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Date : 24/08/2025

Oil and Natural Gas Corporation Ltd. Vs Comex Services

Court: Bombay High Court

Date of Decision: March 12, 2003

Acts Referred: Arbitration Act, 1940 â€" Section 14, 20, 30, 33

Citation: (2003) 3 ARBLR 197 : (2003) 5 BomCR 146

Hon'ble Judges: D.K. Deshmukh, J; A.P. Shah, J

Bench: Division Bench

Advocate: D.R. Zaiwala, P.A. Sawant and Bhalwal, instructed by Vyas and Bhalwal, for the Appellant; Hiroo Advani and Akshay Patil, instructed by Advani and Co., for the Respondent

Final Decision: Dismissed

Judgement

A.P. Shah, J.
This appeal is directed against the order of the learned single Judge dismissing the petition under Sections 30 and 33 of the

Arbitration Act, 1940 of setting aside the Award passed by the learned Umpire Mr. Justice Y.V. Chandrachud (retired CJI). Short facts

concerning the Award in question may be stated as follows:

By a telex dated 6.6.1988, the appellant placed order on the respondent for design engineering, fabrication, supply and installation and testing and

commissioning of pipelines for the D-18 field. The telex set out the terms and conditions of the contract between the parties. Clause (1) of the telex

referred to technical specifications and scope of work. These had to be ""as per the tender document and as clarified through exchange of various

telexes and letters"". Clause 2 of the telex called ""delivery schedule"" provided that the complete scope of the work to be completed by end of

October 1988. The price payable for the total work was FF 2,65,40,000. One of the important terms of the contract was that 10% of the

contract value would be paid to the respondent on their opening the letter of credit on their vendor for the supply of pipe against equivalent bank

guarantee for refund. The respondents were to submit a performance bond in the sum of FF 26,54,000 which was 10% of the contract value at

the time of the signing of the contract. By the said telex the respondent was asked to collect a draft contract by 22.6.1988 so that the contract

could be signed by 4.7.1988. The telex stated that until the contract was signed by the parties, the telex order shall remain binding on the parties.

As originally agreed between the parties, the date of commencement of the contract was 6.6.1988 and the date of completion was 6.12.1988 and

that, any rescheduling of the commencement and the completion dates had to be by mutual agreement in terms of Clause 8.5 of the contract.

According to the respondent, the schedule of the project was affected by the delays caused by the appellant in keeping several key free issue

components for the project ready. It was imperative, according to the respondent, that once their marine spread was mobilized it would remain

fully busy upon arrival in India in order that stand by cost could be avoided. The appellant was not agreement to paying USD 35,000 per day as

stand by charges demanded by the respondent. According to the respondent, the first stage invoice was submitted by them to the appellant on

14.8.1988 but no payment was made by the appellant as stipulated. As a matter of fact the said payment was never made on the ground that the

appellant could not have made the payment in foreign exchange unless the written contract was signed by the appellant. On 26.9.1988 the

appellant demanded written consent to the change in the schedule and asked the respondents to reach the site on 17.11.1988. According to the

respondent, as a result of re-scheduling the completion date had also to be pushed further to 29.12.1988. If that was not done, and if the original

schedule in Annexure 6 of the draft contract was allowed to stand, the respondent would have become liable for liquidated damages. It appears

that discussions were held in various meetings between the parties. While the negotiations were in progress, the appellant encashed the bid bond

for USD 1,75,000.

2. Disputes and differences having arisen between the parties, the respondent filed Arbitration Suit No. 3945 of 1991 u/s 20 of the Arbitration Act

for reference of the dispute to the arbitration as per the contract. In the statement of claim annexed to the suit the respondent claimed USD

21,02,989 details of which are given in paragraph 27 of the statement of claim. However, the respondents restricted their claim to 2 million dollars,

in addition, to the claim for refund of amount of bid bond with interest at 12 percent per annum from 28.12.1988 which is the date of invocation of

bid amount till realization of the amount. Rane J. disposed of the above arbitration suit by order dated 7.12.1993, whereby Shri J.G. Gadkari, a

practicing advocate was appointed by the respondent and Shri M.N. Chandurkar (retd Chief Justice of Madras High Court) was appointed on

behalf of the appellants as arbitrators. Both the learned Arbitrators after considering the pleadings of the parties and evidence led by them, agreed

that the appellant wrongly repudiated the contract between them and the respondent, as a result of which the appellant is liable to pay a sum of

USD 1,75,000 to the respondent by way of damages. However, the Arbitrators had differed on the question of compensation claimed by the

respondent, one of the arbitrators Shri Justice M.N. Chandurkar was of the view that the respondent is not entitled to compensation, whereas the

other arbitrator Shri J.G. Gadkari was of the view that the appellant is liable to pay to the respondent a sum of USD 16,07,000 by way of

compensation.

