Before V.S. Aggarwal, J.

M/S GIAN CHAND RAJ KUMAR,—*Appellant*

versus

F.C.I. AND ANOTHER,—*Respondents*

F.A.O. No. 600 of 1979

1st April, 1998

Arbitration Act, 1940—S. 15—Modification of award—Power of Civil Court—Award beyond jurisdiction—Party submitting to the jurisdiction of the Arbitrator—Raising objections to the jurisdiction—Effect of.

Held, that where it appears that certain questions could not be looked into by the arbitrator, indeed the Court can modify the award with respect to the facts which could not be decided.

(Para 7)

Further held, that the agreement shows that the damages for delay, if any, could be determined by the Senior Regional Manager of the Food Corporation of India who was competent to reduce the damages at the rate prescribed. The arbitrator could not go into the said controversy.

(Para 8)

Further held, that it is not being disputed that respondent—Corporation had raised the dispute before the Arbitrator that claim with regard to refund/storage cannot be decided by the arbitrator. In other words, they submitted to the jurisdiction of the arbitrator, subject to the said objection. Once that is so it cannot be termed that the respondents had unconditionally submitted to the jurisdiction of the arbitrator. In that view of the matter, they could certainly take up the plea before the Court that to that extent the arbitrator had no jurisdiction to go into the said controversy.

(Para 9)

G.S. Jaswal, Advocate, *for the Appellant*

Hemant Kumar, Advocate, *for the Respondent*

JUDGMENT

V.S. AGGARWAL, J.

This is an appeal filed by M/s Gian Chand Raj Kumar (hereinafter described as 'the appellant') directed against the judgment of the learned Subordinate Judge, Phagwara dated 29th September, 1979. The learned trial Court modified the award of Dr. Bakhshish Singh, Arbitrator, relating to reduction of damages/storage charges from Rs. 57,783.75p. to Rs. 28,000. It was directed to be deleted from the award. Otherwise the award was made a rule of the Court.

(2) The relevant facts are that the appellant M/s Gian Chand Raj Kumar entered into two agreements with the Food Corporation of India for converting paddy into rice for the Corporation. The appellant—firm had carried the work under the agreement at Phagwara. Disputes arose between the parties. There was an arbitration agreement that had been entered into. In accordance with the said arbitration agreement, the Managing Director referred the dispute to the sole arbitrator Shri N.S. Mehta, Additional Legal Advisor, Ministry of Law, Government of India. Shri N.S. Mehta resigned. Thereupon the Managing Director appointed Dr. Bakshish Singh as the arbitrator. While the proceedings were pending before Shri Mehta, he had invited the claim and counter claim. Dr. Bakshish Singh thereupon heard the parties and submitted the award on 6th May, 1977. The appellant wanted the award to be made a rule of the court and decree to be passed in terms of the award.

(3) The respondents—Food Corporation of India filed objections. They asserted that the Court at Phagwara did not have the jurisdiction to entertain the application because no cause of action had arisen at Phagwara. It was further asserted that the Food Corporation of India had imposed storage charges against the appellant amounting to Rs. 57,783.75p. The same could not be reduced. The Arbitrator has no jurisdiction to do so. This question could be decided by the Senior Regional Manager of the Food Corporation of India who in fact had taken the decision. The request of the appellant that the storage should be reduced had been rejected. It was pointed that to this extent the award of the Arbitrator whereby he reduced the amount of damages to Rs. 28,000 was without jurisdiction.

(4) The appellant filed the reply to the objections. It reiterated that the Courts at Phagwara had the jurisdiction to entertain the application for making the award the rule of the court. It was further pointed that the Arbitrator had the jurisdiction to go into the question

of the damages that were awarded and reduced by the Arbitrator. A plea was taken that the respondent—Food Corporation of India had submitted to the jurisdiction of the Arbitrator and now cannot take the plea that the Arbitrator had no jurisidction.

(5) The learned trial Court held that the Courts at Phagwara had the jurisdiction to entertain the suit for making the award rule of the court. However, it was held that the Arbitrator had no jurisdiction to deal with the matters which were expressly provided under the contract. Under the contract Senior Regional Manager could decide about the damages for storage charges etc. and consequently the Arbitrator had no jurisdiction to reduce the damages. To that extent the award of the Arbitrator was held to be without jurisdiction. With these findings the impugned judgment was pronounced. Hence, the present appeal.

