(1987) 04 KL CK 0040

High Court Of Kerala

Case No: M.F.A. No. 28 of 1981

State of Kerala and Another — APPELLANT

Vs

T.V. Poulose — RESPONDENT

Date of Decision: April 9, 1987

Acts Referred:

- Arbitration Act, 1940 - Section 16, 30

Hon'ble Judges: U.L. Bhat, J; Chettur Sankaran Nair, J

Bench: Division Bench

Advocate: Government Pleader, for the Appellant; C.K. Sivasankara Panicker, for the Respondent

Final Decision: Allowed

Judgement

Chettur Sankaran Nair, J.

This appeal by the State of Kerala, is directed against an award in arbitration made into a rule of Court. A contract was entered into between the Appellant and the Respondent on 19th December 1977 for construction of an aqueduct, and allied works. This was to be completed by 3rd July 1979, and Rs. 48,66,679 was to be the remuneration. It was completed only on 15th January 1980, according to Respondent for reasons beyond his control, and laches of the Department. The Respondent says a supplementary agreement was entered into, but amounts due thereunder were not paid. Disputes arose between the parties and these were referred to arbitration. Twelve heads of claim were made, besides claim for interest and cost. The arbitrator upheld all the claims, except claim No. 7. Interest and cost were refused. He claimed (Rs. 1,10,667.04) for the additional work'', under different heads based "on law and equity". For losses on account of flood, a claim (Rs. 2,95,449.50) was made. For suspension of work and consequent loss Rs. 1,32,000 was claimed. Likewise, for pile driving, hoisting and pitching Rs. 2,13,632 was claimed. For extended pile driving Rs. 79,713.38 was claimed. For test pile driving a claim of Rs. 52,000 was made and for additional pile driving Rs. 85,760 was claimed.

Claim No. 7 for extended pile driving (Rs. 79,713.38) was rejected, and against the other claims, an award was made in a sum of Rs. 5,01,925.

2. Appellant, avers that Respondent is not entitled to enhanced rates. The supplemental agreement, dated 16th November 1978 reads:

Contractor shall not claim at enhanced rates of compensation whatever for, or on account of such extra items due to increase in rate of labour, materials or any other ground.

(emphasis supplied)

The original agreement states:

Rates once agreed cannot be enhanced on any account.

Ext. R-13 minutes appended to the objections, made this further clear. The so called additional work is also covered by the contract.

3. The award was challenged under Sections 16 and 30 of the Arbitration Act (shortly called ''the Act'' hereinafter). But, the Court below repelled this by an order as cryptic as the award. In its brief order, which certainly is not a reasoned order, the Court below reiterated thrice that ''the agreement is not incorporated in the award'' stated that there are no grounds for setting aside the award.

4. An award is open to challenge only on limited grounds. An award would be vitiated by reason of an error appearing on the face of it. The distinction between a mere error and an error resulting in illegality or nullity, though subtle is real. In Adams v. Great North of Scotland Railway Co. (1891) A.C. 31 (H.L.), Lord Halsbury, L.G. stated the law thus:

a great deal more than mere error on the part of the arbitrator in the conclusion at which he has arrived before the Court can interfere with his award....

In Hodgkinson v. Fernie 140 Eng. Rep. (Common Plea) 712 was stated:

...Where a cause or matters in differerence are referred to an arbitrator whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact....The only exceptions to that rule, are cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz, where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award.

(emphasis supplied)

But, if the arbitrator or the umpire travels beyond his jurisdiction and arrogates jurisdiction that does not exist in him, that would be a ground to impeach the award. In Anttorney General for Manitoba v. Kelly (1922) 1 A.C. 268 Lord Parmoor pointed out:

...It would be impossible to allow an umpire to arrogate to himself jurisdiction over a question which, on the true construction of the submission, was not referred to him. An umpire cannot widen the area of his jurisdiction by holding, contrary to the fact, that the matter which he affects to decide is within the submission of the parties....

Where a question of law has not specifically been referred, but is material in the decision of matters which have been referred to him and he makes a mistake apparent on the face of the award, an award can be set aside on the ground that it contains an error of law apparent on the face of the award. (at page 283).

This statement of law was approved by the Supreme Court of India, in The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board, . Earlier decisions also had approved this view. Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., and Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI), New Delhi, .

5. Bearing these principles in mind, we shall examine the impugned order to ascertain if there is an error of law appearing on the face of it, and if there is misconduct u/s 30 of the Act. We think there is, because, the arbitrator ignored the provisions of the contract under which he derived jurisdiction. If an arbitrator, even in a non-speaking award decides, contrary to the basic features of the contract, that would vitiate the award. When the contract itself is final in regard to certain matters, it is not open to the arbitrator to ignore it, go beyond it, find jurisdiction and make an award, wandering away from the contract into regions far beyond his ken. In the case on hand, rates are fixed by contract, also stating that nothing over and above the said rates will be payable. The supplementary agreement relied on by the Respondent, leads to no different conclusion. Ext. R-13 minutes which was before the arbitrator also unmistakably says so. Notwithstanding these, unsupported by principle, contrary to law and the contract, the arbitrator made an award at enhanced rates. He cannot do this when rates are specified in the contract; nor can principles of Quantom Meruit be invoked in such a situation. When the arbitrator wanders outside his jurisdiction, he commits an error of jurisdiction, which is fatal. In Alopi Parshad and Sons Ltd. Vs. Union of India (UOI), the Supreme Court observed:
The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity.

