RAJASTHAN STATE ROAD TRANSPORT CORPN. A

v.

INDAG RUBBER LTD.

SEPTEMBER 5, 2006

[H.K. SEMA AND A.K. MATHUR, JJ.] B

Arbitration:

Arbitration Act, 1940: Section 33(b).

C

Arbitration award—Rule of court—Validity of—An agreement was executed between a company and a Corporation for purchase of cold processing re-treading plant and re-treading material—According to the warranty for re-treaded tyres, the company was required to guarantee performance of 46,000 KMs average life or 95% of new tyres—The Corporation D *informed the company that re-treaded tyres used on its buses in their eight regions were not giving the guaranteed kilometerage resulting in a loss to the Corporation—Company emphasized that the method of assessment adopted by the Corporation was not proper—A sole arbitrator concluded that the Corporation suffered a loss—District Judge made award as rule of the court—* E *On appeal, a Single Judge of the High Court set aside the judgment and decree passed by the District Judge on the grounds that comparative assessment of new tyres with the re-treaded tyres was to be made in each region in similar conditions—Correctness of—Held: All the materials have been considered by the arbitrator and, after taking into consideration the average of each tyre in each region of the Corporation, he has worked out* F *that the performance of the re-treaded tyres was not to the extent of 95%—This was a finding of fact—Single Judge not justified in setting aside this finding of fact—Hence, view taken by the Single Judge cannot be sustained.*

An agreement was executed between the respondent-company and the G **appellant-Corporation for purchase of cold processing re-treading plant and re-treading material. According to the warranty for re-treaded tyres, the respondent-company was required to guarantee performance of 46,000 KMs average life or 95% of new tyres.**

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A The appellant-Corporation informed the respondent-company that re-treaded tyres used on its buses in their eight regions were not giving the guaranteed kilometerage resulting in a loss to the Corporation. The respondent-company emphasized that the method of assessment adopted by the appellant-Corporation was not proper.

B A sole arbitrator appointed by the parties decided all the issues in favour of the appellant-Corporation and concluded that the appellant-Corporation suffered a loss but declined to grant damages claimed by the appellant-Corporation. The District Judge made the award as a rule of the court.

C On appeal, a Single Judge of the High Court set aside the judgment and decree passed by the District Judge on the grounds that comparative assessment of new tyres with the re-treaded tyres was to be made in each division in similar conditions; that the method of assessment was not in conformity with reference to the warranty clause and that the comparative assessment of performance of re-treaded tyres with new ones was improper. D Hence the appeal.

Allowing the appeal, the Court

HELD: 1. The arbitrator, in his detailed award, has recorded his finding E on the basis of the average performance of new vehicle tyres with that of the re-treaded tyres of the Company and on that basis he has worked out the assessment. [751-A]

2. All the materials have been considered by the arbitrator and, after taking into consideration the average of each tyre in each region of the F Corporation, he has worked out that the performance of the re-treaded tyres was not to the extent of 95%. This was a finding of fact recorded by the arbitrator and the same was made rule of the court by the District Judge. But the Single Judge erroneously took upon himself to sit as a court of appeal and disturbed this finding of fact. The view taken by Single Judge of the High G Court cannot be sustained. [752-D, E, F]

B.V. Radha Krishna v. *Sponge Iron (India) Ltd.*, [1997] 4 SCC 693, *State of Rajasthan* v. *Puri Construction Co. Ltd.*, [1994] 6 SCC 485 and *K.P. Poulose* v. *State of Kerala*, [1975] 2 SCC 236, relied on.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7032 of 2001. A

From Judgment and Order dated 22.12.2000 of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in S.B. Civil Misc. Appeal No. 618/2000.

Sushil Kumar Jain, Sarad Singhania and H.D. Thanvi for the Appellant. B

S. Ganesh, P. Vengupoal, Surekha Raman and Dileep P. (for M/s. K.J. John & Co.) for the Respondent.

The Judgment of the Court was delivered by C

A.K. MATHUR, J. This appeal is directed against the order dated 22.12.2000 passed by learned Single Judge of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in S.B. Civil Misc. Appeal No.618 of 2000 whereby learned Single Judge set aside the order passed by the District Judge, Jaipur City in CMA (Arb.) No.256 of 1997 confirming the award dated D 4.4.1997 passed by the Arbitrator and issuing a decree in terms of the award in favour of the Rajasthan State Road Transport Corporation (hereinafter to be referred to as the Corporation).

