AIR 1958 All 692

Allahabad High Court

Case No: F.A.F.O. No. 199 of 1951

The Indian Minerals Co.	APPELLANT
Vs	
The Northern India Lime Marketing Association	RESPONDENT

Date of Decision: Nov. 28, 1957

Acts Referred:
Arbitration Act, 1940 â€" Section 16, 20, 23(2), 30, 31#Civil Procedure Code, 1908 (CPC) â€" Order 6 Rule 17

Citation: AIR 1958 All 692

Hon'ble Judges: J.N. Takru, J; D.N. Roy, J

Bench: Division Bench

Advocate: R.S. Pathak and Amarnath Kaul, for the Appellant; D.P. Uniyal, for the Respondent

Final Decision: Disposed Of

Judgement

D.N. Roy, J.
These are two connected appeals by rival parties to certain arbitration proceedings u/s 20 of the Arbitration Act (No. X) of

1940. Appeal No. 199 of 1951 is by the Indian Minerals Company. It has been made u/s 39(1)(iv) of the Arbitration Act and is directed against

an order dated 14-6-1951 by which the agreement of a reference to arbitration was ordered to be filed. Appeal No. 257 of 1953 is by the other

side, namely by Brij Lal Suri and Sons, Proprietors of Northern India Lime Marketing Association, Dehara Dun.

It has been made u/s 39(1)(vi) of the same Act and it is directed against an order dated 30-7-1953, by which an application to set aside the award

dated 14-2-1953, was dismissed by trie Civil Judge and the suit was dismissed in terms of the award.

2. The facts may be briefly stated. An application u/s 20 of the Arbitration Act of 1940 was filed by Brij Lal Suri and Sons, Proprietors of

Northern India Lime Marketing Association, Dehra Dun, through Brij Lal Suri and against the Indian Minerals Company, a firm carrying on

business at Maihar in Central India, now Madhya Pradesh. It was contended that the parties had entered into a contract.

The conract was that the Indian Minerals Company would supply certain amount of Hind-awn soap-stone lumps every month for certain territories

including Dehra Dun on certain conditions. There was no formal contract, but the parties exchanged letters which proved the contract On 20-9-

1942, a letter was written by the plaintiff to the defendant setting out the terms upon which he would be prepared to take the goods from the

defendant. Along with the letter he sent a cheque of Rs. 500/-.

On the next day, i.e. on 21-9-1942 the defendant wrote a letter to the plaintiff. In this letter reference was made to the plaintiff''s letter on the 20th

September and a new condition was put forward, namely, that if the plaintiff did not take up 30 wagons of the goods contracted for within six

months, the deposited amount of Rs. 500/- would be forfeited. The defendant required confirmation of this letter from the plaintiff.

On 24-9-1942, a letter was written by the plaintiff to the defendant confirming the terms offered by the defendant in their letter of the 21st

September. The contract was therefore completed by means of the plaintiff''s letter of 24-9-1942. One of the terms agreed to between the parties

by means of this correspondence was that disputes arising between the parties in the matter of the contract shall be referred to mutual arbitration.

The plaintiff alleged that the defendant was guilty of breach of contract and that therefore according to the arbitration Clause the matter Was liable

to be referred to arbitration. He therefore made the application u/s 20 of the Arbitration Act for the agreement being filed in Court and the

arbitration proceedings being taken in pursuance of it. An affidavit was filed by the plaintiff in support of his allegations. There was no counter-

affidavit from the other side.

The learned Civil Judge of Dehra Dun rejected the application on the ground that it was not proved that there was any cause of action for the

application within his jurisdiction. The learned Judge held that the only evidence to prove that the contract was made at Dehra Dun was the

affidavit filed on behalf of the plaintiff and because, in his opinion, this matter could not be proved by an affidavit, the learned Judge ordered that

the application be returned for presentation to proper court.

Against that decision F. A. F. O. No. 186 of 1948 was filed in this Court and two points were urged at the hearing of that appeal. Firstly, that the

letters themselves which were admitted by the defendant clearly showed that the contract was made at Dehra Dun, and that, at any rate, it was to

be performed partly at Dehra Dun. Secondly, that an affidavit u/s 33 of the Arbitration Act could be filed in proceedings u/s 20 of the Act.

