CASE NO.:
Special Leave Petition (civil) 12883-12884 of 2000

PETITIONER:
MAHARASHTRA STATE ELECTRICITY BOARD

Vs.

RESPONDENT:
STERILITE INDUSTRIES (INDIA) & ANR.

DATE OF JUDGMENT: 09/10/2001

BENCH:
S. Rajendra Babu & Doraiswamy Raju

JUDGMENT:

J U D G M E N T
RAJENDRA BABU, J. :

On certain disputes having arisen between the Maharashtra State Electricity Board and Sterilite Industries (India) in connection with the failure to supply certain goods the matter was referred to Arbitral Tribunal consisting of three arbitrators. The petitioners made a claim in a sum of Rs. 70,28,572.05p as damages for breach of contract sustained by them on account of failure of the respondents to supply the entire material ordered from them. In addition to this claim for damages, interest on the said amount at 18% per annum for the period between May 9, 1989 to October 29, 1990 amounting to Rs. 18,62,571.55p was also made. Thus the total claim for damages and interest is in a sum of Rs. 88,91,143.16p.

It is stated that the contract for supply of goods was cancelled by the petitioners on April 17, 1989 on the basis that the material which was not supplied by the respondents was procured by the petitioners from other suppliers at a price much higher than what was tendered by the respondents. The petitioners referred to various orders placed by them with different parties. The damages were thus claimed on the basis that the material which was not supplied by the respondents was actually purchased or procured by the petitioners and the damages were computed on the ground of higher price being required to be paid in order to make good the short supply by the respondents. The claim of the petitioners was contested by the respondents on several grounds.

The arbitrators raised two issues for consideration, which are as follows :-

(1) Whether the respondents have committed breach of contract
or
whether the claimants have committed breach of contract
and on account of such breach it became impossible for the
respondents to supply the requisite material under the
contract?
(2) Whether under the terms of the contract the damages as
claimed can be sustained?

On consideration of the relevant material and arguments placed before the arbitrators, per majority, they held that the breach of the

contract is committed by the respondents and not by the petitioners. As regards damages claimed by the petitioners, they adverted to clause 14 of the contract to the effect that the purchaser has a right to purchase upon such terms and in such a manner as he may deem appropriate equipment similar to that terminated and then the contractor will be liable to the purchaser for any additional cost for such similar equipment and/or for liquidated damages for delay as defined in Article 22 of the General Conditions until such reasonable time as may be required for the final supply of equipment and construed the same as providing for (i) that the contractor is liable to reimburse the purchaser the additional cost of similar equipment which the purchaser has purchased and (ii) that in addition to that or alternatively, the contractor is liable for liquidated damages for delay until such reasonable time as may be required for the supply of equipment and the provision regarding liquidated damages was not attracted in the present case. Clause 14(ii) was thus held to be a special provision with regard to quantum of damages and the quantum is to be determined with reference to the additional cost involved in purchasing the equipment which the contractor had failed to deliver; that in view of this special provision the mode of computation of damages provided for under Section 73 of the Indian Contract Act is not attracted; that, the measure of damages upon a breach of contract for sale of goods is the difference between the contract price and the market price on the date of breach and it is open to the parties to lay down a different rule; that the petitioners had failed to prove that consequent upon the failure of the respondents to supply the material in accordance with the contract, the petitioners had, after the cancellation of the contract, purchased any material in lieu of the material short supplied by the respondents; that the contracts relied upon by the petitioners for similar material were already entered into by the petitioners and the supply made thereunder had no relationship with the short supply made by the respondents; that the petitioners had, therefore, failed to prove that they had suffered any damages as contemplated by clause 14 of the contract; that the concept of award of compensation is bound up with loss or damage that results from the breach of contract and where no loss or damages has ensued, there can be no question awarding compensation; that even under Section 73 of the Indian Contract Act where a claim for damages on the ground of breach of contract is made by a party, the party claiming damages is under an obligation to prove the loss; that the claimants in the instance case had failed to prove that they had suffered any loss. On this basis, the arbitrators held that the petitioners were not entitled to invoke the provisions of Section 73 of the Indian Contract Act and they had failed to prove that any additional purchases were made to make up for the short supply resulting from the breach of contract by the respondents and even otherwise, the petitioners had failed to prove that they had suffered any damages and were, therefore, not entitled to any damages. Accordingly, the claim made by the petitioners was dismissed.

The minority view expressed by another arbitrator is that clause 14(ii) of the contract enables the purchaser the right to purchase upon such terms and manner as he may deem appropriate and that gives only an additional option without affecting the rights arising under general Law and, therefore, he was of the view that the claim should be allowed.