(6) No dispute was raised with respect to the findings of the learned trial court that the civil court has the jurisdiction to entertain the suit for making an award rule of the Court. The sole controversy was with respect to the findings of the leaned trial court whereby the award of the Arbitrator had been modified and it was directed that findings with respect to Item No. 7 relating to reduction of damages/storage charges from Rs. 57,783.75p. to Rs. 28,000 is hereby delated from the award.

(7) At the outset on behalf of the appellant it was urged that the learned trial court could either accept the award and make it a rule of the Court or reject the same. It could not modify the same. However, the said agreement indeed has simply to be stated as rejected. Section 15 of the Arbitration Act, 1940 (as is applicable to the controversy in dispute) provides the answer and reads :—

> "S. 15. Power of Court to modify award :—The Court may by order modify or correct an award—
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> (a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or
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> (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or
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> (c) where the award contains a clerical mistake or an error arising from an accidental slip or omission."

The plain language of Section 15 of the Arbitration Act, 1940 permits the Court to modify or correct the award where it appeas that part of the award refers to a fact not referred to the arbitrator. In other words,

if it is held that certain questions could not be looked into by the arbitrator, indeed the Court can modify the award with respect to facts which could not be decided. Reference with advantage in this regard may be made to the decision in the case of *Ichharam Damodardas* v. *Kantilal Nathubahai and another* (1) in the cited case the Court held :—

> "But in this case the award provided for two things : (1) the payment of Rs. 8000 and (2) the creation of charge on immoveable property, so far as the award created a charge on the immoveable property, it requires registration and to that extent the award is defective. But so far as the award related to the payment of Rs. 8000 there was no defect in the award. Section 15 of the Act provides that the Court may by order modify or correct an award where the award is imperfect in form or contains any obvious error which can be amended without affecting the decision on the matter referred. In my opinion, the non-registration of that part of the award which relates to a charge on the immoveable property would be a defect in form which could be modified and corrected by the Court. For another reason also, the Court can modify the award, because the arbitration agreement referred only the question in respect of the amount due and the instalments payable to arbitration. But the arbitrator created a charge which was not one of the matters referred to in the arbitration agreement."

Same view prevailed with the Delhi High Court in the case *M/s Metro Electric Co., New Delhi* v. *Delhi Development Authority, New Delhi and others* (2). The question in controversy was as to if the valid part of the award can be separated from the invalid part of the award. The answer was that invalid part of the award if it is separable from the valid part, then it could be so severed. In paragraph 29 the Court observed :—

> "Out of the two claims allowed by the Arbitrator, the first claim is not sustainable, whereas the other claim, partly allowed, has to be maintained. The valid part is easily severable from the rest of the award. So that can be made a rule of the Court."

Consequently, as noted above if part of the award is invalid and it can be separated from other part of the award, indeed the award to that extent could be modified.

(1) A.I.R. 1963 Guj. 28.
(2) A.I.R. 1976 Delhi 195.

(8) The agreement entered into between the parties is not subject matter of any controversy. The arbitration agreement reads :—

> "All disputes and differences arising out or in any way touching or concerning this agreement whatsoever except as to any matter the decision of which is expressly provided for in the contract shall be referred to the sole arbitration of the Managing Director, Food Corporation of India, New Delhi or any person appointed by him. It will be no objection to such appointments that such person appointed is/was an employee of the Food Corporation of India—he has expressed view on all or that he had to deal with the matter to which the agreement relates and that in course of his duties as an employee of FCI any of the matters in dispute or differences. The Award of such arbitrator shall be final and binding on the parties to this agreement. It is a term of this agreement that in the event of such arbitrator, to whom the matter is originally referred, bear, transferred or vacating his office or lying or being unable to act for any reason Managing Director as aforesaid at the time of transfer vacation of office or death or inability to act shall appoint another person to act as Arbitrator in accordance with the terms and conditions of this agreement. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this agreement that no person other than a person nominated by the Managing Director of the Food Corporation of India aforesaid should act as arbitrator, and if for any reason that is not possible, the matter is not to be referred to the arbitrator at all. The arbitrator may enlarge the time of making and publishing his award with the consent of all parties."