It was held by this Court on 3-8-1950, in that appeal that the contract took place at Dehra Dun and that at any rate it was to be performed partly

at Dehra Dun and consequently the Court at Dehra Dun had jurisdiction to entertain the application. Upon that view the court refrained from

expressing any opinion on the other question, namely, whether the matter in controversy in an application u/s 20 can be proved by an affidavit as

provided by Section 33 of the Act. The result was that that appeal was allowed and the order of the learned Civil judge was set aside and the case

was remanded to him for trial according to law.

3. After the case was remanded, the original application was amended and the matters at dispute were specified in it. Further written statement

was filed by the defendant. The learned Civil Judge then set forth two issues for decision, namely,

(1) Whether there was in fact any agreement of reference to arbitation; and

(2) what are the disputes between the parties which are to be referred to arbitration.

The Civil Judge by his order dated 14-6-1951, held, relying upon the terms of the contract and in particular upon Clause 6 of the letter Ex. 1 dated

20-9-1942 of the plaintiff, which was not repudiated by the defendant in his letter Ex. 2 dated 21-9-1942, which stipulated that

if unfortunately any dispute may arise out of the agreement it may be referred to mutual arbitration,

that there was an agreement of reference to arbitration between the parties as alleged by the plaintiff.

4. On the question as to what were the matters which were in dispute between the parties two of the matters, according to both sides, related to

the interpretation of the terms of the letter Ex. 2 dated 21-9-1942. The plaintiff insisted that he must be given five waggons per month as the

minimum supply.

The defendant, on the other hand, contended that the supply in terms of Ex. 2 was to be made to the plaintiff after meeting the demand of the

defendant''s own factory at Dohad, which was about six wagons per month. Closely connected with those questions was the ancillary question as

to whether the defendant was justified in supplying materials to other parties within the contracted zone after entering into contract with the plaintiff.

In the letter Ex. 1 there was reference to the territory of N. W. F. P., Punjab, Delhi and Districts of Western U. P. above the line Moradabad-

Delhi.

In respect of this territory the plaintiff wanted in his letter Ex. 1 that no quantities of soap-stone should be supplied by the defendant to other parties

and all inquiries and orders received by the defendant direct should be sent to the plaintiff for disposal. The modification suggested to this term in

the letter Ex. 2 was that all orders previously accepted By the defendant for the above mentioned territory will be executed by the defendant. The

plaintiff agreed to this modification.

The defendant supplied some soapstone to other parties also in the territory after the contract was made. The plaintiff objected to this supply. The

defendant justified his conduct by relying on the modified terms in Ex. 2 and contended that the orders supplied had really been received before the

contract was made with the plaintiff. The plaintiff was not satisfied with that explanation.

The question therefore arose whether the defendant was justified in supplying materials to other parties in that territory after entering into contract

with the plaintiff. Then again there was the question as to whether the defendant was liable in any damages on account of any breach of contract.

The learned Civil Judge after formulating those essential points which arose for determination, directed by his order dated 14-6-1951, that the

agreement of reference to arbitration be filed.

That order was in fulfilment of the provisions of that part of Section 20(4) of the Arbitration Act which says that ""the court shall order the

agreement to be filed."" By a subsequent order of a later date the Civil Judge in terms of the second part of Section 20(4) made ""an order of

reference to an arbitrator"" appointed by the court because the parties could not agree to a common name.

After the order of reference together with the necessary papers reached the arbitrator, the arbitrator refused to recognise the points formulated by

the court for his decision and proceeded to frame his own issues which were as follows:

1. Was there any contract between the plaintiff and the defendant? What were the terms of the contract?

2. If yes, has there been a breach of the contract?

3. Whether Sri Brij Lal Suri and Sons are the Proprietors of the Northern India Lime Marketing Association, Dehara Dun, and Sri Brij Lal Suri its

karta?

4. To what damages, if any, is the plaintiff entitled?

5. Whether Northern India Lime Marketing Association is a joint Hindu family firm or a partnership firm? If the latter, what is its effect?

