(2007) 12 MAD CK 0014

Madras High Court

Case No: O.S.A. No. 5 of 2003

Eastern Trading Company, Eastern Chemicals and Minerals Pvt. Ltd., Universal Enterprises and Amka Trading Company		APPELLANT
	Vs	
Kalpana Lamps and Components Ltd. and S. Nandagopal		RESPONDENT

Date of Decision: Dec. 7, 2007

Acts Referred:

- Arbitration Act, 1940 - Section 30, 33
- Arbitration and Conciliation Act, 1996 - Section 21, 34, 34(2), 34(3), 75

Citation: (2008) 1 LW 814 : (2008) 3 MLJ 680

Hon'ble Judges: K. Raviraja Pandian, J; Chitra Venkataraman, J

Bench: Division Bench

Advocate: R. Murari, for the Appellant; R. Venkatavaradhan, for 1st Respondent, for the Respondent

Final Decision: Dismissed

Judgement

Chitra Venkataraman, J.
This appeal is against the order of the learned single Judge dated 11.4.2001 made in O.P. No. 565 of 1999,

confirming the award passed by the Arbitrator, thereby rejecting the application filed u/s 34 of the Arbitration and Conciliation Act, 1996. The

petitioners in O.P. No. 565 of 1999 are the appellants before this Court.

2. The respondents herein are engaged in the business of selling lamps and tube-lights. The appellants were acting as sole distributors of the

respondents herein since 1979 for the areas of Tamil Nadu and Pondicherry. It is an admitted fact that there was no written agreement between

the parties enumerating the terms of distributorship and the terms of their arrangement was to be seen from the trade practice and the conduct of

the parties. It is stated that in 1995, there was a change in the management of the respondent company and the Anchor Group of Companies took

over the control of the first respondent herein. Differences arose between the parties herein when the first respondent started withholding credits

due to the appellants herein. Due to the strained relationship, the parties entered into an arbitration agreement and appointed one

P.S.Swaminathan, Chartered Accountant, Chennai, as the sole Arbitrator. By agreement dated 9th September 1996 between the parties herein,

both parties agreed to file their respective claim statement and participate in the enquiry before the Arbitrator. The first respondent made a claim

for Rs. 1,45,40,712/- together with interest thereon till the payment was made. The appellants herein filed a counter claim of Rs. 96,38,794/-

exclusive of interest and denied its liability to pay the respondents. It is stated that before the proceedings concluded, the Arbitrator originally

appointed by the parties passed away. Thereafter, this Court appointed Mr.S.Nandagopal, Chartered Accountant, as the Arbitrator to continue

the proceedings. The Arbitrator passed the award on 24.4.1999 awarding a sum of Rs. 94,92,936/- in favour of the first respondent.

3. Before the Arbitrator, the appellant took a specific plea that the claim was barred by limitation. Learned Arbitrator pointed out that the parties

agreed to 31.3.1995 as the cut off date for the purposes of settlement of the dispute before the Arbitrator and that the balance sheet of 1995

exhibiting the liabilities amounted to sufficient acknowledgment of debts and hence, the claim was not barred by limitation. The amount due and

payable in the case of Eastern Trading Co., the first appellant herein, was a sum of Rs. 1,02,52,746/-. As regards Eastern Chemicals and

Minerals, the second appellant herein, a sum of Rs. 21,68,500/- was due. The amount due and payable by Universal Enterprises, third appellant

herein, was fixed at Rs. 16,56,282/-. Eastern Trading Company, first appellant herein, agreed its liability to the extent of Rs. 18,90,952/- as not

time barred. As regards interest, learned Arbitrator held that the interest paid by the first respondent herein to the bank against hundis accepted by

the appellants had to be reimbursed by the appellants. As regards the counter claim made by ""ETC"", the appellant Group, learned Arbitrator

rejected the claim except to an extent of Rs. 47,055/- being the credit agreed to by the first respondent against the supply of electrocast

refractories. On the question of set off, learned Arbitrator held that the appellant was entitled to a credit of Rs. 29,28,660/- as against a claim of

Rs. 35,40,343/- being the credit shown in the books of the first respondent on account of the appellants herein. Ultimately, the learned Arbitrator

held that the transaction between the parties in all aspects had been only on the basis of an oral agreement and the appellants had not produced

any written commitment to pay any trade discount and that the appellants had already filed a suit against the promoter of the respondent company

as regards the amount paid in several instalments. Thus, the Arbitrator finally arrived at the net amount payable at Rs. 94,92,936/-. The Arbitrator

awarded 18% interest per annum from the date of the referring the dispute to arbitration i.e., 9.9.1996, till the date of award and interest at 18%

per annum from the date of award till the date of payment.