Perusal of the aforesaid clearly shows that all disputes and differences arising out of and in any manner touching or concerning the agreement except in matter, decision of which is expressly provided in the contract can be referred to an arbitrator. Consequently, if there is any matter regarding which decision had to be arrived otherwise, the same had to be referred to the arbitrator. But part of the agreement shows that concerning the damages for delay, if any, could be determined by the Senior Regional Manager of the Food Corporation of India who was competent to even reduce the damages at the rate prescribed. The said agreement reads :—

> "The agent will be required to lift the minimum 200 tonnes of paddy or 5% of the contracted paddy whichever is higher in every part of ten days. In the event of Agent's failure to do so

he shall be liable to pay damages to the Corporation for such delay at the rate of 5 paise per bag per day and likewise if he fails to deliver rice to the Corporation within the stipulated period of ten days, he shall be liable to pay damages to the Corporation for delay @ 5 p. per bag per day. The Senior Regional Manager may however waive or reduce such charges, depending upon specific circumstances. The decision of the Senior Regional Manager shall be final and biding in this regard. The delivery of rice shall be deemed to have been completed after the stocks are loaded into wagons or delivered into the godowns as per direction of the District Manager, necessary weighment, inspection and approval of quality in accordance with the prescribed procedure of the State Government and the Corporation, at the cost of the Agent. In the event of non-supply of wagons the delivery of rice may also be taken into local godowns after necessary weighment, inspection and approval of quality in accordance with the procedure as per direction of the District Manager or an officer on his behalf. All expenditures including labour, transportation and other incidental expenditures etc. incurred in connection with lifting of paddy from godown/mandies/Rly. Station/Any other place etc. and delivery of rice shall be borne by the agent and the same shall be deemed to have been included in the Milling Charges and accepted by the Food Corporation of India."

The above quoted portion clinches the issue in favour of the respondents. It shows that the Senior Regional Manager had the right to fix the damages and even on a representation could reduce the same. In fact the record shows that the appellant-firm even had made a representation to the Senior Regional Manager against the imposition of damages. In other words, the Senior Regional Manager was competent to adjudicate and once it is so, the arbitrator could not go into the said controversy. The same did not fall within the purview of the arbitration agreement.

(9) In that event, it was pointed that respondents had submitted to the jurisdiction of the arbitration and, therefore, they could not raise this plea in Court. But even on this count the said contention is without any merit. It is not being disputed that respondent-Corporation had raised the dispute before the Arbitrator that the claim with regard to refund/storage cannot be decided by the arbitrator. In other words, they submitted to the jurisdiction of the arbitrator, subject to the said objection. Once that is so it cannot be termed that the respondents had

unconditionally submitted to the jurisdiction of the arbitrator. In that view of the matter, they could certainly rake up the plea before the Court that to that extent the arbitrator had no jurisdiction to go into the said controversy. The order passed by the learned Subordinate Judge, therefore, requires no interference.

(10) For these reasons, the appeal being without merit must fail and is dismissed.

S.C.K.

Before G. C. Garg & N.K. Agrawal, JJ

M/S KANSAL WOOLEN & HOSIERY MILLS,—*Appellant*

versus

THE COMMISSIONER OF INCOME TAX, PATIALA,—*Respondent*

ITR Nos. 79 & 80 of 1990

15th January, 1999

Income Tax Act, 1961—S. 35—B—Income Tax Rules, 1962—Rl. 6AA-S.35-B amended, sub-clauses (ii), (iii), (v), (vi) and (viii) of clause (b) deleted w.e.f. 1st April, 1981-Assessee claiming deduction for samples not despatched to outside India-Samples lying in stock with the assessee-Assessee claming deductions for expenditure incurred on advertisement, free sample, quality control and export promotion-Grant of such deductions.

Held, that the deduction claimed by the assessee related to the value of the closing stock of the samples. There is nothing on record to show that the deduction had been disallowed in respect of the samples furnished to a buyer outside India. The assessee had divided the samples into three categories. One set of samples was kept at the Delhi office of the buyers, another set of samples was sent to Russia and the third set of samples was kept at the manufacturing unit of the assessee. The Assessing Officer had disallowed deduction in respect of the third set of samples which was retained by the assessee at his manufacturing unit and was shown in the closing stock. The third set of samples was not furnished to the foreign buyers. Sub clause (i) of clause (b) of Section 35B (1) was, thus, not attracted, because it was not a case of sending of samples by way of advertisement or publicity outside India.

(Paras 14)