The facts giving rise to this appeal are that an agreement was executed between Indag Rubber Limited (hereinafter to be referred to as the Company) E and the Corporation on 24.7.1991 for purchase of cold processing retreading plant and retreading material. According to Clause 3 of the agreement, in the cold processing plant of the company no other retreading material except of Indag would be used during subsistence of the contract provided the company supplies retreading material regularly and uninterruptedly as per the need of F the Corporation. Clause 4 contemplated that the corporation would purchase retreading material from the company at the prevailing rates against the rate contract of the Association of State Road Transport Undertaking. Clause 5 deals with warranty for retreaded tyres, according to which the company was required to guarantee performance of 46000 KMs average life or 95% of new G tyres in each division in similar condition whichever is less and the performance would be assessed initially after 12 months on the commissioning of plant and production of tyres and subsequently on quarterly basis, and on failure of guaranteed kilometers, the company is bound to compensate on *pro rata* basis. Clause 10 pertains to arbitration. As per the arbitration clause any H

A dispute between the parties regarding interpretation of the terms and conditions or their fulfillment, both the parties shall refer the dispute to the Chairman of the Corporation who after hearing both the parties shall give the decision which shall be final and binding on the parties.

B The grievance of the Corporation was that retreaded tyres used on its buses, such tyres could not achieve the guaranteed kilometers as per warranty clause 5, whereupon the company was informed of such deficiency in its retreaded tyres. The Corporation informed the company through their various letters dated 27.2.1993, 30.3.1993, 12.5.1993, 29.6.1993, 15.7.1993, 20.1.1994 and 16.7.1994 that retreaded tyres used on its buses in their eight regions were C not giving the guaranteed kilometerage resulting in loss to the corporation to the tune of Rs.1,19,53,430.92 paise with 18% interest. Therefore, the Corporation called upon the company to make payment of the aforesaid loss calculated on the basis of pro rata on each retreaded tyre. The Corporation also claimed a sum of Rs.25 lacs towards damages. Therefore, the total amount claimed D by the Corporation worked out to Rs.1,44,53,430.92 paise. The Company denied its liability and submitted that the Corporation has wrongly construed the agreement because the essential feature of warranty clause 5 was that comparative assessment of new tyre life with retreaded tyre was to be made in each division in similar conditions. It was also submitted that as per clause E 3 complete retreading material which also included repair material was to be purchased from the Company only because of the reason that after a tyre is worn out it is first repaired so as to give it basic strength before it is retreaded thereby repairing of tyre was essential part of the process of retreading. Surprisingly enough the Corporation did not purchase any repair material from the company resulting in breach of clause 3 of the agreement. According F to the company, since improper repair material was used by the Corporation, therefore, 25% to 30% of the tyres allegedly removed prematurely had caused damages on account of bursting, cutting of the tyres, which could not have been used or considered for assessment of a retreaded tyre's life. It is alleged that the Company by its letters dated 14.11.1991, 16.11.1991, 17.1.1992 and G 7.5.1992 had informed the Corporation that while assessing performance of retreaded tyres, the tyres removed from wheels prematurely due to bursts should be treated separately like one side wear or spotty wear, run flat etc. should not be taken into account. For the performance of remaining tyres only comparison should be made with the new tyres. The Company also advised H that the repair material should be purchased from the company and it was also