On the award being sought to be made the decree of the court, objections were raised in the proceedings before a learned Single Judge of the High Court, who, on examination adverted to the award and, in particular, to the scope of clause 14(ii) of the contract entered into between the parties. The learned Single Judge is of the view that if the arbitrators have given reasons in support of their decision, it would be open to the court to set aside the order if it finds that the error of law has been committed by the arbitrators, though reasonableness thereof cannot be challenged. He is influenced by the fact that what is found in the award on the aspect of loss and quantum of damages against the petitioners is pure finding of fact based on appreciation of evidence and,

therefore, could not be examined by the court. He is further of the view that where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by it in order to attract Section 73 of the Indian Contract Act; that the concept of award of compensation is bound up with the loss or damage that results from the breach of contract and where no loss or damage has ensued, there can be no question of awarding compensation; that the majority of the arbitrators have said that the petitioners had failed to prove that they had suffered any loss and, therefore, are not entitled to claim any damages and thus the claim had to be rejected. The learned Single Judge took the view that an award can only be set aside if there is an error of fact or an error of law and unless such error is apparent on the face of the record, the objections cannot be sustained and, hence he overruled the objections holding that the award is unassailable in proceedings under Section 30 of the Arbitration Act.

Appeals were filed against this order of the learned Single Judge on the Letters Patent side and a Division Bench of the High Court reiterated the view taken by the learned Single Judge after reappraisal of the facts, the award made by the arbitrators and the contentions raised in the appeals. It is against this order of the Division Bench, these special leave petitions are filed.

Shri T.R. Andhyarujina, learned Senior Advocate appearing for the petitioners, contended that the view taken by the arbitrators and the High Court on the construction of clause 14(ii) is plainly wrong; that under clause 14(ii) of the contract a right was reserved in favour of the petitioners to purchase upon such terms and in such manner as the petitioners deemed appropriate, equipments similar to that contracted and the respondents are liable to the petitioners for any additional costs for such similar equipments and/or for liquidated damages for delay as defined in Article 22 of the General Conditions until such reasonable time as may be required for final supply of the equipments; that this reservation in favour of the petitioners is an additional right to claim damages from the respondents for an additional costs that might be incurred for such purchases and has not been taken away from the petitioners their general right to claim damages under Section 73 of the Indian Contract Act; that for invoking the provisions of Section 73 of the Indian Contract Act it was not necessary for the petitioners to have purchased the equipments and materials not supplied by the respondents from the open market; that even in such an event, the petitioners are entitled to claim damages from the respondents on the basis of the difference between the contract price and the market price of the materials on the date of the breach of the agreement by the respondents.

The position in law has been noticed by this Court in Union of India vs. A.L. Rallia Ram, AIR 1963 SC 1685, and Firm Madanlal Roshanlal Mahajan vs. Hukumchand Mills Ltd., Indore, 1967 (1) SCR 105, to the effect that the arbitrators award both on facts and law is final; that there is no appeal from his verdict; that the court cannot review his award and correct any mistake in his adjudication, unless the objection to the legality of the award is apparent on the face of it. In understanding what would be an error of law on the face of the award, the following observations in Champsey Bhara & Company vs. Jivraj Balloo Spinning and Weaving Company Ltd., L.R. 50 I.A. 324, a decision of the Privy Council, are relevant:-

An error in law on the face of the award means, in their 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.

In Arosan Enterprises Ltd. vs. Union of India & Anr., 1999 (9) SCC 449, this Court again examined this matter and stated that where the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible view points, the interference in the award based on erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator.

In the Russell on Arbitration [17th Edition], the position in law is thus stated :-

Where an arbitrator makes a mistake either in law or in fact in determining the matters referred, but such mistake does not appear on the face of the award, the award is good notwithstanding the mistake, and will not be remitted or set aside.

The general rule is that, as the parties choose their own arbitrator to be the Judge in the disputes between them, they cannot, when the award is good on its face, object to his decision, either upon the law or the facts.

In the light of this enunciation of law, we are of the view that unless the error of law sought to be pointed out by the learned counsel for the petitioners in the instant case is patent on the face of the award neither the High Court nor this Court can interfere with the award. The exercise to be done by examining clause 14(ii) of the contract entered into between the parties, construing the same properly and thereafter applying the law to it to come to a conclusion one way or the other, is too involved a process and it cannot be stated that such an error is apparent or patent on the face of the award. Whether under the context of the terms and conditions of a contract, a stipulation in the form and nature of clause 14(ii) operates as a special provision to the exclusion of Section 73 of the Indian Contract Act is a matter of appreciation of facts in a case, and when the decision thereon is not patently absurd or wholly unreasonable, there is no scope for interference by courts dealing with a challenge to the award. Therefore, we think, the view taken by the High Court in this matter is correct and calls for no interference.

If as construed by the arbitrators that clause 14(ii) excludes applicability of Section 73 of the Indian Contract Act and the proposition of law stated by the arbitrators is correct, then Section 73 is not attracted to the case.

In this view of the matter, we find absolutely no substance in these petitions and they are dismissed with costs of the respondents quantified at Rs.5,000/- in each set.

J.
[S. RAJENDRA BABU]

J.
[DORAISWAMY RAJU]

OCTOBER 9, 2001.