3. The matter was thereafter referred to the learned Umpire who delivered a reasoned award on 27.3.1997. The learned Umpire on appreciation

of material placed on record came to the conclusion that the appellant repudiated the contract unjustifiably as alleged by the respondent. The

learned Umpire observed that the respondent could not perform their part of the contract since the well heads, Buoy chains and plums which were

to be supplied by the appellants were not ready. The learned Umpire observed that the apprehension entertained by the respondent about the

feasibility of completion of their part of the work within the schedule time frame was well founded. He held that invoking bid bond amounted to

repudiation of the contract by the appellant and accordingly directed refund of USD 1,75,000 with interest. The learned Umpire then noticed the

reason for disagreement on the issue of compensation. He observed that a major difficulty countenanced by Shri Justice Chandurkar has been

removed by the respondents by leading before him the evidence of Ms. Justice Benichou on the issue of damages. Julliete Benichou proved the

zerox copies of the vouchers which were made by Marseilles office on her instructions, that she could identify the signatures, initials and notings on

the zerox copies, and that, the originals were lost, misplaced or destroyed when the respondent shifted its office from Marseilles to a place which

was at a distance of about 20 kms. The learned Umpire opined that it would be impossible for him to conceive that an incredibly large bunch of

documents was manufactured by the respondents; that false notings, signatures and initials were made thereon and that, therefore zerox copies

were made of those documents. Therefore the learned Umpire overruled the objection taken by the appellant to the admissibility of the zerox

copies. The learned Umpire after considering the evidence of Jullette Benichou concluded that the claim made by the respondent in the sum of

USD 20,00,000 should be reduced by one half and it would be in consonance with justice and fair play to award a sum of USD 10,00,000 to the

respondent for the items mentioned in Annexure A to the statement of claim. The counter claim of the appellant was rejected by the learned

Umpire.

4. Mr. Zaiwala, learned counsel appearing for the appellant submitted that the award passed by the learned Umpire is without jurisdiction. He

urged that it is apparent that the learned Umpire has awarded amount for the items for which there is prohibition in the contract and thus he has

travelled beyond his jurisdiction. For this purpose he referred to the conditions 27.0 of the contract, relevant portion of which reads as follows:

27.0 CONSEQUENTIAL DAMAGES:

The Company shall in no event be responsible for or liable to the contractor or his subcontractors for consequential damages suffered by the

contractor or his subcontractor including without limitation, business interruption or loss of profits, whether such liability is based or claimed to be

based upon;

i) any breach by the company of its obligations under the contract;

ii) any negligent act or omission on the part of the company or any of its employees, agents or appointed representatives in connection with the

performance of the works.

Relying upon the aforesaid condition it was urged by Mr. Zaiwala that in view of the aforesaid condition which is incorporated in the contract

which prohibited award of damages or compensation, it was not open for the learned Umpire to award damages for the alleged loss sustained on

account of the breach of the contract. He placed heavy reliance upon the decision of the Supreme Court in Steel Authority of India Limited Vs.

J.C. Budharaja, Government and Mining Contractor, .

5. At the outset we must mention that this contention was not raised nor argued before the learned single Judge nor this contention was taken

before the Umpire. The contention is not even raised in the memo of appeal. Since the appellant has not made necessary averments in the petition

filed by them for setting aside the award in our opinion the appellant should not be allowed to raise this point in this appeal for the first time

especially as the question depends upon the facts which are conspicuous by their absence in the pleadings. It is well settled that specific averments

and grounds for setting aside the award have to be set out in the pleadings to enable the court to set aside the award even though the award may

be a nullity as alleged in the instant case. An Application for setting aside the award u/s 14 has to be made within thirty days of service of notice.

Otherwise the award cannot be set aside on any ground contemplated by Section 30 of the Arbitration Act. The expression ""otherwise invalid

appearing in Clause (c) of Section 30 of the Act includes awards that are nullities. In the instant case no fact has been stated in the petition to show

that the Umpire has exceeded his jurisdiction in making the award or in other words he travelled beyond the terms of the contract in awarding the

compensation claimed by the respondent.