mentioned that the tyres should be compared in similar condition and since the new tyres were fitted on the rear axle, therefore the performance was bound to be lower and thus assessment of performance of the retreaded tyres was not in similar conditions. It was also pointed out that performance should be compared with new tyres of the same design as on rear axles in each division before comparison with performance of Indag retreaded tyres. It was also pointed out by communication dated 14.5.1990 that the performance of retreaded tyres when used on the front wheels should be compared with new tyres' performance on the front wheels fitted to the vehicles operated on similar routes likewise the tyres used on rear axle. It was also submitted that since the Corporation used retreaded tyres in conditions not similar to one in which new tyres were used, therefore, their performance was bound to vary. The Company emphasized that the method of assessment adopted by the Corporation was not proper. The Company cited the case of *Maharashtra State Road Transport Corporation* and submitted that new tyres were fitted on the same axle of the bus as of retreaded tyres and then the performance was to the extent of 97 to 99 % with that of the new tyre. It was submitted that because of not employing the same method of assessment the result has varied. The Company cited the example of *Ajmer Division* and pointed out that performance of retreaded and new tyres is satisfactory. It was also pointed out that the performance was likely to vary Divisionwise because Jaipur- Delhi national highway route could give a better result than the Jaipur Lalsot route as it is not having similar condition as that of Jaipur Delhi National Highway. The company also joined the issues with regard to calculation of loss. On the basis of these pleadings, a sole arbitrator was appointed i.e. the Principal Secretary, Home and Justice, Government of Rajasthan. The arbitrator framed the following three issues for determination.

A B C D E F

> " (1) Whether the retreaded tyres which failed for other reasons like burst etc. should be taken into account while assessing performance of the retreaded tyres ?
>
> (2) Whether the claimant was required to use repair material supplied by Indag only ? and
>
> (3) Whether the retreaded tyres and new tyres were used in similar conditions for the purpose of assessing their comparative performance?"

G H

A The arbitrator after hearing the parties and taking into consideration the documents on record decided all the issues in favour of the Corporation by its award dated 4.4.1997 and concluded that the Corporation suffered a loss to the tune of Rs.1,19,53,430.92 paise. However, the arbitrator declined to grant additional sum of Rs.25 lacs claimed as damages by the Corporation. B After that award dated 4.4.1997 was produced in the Court of the District Judge on 24.5.1997, the District Judge issued notice to both the parties and after considering the matter and hearing the parties made the award as a rule of the court by its order dated 22.11.1999. Aggrieved against the said order, the Company filed an appeal before the High Court of Rajasthan and the matter came up before the learned Single Judge for disposal. Learned Single C Judge after examining the matter held that the essential feature of the warranty clause for comparative assessment of new tyres with the retreaded tyres was necessary to be made in each division in similar condition. Learned Single Judge further held that method of assessment was not in conformity with reference to warranty clause 5 that comparative assessment of performance D of retreaded tyres with new ones, was improper. It was also observed that as per figures shown by the Corporation they had used 14,395 retreaded tyres from June, 1991 to May, 1992 out of which total tyres received after completing retreaded life were 7,797. Learned Single Judge also held that as per the inspection report dated 19.11.1991 total 148 tyres were inspected. Similarly, on E 20.11.1991 30 tyres were inspected. It was also observed that apart from joint inspection report, three other inspections were held for 452 tyres on 4.10.1991, 135 tyres on 29.10.1991 and 522 tyres on 12.11.1991 and as per these joint inspection reports, the Corporation claimed that the tyres had not performed according to their warranty as stipulated in Clause 5 of the agreement. Learned F Single Judge further held that the inspection reports as well as other documentary evidence led by both the parties did not show comparative assessment of retreaded and new tyres with a view to find out as to the guaranteed kilometerage as stipulated in clause 5 of the agreement. Learned Single Judge concluded that in his considered opinion, the significant aspect bearing material to the dispute under the arbitration as to the award of G compensation on *pro rata* basis has totally been ignored not only by the arbitrator but also by the District Judge under the impugned award and decree. Learned Single Judge further observed that the arbitrator did not apply his mind to the joint inspection reports or calculation sheet on the basis of which the Corporation has claimed compensation considering only H performance of retreaded tyres without making comparative assessment of

performance of both retreaded and new tyres. On the basis of the above finding, learned Single Judge set aside the judgment and decree passed by the District Judge, Jaipur City confirming the award dated 4.4.1997 passed by the arbitrator and remanded back the matter to the Corporation for fresh adjudication of the dispute by appointing an arbitrator other than the one who has passed the award earlier. Aggrieved against this impugned order passed by learned Single Judge, High Court of Rajasthan at Jaipur, the present Special Leave Petition was filed by the Corporation.