It will at once be seen that issues nos. 1, 3 and 5 mentioned above were not points which arose for determination by the arbitrator after what had

been settled by the court before the reference was made. Those issues comprehended questions which had been set at rest by the judgment of this

Court in F. A. F. O. No. 186 of 1948 where it was held that the contract was completed by means of the plaintiffs letter of 24-9-1942, and when

it was further held that:

one of the terms agreed to between the parties by means of this correspondence was that dispute arising between the parties in the matter of the

contract shall be referred to mutual arbitration.

They were further set at rest by the decision of the Civil Judge given on 14-6-1951, which decision as to what were the points of dispute between

the parties which should be referred to arbitration.

In fact that reference was based upon those points. Before the arbitrator objection had been taken by the plaintiff that the first part of issue No. 1

as also issues Nos. 3 and 5 formulated by the arbitrator were not left to be decided by the arbitrator and that the arbitrator should confine himself

to the points of reference mentioned in the judgment of the Civil Judge dated 14-6-1951.

The arbitrator, however, overruled that objection and came to the conclusion that the order dated 2-9-1952 sent to him by the Civil Judge

directed him ""to decide the case"" and was wide enough to bring within its scope issues Nos. 1, 3 and 5 framed by him. In our opinion the arbitrator

completely misdirected himself by adopting that line of action.

5. It has been urged by Mr. Kunzru on behalf of the Indian Minerals Company that the Civil Judge had no power to order amendment of the

petition that was made u/s 20 of the Arbitration Act and that he had further no power to formulate points of dispute which the arbitrator was called

upon to decide. We are unable to agree to these propositions.

Clause (a) of Section 41 of the Arbitration Act of 1940 makes the provisions of the CPC applicable to all proceedings before the court and to all

appeals, except where such application is expressly excluded by this Act or by any of the Rules framed by the High Court u/s 44.

The operative part of Section 41 is prefaced by the words ""subject to the provisions of this Act"", which mean that the CPC is applicable only

subject to the provisions of Section 23(2) and Section 32. Those provisions forbid interference with the reference and award, save as provided for

in the Act, and to that extent; only the CPC is excluded. We are fortified in this view by a decision of the Calcutta High Court in prafulla Chandra

Karmakar v. Panchanan KarmakarILR (1946) Cal 398 : AIR 1946 Cal 427 (A).

The provisions of Order VI, Rule 17 of the CPC were therefore fully available to the Civil Judge and the Civil Judge could at any statge before

reference was made to the arbitrator, allow either party to alter or amend his pleadings in such manner & on such terms as were just and all such

amendments could be made as were necessary for the purpose of determining the real questions in con-trovery between the parties.

The amendment, it may be mentioned, was necessitated because the defendant had complained that full particulars had not been disclosed by the

Plaintiff. The amendment was allowed on payment of a sum of Rs. 100/- as costs to the defendant. Rule 17 of Order VI allows at any stage all

amendments which satisfy two conditions:

(a) of not working injustice to the other side; and

(b) of being necessary for the purpose of determining the real questions in controversy between the parties. Both those conditions were fulfilled in

the present case.

The amendment of the petition u/s 20 of the Arbitration Act was therefore allowed in the case on just, proper and reasonable grounds.

6. On the question as to whether the Civil Judge was competent to formulate the points of difference between the parties and to refer those points

for decision to the arbitrator, we are clearly of opinion that he could do so. Section 20 of the Arbitration Act, so far as relevant for the

determination of this question, may be quoted:

Section 20(1) Where any persons entered into an arbitration agreement before the institution of any suit with respect to the subject matter of the

agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under

Chapter II, may apply to a court having jurisdiction in the matter to which the agreement relates, that the agreement be filed.

2 .....

3 .....

4 Where no sufficient cause is shown, the court shall order the agreement to be filed, and shall make an order of reference to the

abritrator.....

The expression used in Sub-section (1) is ""subject-matter of the agreement or any part of it"".

In order to give jurisdiction to the court to take up the agreement it must be shown that the subject-matter of the agreement or any part of it lies

within the court''s jurisdiction and the provisions of Section 31(1) must be complied with. Jurisdiction is either territorial or pecuniary and may also

depend on the subject-matter of the dispute to be referred to arbitration on which the award is to be invited.

