JAJODIA (OVERSEAS) PVT. LTD. A

v.

THE INDUSTRIAL DEVELOPMENT CORPORATION OF ORISSA LTD.

AND

VICE VERSA B

JANUARY 15, 1993

[K. JAYACHANDRA REDDY AND S.P. BHARUCHA, JJ.]

Aribitration Act, 1940—S.20—Arbitration award—Held, on facts of the case that award not a speaking or reasoned award, agreement not incorporated by reference in the award and no inconsistency on the face of the award. C

IDCO and JOPL entered into an agreement whereunder IDCO agreed to supply to JOPL 5000 tens of MS rounds for export on terms and conditions mentioned therein. The goods were not supplied. By a letter dated September 12, 1969, IDCO cancelled the agreement and intimated to JOPL that its offer which had culminated in the agreement, should be treated as withdrawn. Some correspondence followed. Thereafter JOPL's claim for damages against IDCO for breach of contract was referred to the Chief Secretary, who was named in the agreement, for arbitration. He declined to act as arbitrator. An arbitrator was thereafter appointed by the Subordinate Judge, Bhubaneswar under S.20 of the Arbitration Act, 1940. He gave his award on September 24, 1985. D E

In the award the arbitrator briefly stated the facts, the issues settled for adjudication and that the parties had produced a large number of documents, examined witnesses and advanced elaborate arguments. Having carefully considered them, he set out the conclusions and awarded JOPL Rs. 11,00,344 with *pendente lite* interest @ 6%. F

IDCO challenged the award before the Subordinate Judge, Bhubaneswar who dismissed the petition and made the award a rule of the Court. In appeal before the Orissa High Court, the learned Judge rejected all contentions of IDCO except one namely that in answering three issues the arbitrator had arrived at inconsistent conclusions apparent on the face of the award, which had a bearing on the question of awarding of damages. He therefore directed that the records be sent back to the G H

A arbitrator for making a fresh award.

Cross appeals were filed in the Supreme Court. JOPL contended that there was no inconsistency on the face of the award which vitiated it. For IDCO, it was contended that the award was bad in law, and in any event the High Court was in error in sending the matter back to the B arbitrator for making a fresh award.

Dismissing the appeal of IODC, this Court,

HELD: 1. A speaking or reasoned award is one which discusses or sets out the reasons which led the arbitrator to make the award. Setting C out the conclusions upon the questions or issues that arise in arbitration proceedings without discussing the reasons for coming to these conclusions does not make an award a reasoned or speaking award. The arbitrator has in the award only answered the issues that were framed. He had not discussed or set out the reasons for the answers. The award is, D therefore, not a speaking or reasoned award. [234E-F]

2. That the arbitrator merely referred to the pleadings does not mean that the pleadings are incorporated in the award. [234F]

Allen Berry and Co. v. *Union of India,* AIR 1971 SC 696 and *Ciacomo* E *Costa Fu Andrea* v. *British Italian Trading Co. Ltd.,* (1962) 2 All E.R. 53, followed.

3. In answering issue no.2, the arbitrator construed only such clause of the agreement as was relevant to decide the issue. Such clause alone would be incorporated in the award and could be looked at by the court F to determine if the arbitrator had misconstrued it. (pp.9-10) [236B]

4. Even assuming the incorporation of the agreement, an error apparent on the face of the award had to be shown. (p.10) [236D]

Bungo Steel Furniture Pvt. Ltd. v. *Union of India,* [1967] 1 SCR 633, G relied on.