We have heard learned counsel for the parties and perused the records.

Learned counsel for the appellant strenuously urged before us that the learned Single Judge has upset the finding of fact recorded by the arbitrator and has examined the matter like an appellate authority which is not open to the learned Single Judge. Learned counsel for the appellant submitted that the arbitrator after recording necessary evidence and after examining the whole material on record, came to the finding that the claim of the Corporation deserves to be accepted partially. But the learned Single Judge sitting as a court of appeal has upset the finding of fact recorded by the arbitrator. Learned counsel for the appellant in support of his submission invited our attention to a decision of this Court in the case of *B.V. Radha Krishna* v. *Sponge Iron India Ltd.*, reported in [1997] 4 SCC 693 and submitted that it is not open to the learned Single Judge to sit as a court of appeal while disposing of the award of the arbitrator which was made the rule of the court. In the above decision, it was observed as under:

> "Bearing in mind the principles laid down by this Court in the abovesaid cases, if we look into disposal of the matter by the High Court, it would be evident that the High Court has substituted its own view in place of the Arbitrator's view as if it was dealing with an appeal. That is exactly what is forbidden by the decisions of this Court. Therefore, we have no hesitation to set aside the judgment of the High Court on this issue."

In this connection, learned counsel for the appellant invited our attention to a decision of this Court in the case of *State of Rajasthan* v. *Puri Construction Co. Ltd. & Anr.*, reported in [1994] 6 SCC 485 wherein it was observed as under:

A "However, in the anxiety to render justice to the party to arbitration, the court should not reappraise the evidence intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the court, erroneous. Such exercise of power which can be exercised by an B appellate court with power to reverse the finding of fact, is alien to the scope and ambit of challenge of an award under the Arbitration Act. If a question of law is referred to arbitrator and the arbitrator comes to a conclusion, it is not open to challenge the award on the ground that an alternative view of law is possible. Even if it is assumed that on the materials on record, a different view could have been taken C and the arbitrators have failed to consider the documents and materials on record in their proper perspective, the award is not liable to be struck down in view of judicial decisions referred to hereinbefore. Error apparent on the face of the record does not mean that on the closer scrutiny of the import of documents and materials on record, D the finding made by the arbitrator by itself does not constitute misconduct warranting interference with the award."

As against this, learned counsel for the respondent-Company submitted that in fact there was no material on which the finding was recorded by the Arbitrator. In support thereof, learned counsel invited our attention to a E decision of this Court in the case of *K.P. Poulose* v. *State of Kerala & Anr.*, reported in [1975] 2 SCC 236 wherein it was held that the award can be set aside on the ground of misconduct if relevant documents are not considered by the Arbitrator. Therefore, we asked learned counsel for the appellant-Corporation to substantiate the finding recorded by the arbitrator that it is F based on the material on record. In pursuance to the direction given by this Court, learned counsel for the Corporation filed an affidavit on 12.7.2006 and submitted that the document wherein the details on divisionwise average kilometer of new tyres and retreaded tyres along with average short-fall in guaranteed kilometers for the various periods was on record of arbitrator and G same was produced before us. The details were given of all the Divisions i.e. Bharatpur, Jaipur, Sikar, Kota, Ajmer, Bikaner, Jodhpur and Udaipur. In all these eight divisions for the various period i.e. from June 1991 to February, 1994 the details have been given to substantiate the allegations that what was the average mileage of the new tyre and what was the average mileage given by the retreaded tyres and on that basis, the short-fall was given and H

accordingly, the amount of loss was worked out. These details which were placed before us formed part of the record before the arbitrator. The arbitrator in his detailed award has recorded his finding on the basis of the average performance of new vehicle tyres witht that of the retreaded tyres of the Company and on that basis he has worked out the assessment in paragraph 17 of the award. Paragraph 17 of the award reads as follows :

> "The RSRTC has compared the performance of retreaded tyres with the performance of new tyres in each division. In each division, as mentioned earlier, the road conditions, the vehicles used, the weather conditions, the general driving skills of the drivers and the level of maintenance and upkeep of vehicles were similar for the new tyres as well as retreaded tyres. The retreaded tyres should have given a kilometerage of 46,000 or 95 % of the life of new tyres. Therefore, the assessment of the performance done by the RSRTC is strictly in conformity with the provisions of clause 5 of the agreement. Notwithstanding the acceptance by the respondent of an error of judgment in guaranteeing 46,000 kms for a retreaded tyre, from the Statements enclosed by the claimant with its letters mentioned in para 5 of this order, it is clear that the retreaded tyres performance fell short of the guaranteed level. I, therefore, find claim of the RSRTC to be fully justified."