The word ""court"" means the civil court having jurisdiction formulating the subject-matter of the reference if the same had been the subject-matter of

a suit. To determine jurisdiction and to find out what is the subject-matter of the reference as if the same had been the subject-matter of a suit, the

court necessarily has to weigh the pleadings of the parties in order to find out as to what are the points of difference between the parties.

In an agreement to refer to arbitration any dispute which may arise in future between the contracting parties on the subject-matter of the agreement,

the court has therefore to formulate the issues which the arbitrator is called upon to decide. In certain cases it may be open to the arbitrator to

frame certain additional issues if the circumstances so demand, and if upon the case put by the parties before the arbitrator the parties invited the

decision of the arbitrator on such additional issue.

The arbitrator would not, however, be justified in ignoring the points formulated by the court for his decision and in framing points not really

required to be determined by him, or which have been already determined by the court in the manner provided by law before the reference was

made. Nor would the arbitrator be justified in acting against the decision of the court which forms the very foundation of his jurisdiction.

7. In Piercy v. Young (1379) 14 Ch. D. 200 (B) it was laid down that the question whether the matters in dispute were within the agreement of

arbitration is one which the court will decide and will not leave to the arbitrator. By his award the arbitrator held in the present case that the plaintiff

had no right to sue as there was no contract between the plaintiff firm and the defendant.

That finding was based upon the view, erroneously taken, that Brij Lal Suri and Sons were not the Proprietors of the Northern India Lime

Marketing Association, which was not a partnership firm. That was not a question referred to arbitration. The plaintiff''s right to sue had already

been determined by the court. It was also determined by the court that there was a completed contract between the plaintiff and the defendant.

That question could not be reopened by the arbitrator and was not the subject of review by him. In determining that question over again, and to the

detriment of the plaintiff, the arbitrator did not act judicially. Courts would expect from the arbitrators that nothing unfair or irregular is done by

them and courts would be vigilant that the arbitrators act with fairness to the parties. Sir John Stuart in Kemp. v. Rose (1858) 1 Gif 258 (C) has

remarked:

A perfect, even and unbiassed mind is essential to the validity of all judicial proceedings.

When a submission is made to an arbitrator and the points in dispute are referred to him, the arbitrator would not be justified in ignoring the points

formulated by the court for his decision and in framing points not really required to be determined by him, or which have already been determined

by the court in the manner provided by law before the reference was made.

An award which does not dispose of all the matters referred to arbitration is incomplete and consequently it is invalid in law. The court may in such

a case either remit the award u/s 16(a) or set it aside u/s 30. The ground for so holding is that when the parties agree to refer the matter to

arbitration there is an implied condition in the submission of the parties that the arbitrator shall dispose of all the matters.

Failure of the arbitrator to decide the question as to whether the defendant made a breach of the contract if he did not supply the minimum five

wagons to the plaintiff on the ground that his Dohad factory was to have preference, and also the question whether the defendant was in fact

justified in supplying materials to other parties in the territory in question after entering into contract with the plaintiff would vitiate the award.

8. In the leading English case of Randall v. Randall (1805). 7 East 81 (D) there were three matters in sharp conflict between the parties and the

arbitrator was asked to decide each one of them. He failed to decide one, and it was held that the whole of the award was bad.

9. In Ganes Narayan Singh v. Malida Koer 13 Cal LJ 399 (E) a cardinal point in controversy namely, whether the testator belonged to a joint

Hindu family or not was left undecided by the arbitrators, and that was held sufficient to vitiate the award.

10. In Ramji Ram v. Salig Ram 14 Cal L. J. 188 (F) it was patent on the face of the award that the arbitrator had entirely failed to decide one of

the most important matters referred to him, namely, how much money was due by one party to the other.

In dealing with the question as to how far the failure of the arbitrator to decide one of the matters referred to him vitiated the whole of the award, it

was held that an award would not be set aside if the question undecided was not notified to the arbitrator as a matter of difference or the parties

showed by their conduct that they did not mean him to decide it.

11. In Harakh Ram Jani and Another Vs. Lakshmi Ram Jani and Others, this Court held that although the neglect of the arbitrator to determine any

of the matters submitted to him might be sufficient to vitiate the award, the matter left undetermined must be some definite and substantial question

upon which the parties were at variance.

