'amiable compositeur' 'equity', 'ex aequo et bono', the 'general principles of law recognized by civilized nations' or the 'lex mercatoria'. The expression 'lex mercatoria' is not found in arbitration clauses, and some commentators have doubted whether it has any meaning. Those who do assign it a meaning differ as to whether it is a separate body of international commercial law or equivalent to freedom from strict legal constraint. Various wordings are encountered in arbitration agreements, and each has to be carefully interpreted.

Black's Law Dictionary defines the term 'Ex aequo et bono' as 'in justice and fairness' or according to equity and good conscience. The word, 'amiable

compositeur' is a French term. It means a person who adopts a flexible approach brimful with fairness and reality. Section 46 (i) (b) of the English Arbitration Act 1996 permits the arbitrator to decide the dispute in accordance with such other considerations as are agreed or determined. RUSSELL on ARBITRATION, 21st Edn. at page 164 states as under on the subject.

The courts will interpret the new statutory provisions allowing a tribunal to decide a dispute in accordance with such other considerations as are agreed or determined as obliging them to uphold equity clauses. In agreeing that a dispute shall be resolved this way, the parties are in effect excluding any right to appeal to the court, there being no question of law to appeal. Special transitional provisions apply to equity clauses to prevent retrospective changes to their meaning, Section 46(i)(b) of the Arbitration Act, 1996 does not apply to arbitration agreements that were made before the Act came into force (on January 31, 1997).

Sir Michael J. Mustill and Stewart C. Byod in 'Commercial Arbitration' IInd Edn. at paSge 606 state as follows:

A commercial arbitration agreement may contain a stipulation or a clause by which arbitrators are empowered not to apply strict or settled principles of law in the settlement of a dispute referred to them, but instead to settle such dispute by the application of what they may deem to be fair and reasonable. In other words, such arbitrators are then meant to act as amiables compositeurs. Considering that an agreement between the parties to an arbitration reference constitutes an essential basis for the establishment of conduct of a commercial arbitration, one would expect any such stipulation on clause in an arbitration agreement to be observed by arbitrators without judicial intervention. Obviously commercial arbitrators cannot be presumed to be entitled to settle a dispute referred to them by applying what they deem to be fair and reasonable, in the absence of a specific authorization in an arbitration agreement. As an English appellant court Judge had occasion to stress in a recent symposium on international commercial arbitration. 'The arbitrator must not act as amiable compositeur unless authorized to do so.'

15. The legislature obviously was not satisfied with merely requiring the arbitral award to state reasons but also expressly provided that, as under the 1940 Act, a

mere statement of the arbitrator to the effect that on consideration of entire material or in the entirety of the facts and circumstances of the case or on perusal of the evidence or that no case is made out, the arbitrator shall not be entitled to make an award. Such expressions are used only by an amiable compositeur, whom the parties have chosen owing to his familiarity with the disputes and who, if so authorized by the parties, is permitted by the 1996 Act to make an award in such fashion. However, an arbitrator who is not an amiable compositeur is not permitted under the Act to decide the matter using such expression.

16. In my view, the requirement of the arbitral award under the 1996 Act to give reasons is something more than the requirement even in an agreement of arbitration of a reasoned award. The constitution bench of Apex Court in Raipur Development Authority (supra), in para 37 emphasised the need to give reasons by holding:

37. There is, however, one aspect of non-speaking awards in non-statutory arbitrations to which Government and Governmental authorities are parties that compel attention. The trappings of a body which discharges judicial functions and required to act in accordance with law with their concomitant obligations for reasoned decisions, are not attracted to a private adjudication of the nature of arbitration as the latter, as we have noticed earlier, is not supposed to exert the State's sovereign judicial power. But arbitral awards in disputes to which the State and its instrumentalities are parties affect public interest and the manner in which government and its instrumentalities allow their interest to be affected by such arbitral adjudications involve larger questions of policy and public interest. Government and its instrumentalities cannot simply allow large financial interests of the State to be prejudicially affected by non-reviewable-except in the limited way allowed by the Statute-non- speaking arbitral awards. Indeed, this branch of the system of dispute- resolution has, of late, acquired a certain degree of notoriety by the manner in which in many cases the financial interests of Government have come to suffer by awards which have raised eye-brows by doubts as to their rectitude and propriety. It will not be justifiable for Governments or their instrumentalities to enter into Arbitration agreements which do not expressly stipulate the rendering of reasoned and speaking awards. Governments

and their instrumentalities should, as a matter of policy and public interest-if not as a compulsion of law-ensure that wherever they enter into agreements for resolution of disputes by resort to private arbitrations, the requirement of speaking awards is expressly stipulated and ensured. It is for Governments and their instrumentalities to ensure in future this requirement as a matter of policy in the larger public interest. Any lapse in that behalf might lend itself to and perhaps justify the legitimate criticism that Government failed to provide against possible prejudice to public interest.