This is the finding of fact given by the arbitrator. As against this, learned Single Judge as mentioned above, has held that there was no assessment in each division in similar conditions. Therefore, the learned Single Judge set aside the award but it is not factually correct. As mentioned above, there was a comparative assessment given by the Corporation and that was part of the record before the arbitrator and on that basis the finding of fact was recorded by the arbitrator. Learned counsel for the respondents strenuously urged before us that the performance of new tyres and of retreaded tyres on roads like Jaipur-Delhi would be better as against the road of Jaipur-Lalsot. Therefore, there was no assessment of performance of the new tyres *vis-a-vis* the retreaded tyres supplied by the Company in similar conditions. In fact, an average has to be taken of each division. It is not necessary that in each of the divisions of the Corporation, the road conditions will be similar. Once the company has entered into an agreement knowing fully well the conditions obtaining in the State of Rajasthan that all the routes in the State are not the

A roads of Class 'A' category but there are roads of Class 'A', Class 'B' and Class 'C' categories also. Therefore, the average performance has been recorded taking into consideration this aspect. It is unlikely that all over the State of Rajasthan the road condition like Jaipur-Delhi will be available for all other divisions. Therefore, in all the divisions the average performance has been
B taken into consideration. The assessment has been based on average of similar conditions of the roads i.e. the good quality as well as the poor quality. Therefore, average performance of the new tyres with the retreaded tyres has to be taken on the basis of roads available in Rajasthan. The average running of the new tyres on these road conditions with that of the retreaded tyres was to be compared to find out whether the performance of retreaded tyres was
C up to 95% average or not. After assessing the comparative assessment and going through the materials on record the arbitrator has recorded his finding. It was for the company if they wanted more information or wanted to allege that the road conditions are not similar or that the performance of the tyres which were fitted in the rear axle or on the front axle would not be the same,
D all these details if it wanted, it could have obtained from the Corporation but they did not do so and only at this stage the company wants to bring this factual controversy that retreaded tyres were not used in similar conditions. This argument at this belated stage cannot be accepted as all the materials have been considered by the arbitrator and after taking into consideration the
E average of each tyre in each region of the corporation has worked out that the performance of the retreaded tyres was not to the extent of 95%. This was a finding of fact recorded by the arbitrator and the same was made rule of the court by the District Judge. But the learned Single Judge erroneously took upon himself to sit as a court of appeal and disturbed this finding of fact. In
F our opinion, the view taken by the learned Single Judge of the High Court cannot be sustained.

Learned counsel for the respondent-company next submitted that the arbitrator has awarded interest at the rate of 12% per annum from the date of the award i.e. 4.4.1997. Learned counsel for the respondent submitted that
G it was excessive as long spell of time has expired since the date of the award. Therefore, granting of interest at the rate of 12% per annum will be burdensome for the company. Therefore, learned counsel for the respondent prayed that some relief in interest be given. After bestowing our best of consideration, we are of opinion that awarding of interest at the rate of 12% per annum from
H the date of award i.e. 4.4.1997 till the realization of the amount will be too

excessive. Therefore, looking to the peculiar facts and circumstances of this case, we reduce the rate of interest from 12% to 6% per annum. We allow this appeal and set aside the judgment and order dated 22.12.2000 passed by learned Single Judge of the High Court of Rajasthan at Jaipur in SBCMA No.618 of 2000 and affirm the decree passed by the District Judge, Jaipur City making the award rule of the Court. The appellant shall be entitled to interest at the rate of 6% per annum from the date of the award till realization of the amount in question. No order as to costs.

V.S.S. Appeal allowed.