12. In Khub Lal and Others Vs. Bishambhar Sahai and Others, it was held that an omission to decide something material is sufficient to destroy the

award.

13. The preponderance of opinion as stated above aligns itself to the view that if those tests are applied the award in this case is vitiated. It is no

doubt true that in fit cases and in given circumstances the arbitrator is not bound to give an award on each point referred to him and it is sufficient if

he gives his award on the whole case.

The obligation to decide depends upon the questions whether the submission requires that all the matters in dispute or only some of them are to

determined by him. The arbitrator cannot, however, say that he is not called upon to decide the points referred to him and that upon points not

really arising in the case he can decide the matter and give the award to the detriment of one of the parties.

14. u/s 30(c) of the Arbitration Act of 1940 an award shall be set aside if it has been improperly procured or is otherwise invalid. Clause (a) of

that Section provides that an award shall be set aside when an arbitrator has misconducted himself or the proceedings. Misconduct not amounting

to moral turpitude is called legal misconduct and has a very wide meaning.

It is difficult to give an exhaustive definition of what amounts to legal misconduct. It may however be stated that legal misconduct means

misconduct in the judicial sense arising from some honest, though erroneous, breach and neglect of duty and responsibility on the part of the

arbitrator causing miscarriage of justice.

There may be ample misconduct in a legal sense to make the Court set aside the award even when there is no ground to impute the slightest

improper motive to the arbitrator. As observed by Martin, J. in Harakh Ram Jani and Another Vs. Lakshmi Ram Jani and Others, it includes

failure to perform the essential duties which are cast on an arbitrator as such. It also includes any irregularity of action which is not consonant with

general principles of equity and good conscience which ought to govern the conduct of an arbitrator.

15. The phrase ""when the award is otherwise invalid,"" in Section 30(c) of the Arbitration Act has been the subject of judicial consideration in a

number of cases. It was considered by their Lordships of the AIR 1946 72 (Privy Council) where their Lordships construed this expression which

occurred in paragraph 15 of the Second Schedule of the CPC as ejusdem generis and accepted the dissenting; judgment of Iqbal Ahmad, J. in the

case of Mt. Mariam and Another Vs. Mt. Amina and Others .

The submission to arbitration furnishes the source and prescribes the limits of the authority of the arbitrator, and the award, both in substance and

form, must conform with the submission. Manifestly, therefore, where the arbitrator misdirected himself and exceeded the scope of his authority,

the award cannot be sustained. Anything done by the arbitrator beyond the terms of reference would be without jurisdiction whether it be called

misconduct or not.

If an arbitrator feels that he cannot do justice to the parties unless he deals with some other matter not covered by the agreement or the terms of

reference, he should defer making the award until the agreement is extended, either by consent between the parties or by an order of the

competent Court, or the terms of reference are modified and extended by the Court. He is not at liberty to proceed to arbitrate on something not

covered by the agreement or the terms of the reference.

16. A question was raised before us that since the award had been assailed on the ground that it was in excess of the reference and in certain

respect it fell short of the reference, the power of the Court lay within the ambit of Section 15 of the Arbitration Act to modify or correct the award

or within the ambit of Section 16 of the Act to remit the award or any matter referred to arbitration to the arbitrator for reconsideration, and since

the Court did not see cause to remit the award or any of the matters referred to arbitration for a reconsideration or to set aside the award and

pronounced judgment in accordance with the award and a decree followed upon it, no appeal from such decree lay in view of Section 17 of the

Act and consequently Appeal No. 257 of 1953 is incompetent.

On the other hand, it has been contended that that appeal was made under the express provisions of Section 39(1)(vi) of the Act, which provides

that an appeal shall lie from an order setting aside or refusing to set aside an award. It is manifest from the Section that Clauses (1) to (v) are

adopted from Section 104(1), Clauses (a) to (c) of the CPC with certain changes. Clauses (vi) is new. Formerly there was no provision under the

CPC for an appeal from an order setting aside or refusing to set aside an award; but now Clause (vi) of Section 30(1) of the Arbitration Act

expressly provides for an appeal from such an order passed u/s 30.