5. In the circumstances of the case, merely because the arbitrator had not mentioned the pleadings and order of reference does not mean that the issues framed did not reflect the referred disputes. (pp.11 and 12)

H [237B]

6. That the original foreign sale contracts had not been sent to IDCO does not *ipso facto* lead to the conclusion that the arbitrator had no material before him upon which he could find in monetary terms the damages suffered by JOPL. [237E]

7. In the facts of the case, there are no inconsistencies upon the face of the award as can be characterised as errors that vitiate the award. An award has to be read as a whole and harmoniously. The grounds upon which an award can be set aside are liimited. The court should be very circumspect about setting aside an award reached by an arbitrator for parties have agreed that the disputes that may arise or have arisen between them should be resolved not by a court of law but by arbitration. [239H, 240A]

8. Evidence of a "malady of the racket of arbitration" should make the court scrutinies the award carefully in each case, but would not make the court declare all high amounts of awards would be bad *per se*. (p.17) [240B-C]

State of Orissa **v.** *Gangaram Chhapolia,* **(1983) 5 OLJ 214 and** *State of Orissa* **v.** *Dandasi Sahu,* **[1988] 4 SCC 12.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 572 & 591 of 1980.

From the Judgment and Order dated 7.11.79 of the Orissa High Court in Misc. A.No. 92 of 1979.

G.L. Sanghi, Harish N. Salve, S. Khaitan and Darshan Singh for the Appellant in C.A. No. 572/80 and Respondent in C.A. No. 571/80.

B.M. Patnaik, R.K. Mehta and Ms. Mona Chakraborty for the Respondent in C.A. No. 572/80 and for the Appellant in C.A. No. 571/80.

The Judgment of the Court was delivered by

BHARUCHA, J. These are cross appeals and they can be disposed of by a common judgment. The Industrial Development Corporation of Orissa Ltd. (IDCO)) is the appellant in Civil Appeal No. 571 of 1980 and Jajodia (Overseas) Private Ltd. (JOPL) is the appellant in Civil Appeal No. 572 of 1980.

A IDCO and JOPL entered into an agreement whereunder IDCO agreed to supply to JOPL 5000 tons of M.S. Rounds for export on the terms and conditions mentioned therein. The goods were not supplied. By a letter dated 12th September, 1969, IDCO cancelled the agreement and intimated to JOPL that its offer, which had culminated in the agreement, should be B treated as withdrawn. There was some correspondence between the parties. Thereafter the claim against IDCO for damages for breach of contract made by JOPL was referred to the Chief Secretary to the Government of Orissa, the arbitrator named in the agreement, for adjudication. The Chief Secretary declined to act as arbitrator. Thereupon JOPL filed a suit under Section 20 of the Arbitration Act 1940, in the Calcutta High Court praying C that the agreement be taken on file and the dispute between JOPL and IDCO be referred to an arbitrator to be nominated by the court. That plaint was returned to JOPL to be presented before the proper court. It was presented in the court of the Subordinate judge, Bhubaneswar. On 4th April, 1973, the learned Subordinate Judge appointed Mr. B. Mohapatra, D a retired Judge of the Patna High Court "to act as the arbitrator to give his award on the disputes between the parties as enumerated in their respective pleadings and the order of this court. Reference he made to him requesting him to make the award by 30th June, 1974. Copy of the plaint, written statement and the order of this court be sent to the arbitrator."

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The arbitrator entered upon the reference and, after hearing parties and considering the material placed upon the record before him, gave an award on 24th September, 1985. In the Preamble to the award the arbitrator set out briefly some of the facts afore-mentioned. The arbitrator stated that issues had been settled for adjudication and that the parties F produced a large number of documents, examined witnesses and advanced elaborate arguments. The arbitrator, having given careful consideration to all the written statements, documents and evidence and the arguments, set out the conclusions to which he had come upon the issues raised. He concluded:

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> "In the result, my award is that Jajodia Overseas Pvt. Ltd. is entitled to recover from the Industrial Development Corporation of Orissa Rs. 11,00,344 only (eleven lakhs three hundred forty-four) with *pendente lite* interest at the rate of 6 per cent per annum from 28th April, 1974 to the date of award (24th H September, 1975)".

The award was challenged by IDCO before the Subordinate Judge, Bhubaneshwar. JOPL supported the award and prayed that it be made a rule of the court with future interest. The learned Subordinate Judge dismissed IDCO's petition and made the award a rule of the court ordering that JOPL was entitled to future interest at the rate of 6 per cent per annum.