6. Mr. Zaiwala, however, contended that the point regarding jurisdiction goes to the root of the matter and, therefore it is open for the appellant to

raise this issue even in oral submission though he maintained that the point should be presumed to have been taken or raised in the petition in view

of the averment that the award is contrary to the terms of the contract. He sought to place reliance on the decisions of the Supreme Court in Kiran

Singh and Others Vs. Chaman Paswan and Others, and Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through his Lrs., . These decisions

are not rendered under the Arbitration Act and we have serious doubt whether these decisions have any application to the petitions u/s 14 of the

Arbitration Act. In any event the issue of jurisdiction raised by the learned Counsel is not a pure question of law and it is mixed question of law and

facts and it will totally unfair to allow the learned counsel to raise this contention for the first time in oral submission when no such contention was

raised either before the learned single Judge or even in the memo of appeal. Mr. Advani, learned Counsel for the respondent submitted and not

without sufficient force that Clause 27.0 of the Contract prohibits consequential damages and not damages resulting directly and naturally from the

breach of the contract. He submitted that the concept of consequential damages is different from general or ordinary damages.

7. Mr. Advani drew our attention to the decision in the case of the Crowdie Construction Ltd. v. Cawoods Concrete Products Ltd 8 B LR 20,

where the court while construing the contract held that ""consequential"" is all damage other than the normal or ordinary damage which is recoverable

in the case of delay of delivery in a contract for the sale of goods. The court followed the meaning given to the word ""consequential"" in Millar''s

Machinery Co. Ltd. v. David Way and Son: (1934) 40 Com Cas 204. of the report it is recorded that ""Roche LJ agreed that the damages

recovered by the defendants on the counterclaim were not merely ""consequential"", but resulted directly and naturally from the plaintiffs breach of

contract"". Mr. Adwani also drew our attention to a passage in Pollock and Mulla''s Indian Contract and Specific Relief Acts (Twelfth Edition)

where the terms consequential damage and incidental loss are explained as follows:

Consequential damage or loss usually refers to pecuniary loss consequent on physical damage, such as loss of profit sustained due to fire damage

in a factory. When used in an exemption clause in a contract, consequential refers to damage, which is only recoverable under the second head in

Hadley v. Baxendale, i.e. the second branch of the section, and may also include recovery of loss of profits under the first branch. Another term

incidental loss refers to the loss incurred by the loss incurred by the plaintiff after he has come to know of the breach, and made to avoid the loss,

viz. costs of buying or hiring a substitute, or sending back defective goods.

Mr. Advani submitted that various damages claimed by the respondent are direct damages arising out of the breach of the contract and the

respondent has not claimed consequential damages under any head. Prima facie we find substance in the submission of Mr. Adwani. In any event,

in our opinion, this issue cannot be decided in abstract or on the basis of oral submission of the learned counsel in the absence of any pleadings in

this behalf before the arbitrators or before the learned single Judge. It would be highly improper to entertain such belated challenge to the

jurisdiction of the Umpire at this stage. We therefore reject the submission of Mr. Zaiwala that the award for damages is without jurisdiction.

8. Mr. Zaiwala next argued that the actual proof of loss suffered by the respondent is sine qua non for award of damages and in the absence of a

finding of actual loss suffered by the respondents the award for damages is patently erroneous. He took us through the relevant discussion in the

award and submitted that the quantification of damages must be based on some basis and cannot be quantified arbitrarily by adopting a rule of

thumb. The learned counsel urged that the award of damages in USD one million awarded by the learned Umpire is patently excessive and

disproportionate to the loss suffered by the respondent. According to the learned counsel the Umpire has misconducted himself in awarding

damages for various items when the Umpire found that the evidence of the respondents own witness was not satisfactory as there were several

loopholes in the evidence. He submitted that the Umpire could not have awarded huge damages of USD 10 lacs on a mere rough and ready basis

by reducing one half of the total claim. Thus the reasoning adopted by the learned Umpire is ex facie bad and forfeit the very purpose of having a

reasoned award.

9. The submission of Mr. Zaiwala is without any merit. It is well settled that appraisement of evidence by the arbitrator is ordinarily a matter which

the courts do not question and consider and the court has no jurisdiction to substitute its own evaluation of the conclusion in law or fact. The

learned Umpire has taken into consideration the oral as well as documentary evidence on record. He had taken pains to refer to various facts in

detail in basing his findings in support of the award. Both the parties were given adequate opportunities to lead evidence and to make submissions.

The award running into 26 pages contains cogent reasons for basing the various findings in support of the award with reference to materials on

record. Even if it is held that the learned Umpire has failed to appreciate the evidence and material on record in the proper perspective, the findings

made by the Umpire on misunderstanding or misappreciation of the law and facts do not render the award invalid warranting interference by the

court. Mr. Zaiwala has failed to demonstrate that the finding made by the learned Umpire is either fanciful or not referable to the materials on

record. The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the

arbitrator has drawn his own conclusion or has failed to appreciate the facts.