The decisions under the Arbitration Act of 1899 or u/s 104 of the CPC before it stood amended under Schedule III of the Arbitration Act of 1940

would not, therefore, be of any help to the present case. There is a distinction between an appeal u/s 39 of the present Arbitration Act against an

order passed u/s 30 and an appeal against a decree passed u/s 17 of the Act. It seems to us that Section 39 is a specific provision which provides

for an appeal against certain orders of the Court, one of which is an order refusing to set aside an award.

The Act cannot be so interpreted as to destroy this specific provision for an appeal by the argument that a judgment having been pronounced in

accordance with Section 17, no appeal lay. The scheme of the Act provides that an appeal shall lie against the orders enumerated in Section 39

and from none others on the one hand, and that no appeal shall lie against a decree which is made in accordance with an award. The reason for

this distinction appears to us to be indicated in Section 30 of the Act which provides that an appeal shall not be set aside except on one or more of

the following grounds.:

(a) that an arbitrator or umpire has committed misconduct in the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become

invalid u/s 35; and

(c) that an award has been improperly procured or is otherwise invalid;

That is to say, the grounds on which an appeal is allowed against an order refusing to set aside an award are limited, and the merits of the litigation

between the parties cannot be raised.

In the present case Clause (a) of Section 30 of the Act would be applicable. The provisions of Section 17 merely state that where a Court refuses

to set aside the award it shall pronounce judgment in accordance with it with a decree following, and no appeal shall lie against such a decree.

There is therefore a clear distinction between an appeal against an order mentioned in Section 39 and appeal against a decree as mentioned in

Section 17. A similar view appears to have been taken by a Bench of the Patna High Court in Sheocharan Mahton and Others Vs. Sanichar

Mahton and Others, . In our opinion therefore there is no force in the contention that Appeal No. 257 of 1953 does not lie u/s 39 of the

Arbitration Act and we overrule this contention,

17. It has been contended on behalf of the Indian Minerals Company that since the Northern India Lime Marketing Association withdrew the sum

of Rs. 500/- on 18-11-1943; the contract had been repudiated by them and consequently they were not entitled to seek recourse to Section 20 of

the Arbitration Act. This argument in our opinion bears no force. We have already referred to the letter dated 21-9-1942, of the defendant when

he wrote the plaintiff putting forward a new condition, namely, that if the plaintiff did not take up thirty wagons of the goods contracted for within

six months, the deposited amount of Rs. 500/- would be forfeited.

The defendant had required confirmation of this from the plaintiff and it was on 24-9-1942, that the plaintiff wrote a letter to the defendant

confirming the terms aforesaid. It is obvious therefore that the sum of Rs. 500/- which w3s deposited with the Indian Minerals Company by way of

security was to guarantee that the plaintiff would take up thirty wagons of the goods contracted for within six months.

It was not by any act or default of the plaintiff that the stipulated quantity could not be taken up by the plaintiff. On the other hand, it was due to the

conduct of the Indian Minerals Company that that supply was not made to the plaintiff. Consequently if the plaintiff asked for a return of that

deposit and if the Indian Minerals Company returned that sum to the plaintiff on account of the default committed by the Indian Minerals Company

itself, it cannot by any stretch of reasoning be said that the contract had been repudiated by the Northern India Lime Marketing Association.

18. There remains one other point which needs consideration. It was urged on behalf of the Northern India Lime Marketing Association that the

arbitrator was considerably influenced by his own brother who is an advocate who happened to take part in the deliberations of the arbitration

proceedings in spite of objection by the Northern India Lime Marketing Association. It was further urged that the arbitrator further got influenced

by the presence of Sri M. S. Saxena the Civil Judge on one of the hearings of the matter,--Sri M. S. Saxena having been a relation of the arbitrator

which relationship cropped up by reason of a marriage between the son of the one with the daughter of the other.

It would be unnecessary for us to pursue this matter and to find out whether the arbitrator got influenced by his own brother or by Sri M. S.

Saxena in making the award, because we have already held that the award is vitiated on grounds discussed above.

19. The result therefore is that F. A. F. O. No. 199 of 1951 is dismissed with costs and F. A. F. O. No. 257 of 1953 is allowed with costs and

the award dated 14-2-1953, is set aside.