The judgment and order of the learned Subordinate Judge was impugened before the Orissa High Court. The learned Single Judge who heard the appeal rejected all contentions raised on behalf of IDCO except one: be found that in answering three issues the arbitrator had arrived at inconsistent conclusions which had a bearing on the question whether or not damages should be awarded. The inconsistency was not a trifling or inconsequential matter and, being apparent on the face of the award, the learned Judge held that the arbitrator had been guilty of legal misconduct so that the award was set aside. The learned Judge directed that the records pertaining to the arbitration proceeding be sent back to the arbitrator, who was directed to give a fresh award, after giving an opportunity of hearning to both parties, keeping in view the findings and observations made in the judgment.

Against the judgment and order of the Orissa High Court, both JOPL and IDCO are in appeal. JOPL contends that there is no inconsistency upon the face of the award which vitiates it. On behalf of IDCO it is contended that the award is bad and that, in any event the High Court was in error in sending the matter back to the arbitrator for making a fresh award.

It was submitted by Mr. B.M. Patnaik, learned counsel for IDCO, that -

(i) No disputes which were referred to the Chief Secretary by JOPL and which were contained in the plaint and the written statement before the Subordinate Judge, Bhubaneshwar, and were referred by the said Subordinate Judge to the arbitrator were considered by the arbitrator because these documents were not mentioned in the award. Consequently, the arbitrator had acted without jurisdiction.

(ii) That the award of damages was based on no evidence or material.

A (iii) The answer by the arbitrator to issue No. 2, set out in the award, showed that the arbitrator had construed the agreement between the parties. As such, the agreement was incorporated in the award and it was, therefore, open to the court to see if the arbitrator had in any wise mis-construed the agreement.

B (iv) The arbitrator had referred to the statement of claim and the counter filed before him and had given findings. As such, the statement of claim and the counter was incorporated in the award so that the whole matter was open before the court.

C (v) The award was a speaking award inasmuch as the answers to the issues were the reasons for the award.

(vi) There were inconsistencies in the answers to the issues and the arbitrator had, therefore, misconducted the proceedings.

D (vii) In any event, if at all the matter had to go back, it should not go back to the arbitrator but to the arbitral tribunal now constituted in the State of Orissa.

It is, we think, necessary, first, to clear some cobwebs. A speaking or reasoned award is one which discusses or sets out the reasons which led E the arbitrator to make the award. Setting out the conclusions upon the question or issues that arise in the arbitration proceedings without discussing the reasons for coming to these conclusions does not make an award a reasoned or speaking award. The arbitrator has in the award before us only answered the issues that were framed. He has not discussed or set out the reasons for the answers. The award is, therefore, not a speaking or F reasoned award.

That the arbitrator merely referred to the pleadings filed before him does not mean that the pleadings are incorporated in the award. As was said in the context of a contract in a passage, quoted by this Court with G approval in *Allen Berry and Co.* v. *Union of India,* AIR 1971 SC 696, from the judgment of Diplock, L.J. in *Ciacomo Costa Fu Andrea* v. *British Italian Trading Co. Ltd.,* [1962] 2 All E.R. 53 :

> "It seems to me, therefore, that, on the cases, there is none which compels us to hold that a mere reference to the contract H in the award entitles us to look at the contract. It may be that

in particular cases a specific reference to a particular clause of a contract may incorporate the contract, or that clause of it, in the award. I think that we are driven back to first principles in this matter, namely, that an award can only be set aside for error which is on its face. It is true that an award can incorporate another document so as to entitle one to read that document as part of the award and, by the reading them together, find an error on the face of the award."

"9. The question whether a contract or a clause of it is incorporated in the award is a question of construction of the award. The test is, does the arbitrator come to a finding on the wording of the contract. If he does, he can be said to have impliedly incorporated the contract or a clause in it whichever be the case. But a mere general reference to the contract in the award is not to be held as incorporating it."

The arbitrator merely referred to the fact that parties had "filed their statements" before him and that he had given "careful consideration to all the written statements, documents and evidence and the arguments". This is not such a reference as can be said to incorporate the pleadings before him in the award.