10. In Sudarsan Trading Co. Vs. Government of Kerala and Another, , it has been held by the Supreme Court that there is a distinction between

dispute as to the jurisdiction of the arbitrator and the dispute as to in what way that jurisdiction should be exercised. There may be a conflict as to

the power of the arbitrator to grant a particular remedy. One has to determine the distinction between an error within the jurisdiction and an error

in excess of the jurisdiction. Court cannot substitute its own evaluation of the conclusion of law or fact to come to the conclusion that the arbitrator

had acted contrary to the bargain between the parties. If on a view taken of a contract, the decision of the arbitrator on certain amounts awarded is

a possible view though perhaps not the only correct view, the award cannot be examined by the court. Where the reasons have been given by the

arbitrator in making the award the court cannot examine the reasonableness of the reasons. If the parties have selected their own forum, the

deciding forum must be conceded the power of appraisement 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.

11. In M/s. Arosan Enterprises Ltd. Vs. Union of India and Another, the Court held that the issues raised in the matter on merits relate to default,

time being the essence, quantum of damages - these are all issues of fact, and the arbitrators are within their jurisdiction to decide the issue as they

deem fit - the courts have no right or authority to interdict an award on a factual issue. The Court referred to the following observations made in

Sudarsan Trading Co. Vs. Government of Kerala and Another, as under:

An error of law on the face of the award means that you can find in the award or a document actually incorporated thereto, as, for instance, a

note appended by the arbitrator stating the reason for his judgment, some legal proposition which is the basis of the award and which you can then

say is erroneous (see Lord Dunedin in Champosey Eharu & Co v. Jivraj Baloo Sgp & Wvg Co Ltd)). In Union of India v. Bungo Steel Furniture

(P) Ltd this court adopted the proposition laid down by the Privy Council and applied it. 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 has

committed an error of law"".

Again in para 36 the court observed thus:

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 u/s 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 exit 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.

12. After considering the respective contentions of the parties and the submissions made by the learned Counsel for the parties and the award

impugned, it does not appear to us that the findings made by the learned Umpire are without any basis whatsoever and not referable to documents

relied upon and such findings are so patently unjust or perverse that no reasonable man could have arrived at such findings. Hence, on the score of

alleged misreading, misconstruction in appreciation of the materials on record or failure to consider some of the materials in their proper

perspective, the impugned award is not liable to be set aside. The submission that the Umpire had no power to grant lump sum damage cannot be

countenanced in view of clear pronouncement of the Supreme Court in State of Rajasthan v. Puri Construction Co. Ltd.; (1994) 6 SCC 4856 that

it is not necessary to indicate in the award computation made for various heads and it is open to the arbitrator to give a lump sum award. Similar is

the view taken in State of Rajasthan Vs. R.S. Sharma and Co., ; State of Orissa and Others Vs. Lall Brothers, and Firm Madanlal Roshanlal

Mahajan Vs. Hukumchand Mills Ltd., Indore, .

13. Before we conclude we may deal with rather hyper technical point raised by Mr. Zaiwala. He submitted that in the statement of claim annexed

to the arbitration suit, for compensation on account of travelling amount USD 16,07,000 were claimed whereas in the statement of claim submitted

before the Arbitrator USD 1 lac were claimed on that count. Similarly in the arbitration suit the amount under the head ""other cost"" is mentioned as

USD 1,50,000 as against USD 1,26,128 claimed before the Arbitrators. According to Mr. Zaiwala this is contrary to the decision of the Supreme

Court in Orissa Mining Corporation Ltd. Vs. Prannath Vishwanath Rawlley, . The contention is required to be stated only to be rejected. In the

case before the Supreme Court the claim to an additional amount before the arbitrator was beyond the order of reference which incorporated the

reliefs prayed for in the plaint filed by the respondent and therefore the court observed that when an agreement is filed in court and order of

reference is made, then the claim as a result of the order of reference is limited to a particular relief and the arbitrator cannot enlarge the scope of

the reference and entertain fresh claim without a further order of reference from the court. In the present case the claim remains the same i.e. USD

20 lacs. There is minor variation in various sub heads which are incorporated in the statement of claims. Surely this cannot constitute a ground for

setting aside the award.

In the result, in view of the foregoing discussion appeal is dismissed.

On the request of Mr. Zaiwala, operation of this order is stayed for a period of eight weeks.

Certified copy expedited.