17. The Apex Court recently in *Mc Dermott International Inc v. Burn Standard Co. Ltd and Ors.* (2006) SLT 345 has quoted with approval the following passage from *Bachawat's Law of Arbitration and Conciliation*, Fourth Edition, pages 855-856:

Reason is a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action. It is in this sense that the award must state reasons for the amount awarded.

The rationale of the requirement of reasons is that reasons assure that the arbitrator has not acted capriciously. Reasons reveal the grounds on which the Arbitrator reached the conclusion which adversely affects the interests of a party. The contractual stipulation of reasons means, as held in *Poyser and Mills' Arbitration In Re*, 'proper adequate reasons'. Such reasons shall not only be intelligible but shall be a reason connected with the case which the Court can see is proper. Contradictory reasons are equal to lack of reasons.

The meaning of the word 'reason' was explained by the Kerala High Court in the context of a reasoned award.

Reasons are the links between the materials on which certain conclusions are based and the actual conclusions....

A mere statement of reasons does not satisfy the requirements of Section 31(3). Reasons must be based upon the materials submitted before the arbitral tribunal. The Tribunal has to give its reasons on consideration of the relevant materials while the irrelevant material may be ignored.

Statement of reasons is mandatory requirement unless dispensed with by the parties or by a statutory provision.

18. Having held so, and the award being without reasons, becomes liable to be set aside as held by the Apex Court in *Saw Pipes Ltd (supra)* also.

19. The second submission of the counsel for the respondent also does not find favour with me. An award can be on several claims, as is in the present case. A claimant ought not to be prevented from receiving the amounts awarded for the fear of losing the right to challenge the award insofar as with respect to the claims disallowed. When the statute confers a right on a party to an arbitration to challenge the same, the said right cannot be taken away merely for the reason of the party accepting payments under that part of the award which is neither challenged by him nor by the opposite party. In fact, the 1996 Act itself recognizes setting aside of the award in part in proviso to Section 34(2)(iv).

20. It is not the case of the respondent that the petitioner accepted the payments allowed by the arbitrator to the petitioner in full and final settlement. The reliance by the counsel for the respondent on *Ramsahai Sheduram v. Harishchandra Dullchandji and Anr. : AIR 1963 MP143* is misconceived. In that case the court found that the party objecting to the award had benefited from part of the award. In that case, the award was found to be in relation to all the claims and counter claims and thus it was-held that piecemeal challenge was not permissible. However in the present case though the respondent had also made the counter claims before the arbitrator, which were dismissed by the arbitrator in a similar fashion as the claims to which objection is filed, i.e. without giving any reason, but the respondent has not objected to the award. It is thus not the case of the respondent that by the reason of the petitioner having accepted payments allowed/awarded by the arbitrator, the respondent has suffered any prejudice.

21. Even otherwise, an important right can be given up only with full knowledge. The petitioner in the present case cannot be imputed the knowledge that by accepting the monies awarded it would lose its statutory right to object to the award with respect to the claims which were disallowed by the arbitrator. The Apex Court in *Pulin Behari Lal v. Mahadeb Dutta and Ors. : [1993]1SCR472* has held

that in the case of a waiver of any provision of a statute, it is necessary that there was a conscious relinquishment of the advantage of such provisions of the statute.

In this regard, it may also be noticed that the total claims of the petitioner/claimant before the arbitrator were in the sum of Rs. 1,90,14,224.34 and only a sum of Rs. 20,57,36.06 has been allowed by the arbitrator to the claimant.

22. I have in *Sharma Enterprises v. National Building Construction Corporation Ltd and Anr.* OMP 144/2003 decided on 20.08.2008 already held that while setting aside the award where the court, on the basis of the material and without any intricate inquiry, is able to arrive at a finding, the court is empowered to modify the award. However, I do not find the same to be possible in the present case. As such there is no option but to give the arbitral tribunal an opportunity to resume the arbitral proceedings to adjudicate the items b, c, e, g, i and k of claim No. 1 and of the items of claims No 2 to 8 afresh on the basis of record/material available to the earlier arbitrator. It is clarified that the parties shall not be entitled to lead any further evidence before the arbitrator and would address arguments on the existing records. The arbitrator shall give a reasoned award, in terms of above, on the aforesaid claims of the petitioner.

23. The respondent is directed to appoint an arbitrator within four weeks and considering that the matter has already remained pending for long, the arbitrator, so appointed by the respondent, shall make a reasoned award within 16 weeks thereafter. The arbitral record be returned to the respondent for being made available to the new arbitrator.

With the aforesaid directions, the petition is allowed.