Reference was made to issue No.2 and its answer and it was contended that the arbitrator had thereby made a specific reference to the agreement and it must, therefore, be held that the agreement was incorporated in the award. Issue No. 2 and the answer to it read thus:

"Issue	*Answer*
Was the said agreement a commission agency or export agency agreement?	The agreement was not a commission agency or export agreement."

In the first place, the pleadings before the Subordinate Judge, Bhubaneshwar and the order of reference made by him are not placed by IDCO before us. If it was IDCO's case that no issue of law had specifically been referred to the arbitrator, it was its obligation so to show. But we shall proceed on the basis that a specific question of law was not referred. The submission on IDCO's behalf was that the arbitrator mis-construed the

A agreement and, therefore, the court was entitled to look into the agreement and determine whether the award was correct. We do not think that this broad submission is correct. It would appear that the arbitrator construed only such clause of the agreement as was relevant to decide whether the agreement was, as contended by IDCO, a commission or export agency agreement. Such clause alone would be incorporated in the award and B could be looked at by the court to determine whether the arbitrator mis-construed it. We cannot accede to the submission that, by reason of the answer to issue no. 2, the entire agreement became incorporated in the award and that it was, therefore, open to the court to look into the entirety of the dispute in the arbitration proceedings and determine whether the C award was correct.

Even assuming the incorporation of the agreement, an error apparent upon the face of the award had to be shown. We may refer with advantage to this court's judgment in *Bungo Steel Furniture Pvt. Ltd.* v. *Union of India,* [1967] 1 SCR 633. The court quoted the well-known D passage from the judgment of Lord Dunedin in *Champasey Bhara and Company* v. *Jivraj Balloo Spinning and Weaving Company Ltd.,* 50 I.A. 324, thus:

> "An error in law on the face of the award means, in their E Lordships' view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that in narrative a F reference is made to a contention of one party, that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound."

G It went on to observe:

> "An award may be set aside by the court on the ground of an error of law apparent on the face of the award but an award is not invalid merely because by a process of inference and argument it may be demonstrated that the arbitrator has com- H mitted some mistake in arriving at his conclusion."

It was argued on behalf of IDCO before the High Court that the pleadings before the Subordinate Judge, Bhubneshwar and the order of reference to the arbitrator made by him were not before the arbitrator and that, therefore, the arbitrator had acted without jurisdiction. The High Court rejected that contention and made reference to the order of the Subordinate Judge, which we have quoted above, which showed that if directed that the copy of the pleadings and of itself should be sent by the Court to the arbitrator. Before us it was submitted that these pleadings and order had not been considered by the arbitrator, because he had not mentioned them in the award. Issues were framed by the arbitrator, obviously in consultation with the parties and arising upon the pleadings. There were several hearings. It is, in these circumstances, inconceivable that the issues would not have reflected the referred dispute between the parties. It is also significant that the pleadings before the Subordinate Judge, Bhubaneshwar, and the statement of claim and the counter filed before the arbitrator were not produced before us by IDCO so that we could determine whether the statement of claim filed by JOPL before the arbitrator raised claims different from those contained in the pleadings before the Subordinate Judge, Bhubaneshwar.

It was submitted that the award of damages was based on no evidence or material. The submission was based on the finding that the originals of the foreign sale contracts entered into by JOPL in respect of the goods under the agreement had not been sent to IDCO. That these original agreements had not been sent does not *ipso facto* lead to the conclusion that the arbitrator had no material before him upon which he could find that JOPL had suffered damage and assess the same in monetary terms.

This brings us to the question of the inconsistencies found by the High Court upon the face of the award. The issues and the answers to which the High Court referred are issue Nos. 6, 7(b) and 9(a).

In our view, it is necessary to reproduce the issue nos. 6, 7, 9, and 10 and their answers in extenso.

"Issues	*Answers*
6. Did the claimant fulfil their obligations under the terms and conditions of the agreement.	JOPL fulfilled their obligations under the agreement in question.