The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate- a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made....

In Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others, the Supreme Court reiterated the position thus:

It is clear that the arbitrator including in his valuation some amount which he was incompetent, by virtue of the limits placed upon his authority by the deed of reference, to include. This is not a case in which the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication. It is a case of assumption of jurisdiction not possessed by him, and that renders the award, to the extent to which it is beyond the arbitrator''s jurisdiction, invalid.

The contractor bound himself to perform certain items of work for a specified remuneration. He cannot avoid it. This is a basic principle of contract. If it were not, the law of contract would have neither significance, nor sanctity. This fundamental doctrine upon which the law of contract is founded cannot be ignored, except where an equally fundamental rule enables or sanctions such departure. An arbitrator though free from the duty to make a reasoned award, is not altogether free to depart from law or reason or the covenant, under which he gains jurisdiction. If he does this, it will be clear misconduct u/s 30 of the Act.

6. That is precisely what the arbitrator has done in the instant case. While the contract specified remuneration and re-affirmed that such cannot be varied, the arbitrator varied it. If a point is taken that there was no arbitrable dispute, it has to be decided with reference to the contract. In this case, regarding enhanced rates of compensation such a point was taken. Instead of referring to the contract, the arbitrator ignored it and decided against it. So did the Court below, in dealing with the application u/s 30. Likewise, floods which in no manner can be attributed to the Appellant, and which in no sense will be a dispute or difference arising under the contract, has been treated as amenable to arbitration and an award made. This will be a clear instance of what is forbidden by the rule in Attorney-General for Manitoba v. Kelly (1922) 1 A.C. 268 and Alopi Parshad and Sons Ltd. Vs. Union of India (UOI), . We are of the opinion that the arbitrator has innovated his way out of the contract and out of the parameters of law acting contrary to both.

7. In Seth Thawardas Pherumal Vs. The Union of India (UOI), Bose, J. after noticing with approval the rule in Kelanton Government v. Duff Development Co. 1923 A.C. 395 and F.R. Absalom v. Garden Village Society 1933 A.C. 592 said:

...the law about this, in our opinion, is the same in England as here,...The arbitrator is not a conciliator and cannot ignore law or misapply it in order to do what he thinks is just and reasonable. He is a Tribunal selected by parties to decide their disputes according to law and so is bound to follow and apply the law....

There is no need to go outside the award to find that the arbitrator has ignored the law. It is self evident. Where the error of law goes to the root of jurisdiction, even extrinsic evidence can be called in to prove illegality. But, in the instant case, it is not necessary to do that. The error is apparent on the face of the award.

8. The Court below appears to have made a very superficial approach to the question. As we have noticed earlier, none of the objections raised was considered. After stating that the contract was not incorporated, the objections were rejected, presumably thinking that Section 30 of the Act would come into play only if the contract is incorporated. The Court below had a plain duty to consider the objections raised. The character and quality of the jurisdiction exercised by the Court acting u/s 30, is different from that of an arbitrator. The Court is not a mere rubber stamp putting its imprimatur on an award. In proceedings u/s 30, the Court must exercise its jurisdiction based on reason and law. Its verdict cannot be cryptic, as the ordinances of an oracle. The validity of the objections should have been considered and findings recorded subject of course, to the limitations which are now well-settled. In M.F.A. 326/84, Sivaramaxi Nair, J. speaking for the Division Bench observed:

At least the Court, in an application u/s 30 of the Arbitration Act, was bound to consider that objection on merits. The silence of the arbitrator was not good enough justification to refuse to examine this vital objection.

9. We are of opinion that the arbitrator ignored the express provisions of the covenant relating to rates, and awarded compensation at enhanced rates, not only opposed to the contract but opposed to the law of contract, and flying in the face of fundamental principles of the law of contract. He did not stop there; but proceeded to find a jurisdiction that did not ensure to him by treating an act of God as a dispute, and compensating Respondent for floods. There is an en or apparent on the face of the award, and the arbitrator wandered away from his jurisdiction on an unchartered course, finding pastures alien and off bounds to him. No different, was the exercise in which the Court below engaged itself. It thought that its functional responsibilities were on lines similar to that of an arbitrator and not systematized by substantive law. He has not investigated the issuer, that arose for consideration.

In the result, we set aside the order of the Court below and the award of the arbitrator, and allow the appeal with costs.