7.(a) Did the respondent accept or affirm the claimant's order for supply of 4000 tonnes as mentioned in para 4 of the statement of claim ?	IDC accepted or affirmed the JOPL's order for supply of 4000 tonnes.
(b) Did the claimant send the original foreign sale contracts to the respondent.	JOPL did not send the original foreign sale contracts to I.D.C.
9.(a) Were the acts mentioned in para 10 of the counter-statement covered by the agreement?	The agreement provided for JOPL sending the original foreign sale contracts to the respondent at a certain stage. Reference to para 10 of the counter statement of IDC.
(b) Were the acts mentioned in para 11 of the counter-statement covered by the agreement.	The agreement provided that JOPL would arrange for export license, (Reference to para 11 of the counter-statement of IDC.
(c) Were the acts mentioned in para-12 of the counter-statement covered by the agreement? (JOPL)	The agreement provided that JOPL would procure orders for export of 5000 metric tonnes of MS Rounds within 3 months from the date of acceptance of the IDC's offer and they would follow up the indents placed by the respondent (IDC) for supply of billets and arrange for export licences, letter of authorisation from the Iron and Steel Controller in time (Ref. to para 12 of counter- statement of IDC).

(d) Were the acts mentioned in para 13 of the counter-statement covered by the the agreement.	The 'acts' mentioned in para 13 of the counter-statement by IDC are covered by the previous three paragraphs (10, 11 and 12) of that statement and they have been already dealt/with under sub issues (a), (b) and (c) above.
If so, did the party concerned perform such Acts?	The party concerned that is the JOPL performed their part of the work as was necessary under the agreement at relevant stage.
10. Was the respondent justified in cancelling the agreement?	IDC was not justified in cancelling the agreement".

It will be seen that the award says that the agreement provided for JOPL sending the original foreign sale contracts to the respondent *at a certain stage.*" It also says that "JOPL fulfilled their obligations under the agreement in question" and that "JOPL performed their part of the work *as was necessary under the Agreement at relevant stage*". On the other hand, it says that "JOPL did not send the original foreign sale contracts to I.D.C." The award then finds that "IDC was not justified in cancelling the agreement". (Emphasis supplied). Reading these issues and answers together and harmoniously, it is apparent that the agreement provided that JOPL should send to IDCO the original foreign sale contracts at a certain point of time and that it is found that JOPL had not sent the original foreign sale contracts to IDCO. It is also apparent that it is found that at the point of time at which IDCO purported to cancel the agreement, JOPL had performed all its obligations under the agreement. The conclusion is, therefore, that upto that point of time JOPL had not been obliged to send the foreign sale contracts to IDCO. So read, in our view, there are no inconsistencies upon the face of the award as can be characterised as errors that vitiate the award. An award has to be read as a whole and harmoniously. The grounds upon which an award can be set aside are limited. The court

A should be very circumspect about setting aside an award reached by an arbitrator for parties have agreed that the disputes that may arise or have arisen between them should be resolved not by a court of law but by arbitration.

Mr. Patnaik pointed out that the Orissa High Court had recognised
B that "the malady of the racket of arbitration" affected its State *State of Orissa* v. *Gangaram Chhapolia,* (1983) 5 OLJ 214 and that this had been taken note of by this court in *State of Orissa* v. *Dandasi Sahu,* [1988] 4 SCC 12. The court said:

> C "In our opinion, the evidence of such state of affairs should make this court scrutinise the award carefully in each particular case but that does not make the court declare that all high amounts of awards would be bad per se."

We are in respectful agreement. We do not, having bestowed due
D care upon the award and the arguments advanced to assail it, find the award to be bad in law.

Having regard to the view that we take, the question of setting aside the award and sending the arbitration proceedings back to the arbitrator or to the arbitral tribunal now created in the State of Orissa does not arise.

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In the result, Civil Appeal No. 571 of 1980 (filed by IDCO) is dismissed. Civil Appeal No. 572 of 1980 (filed by JOPL) is allowed and the judgment and order of the Subordinate Judge, Bhubaneshwar dated 9th March, 1979 is restored.

F There shall be no order as to costs.

U.R. C.A No. 571/80-dismissed.
C.A. No. 572/80-allowed.