4. The appellants herein challenged the award u/s 34 of the Arbitration and Conciliation Act, 1996, before this Court. By order dated 11.4.2001

made in O.P. No. 565 of 1999, the learned single Judge dismissed the petition filed to set aside the award. Referring to the decision of this Court

reported in 1951 MLJ 535 Rajah of Vizianagaram v. The Official Liquidator, Vizianagaram Mining Company Limited, Visakhapatnam and Ors.

Lahore Enamelling and Stamping Co. Ltd. Vs. A.K. Bhalla and Others, 1999 TLNJ 248 Swarna Paper Cutting Works and Anr. v. Indian

Express, learned single Judge confirmed the view of the Arbitrator that the claim was not barred by limitation and that the liability shown in the

balance sheet amounted to sufficient acknowledgment of the debts. Referring to the balance sheet, learned single Judge pointed out that proper

adjustment was given by the Arbitrator; as such, the contention of the appellants that the balance sheet figures had not been taken as a whole could

not be sustained. On the granting of interest, learned single Judge held that in the absence of any specific provisions on the payment of interest, it

was open to the learned Arbitrator to award interest. Taking the view that the scope of interference u/s 34 of the Arbitration and Conciliation Act,

1996 was very limited and that the Court was not sitting in appeal u/s 34, learned single Judge rejected the petition. Hence, the present appeal.

5. Learned Counsel appearing for the appellant made his submission on two fronts, one on the point of limitation and secondly that the award

passed were based on bills which did not tally with the set of bills given originally before the first Arbitrator. He pointed out that there was no

statement of claim. Consequently, he submitted that the award suffered from fundamental illegalities and liable to be set aside by this Court.

6. Learned Counsel submitted that the arbitration agreement and appointment of the Arbitrator was referable to the agreement written on 9th

September 1996. Therefore, the bills which were alive as on the date of reference alone could go for arbitration. Placing reliance on Section 21 of

the Arbitration and Conciliation Act, 1996, he submitted that the arbitral proceedings commenced on the date on which the request for reference

to arbitration was received by the respondents. Here, in this case, admittedly, on 9th September 1996, the parties agreed mutually to appoint an

Arbitrator for deliberation and hence, the proceedings commenced on 9.9.1996. Learned Counsel pointed out that going by the dates of the bills

as on the date of commencement of the proceedings, if the entire claim was time barred, the question of passing an award on the basis of the claim

did not arise. So too, the interest on this amount claimed.

7. The appellant pointed out that the second set of bills filed by the respondents, even on a cursory glance, showed that they were totally different

one. In these circumstances, the Arbitrator must have satisfied himself that the outstanding amount claimed by the respondents must be shown as

relatable to the bills. He pointed out that there was no acknowledgment of the liability as stated with reference to the letter dated 21.9.1994.

Referring to the balance sheet as on 31.3.1995, he submitted that the learned Arbitrator had not considered three items given as credit

subsequently. Hence, the Arbitrator ought to have taken note of the net amount alone for the purpose of resolving the issue. He pointed out to the

various documents relating to each one of the appellants and contended that mere amount tallying between the two bills does not give a reasoning

for passing an award.

8. Learned counsel, in this connection, placed reliance on the decision reported in Steel Authority of India Limited Vs. J.C. Budharaja,

Government and Mining Contractor, and Popat and Kotecha Property Vs. State Bank of India Staff Association, on the ground that the award

passed ignoring the period of limitation would be violating the public policy and hence liable to be interfered with u/s 34. Any award passed against

the statutory provisions or ignoring the same is against public policy and hence, he relied on the decision reported in Oil and Natural Gas

Corporation Ltd. Vs. SAW Pipes Ltd., and contended that the order in appeal confirming the award is totally erroneous and unsustainable. On the

question of interest, he referred to the decision reported in Krishna Bhagya Jala Nigam Ltd. Vs. G. Harischandra Reddy and Another, that in any

event, the award should carry a normal interest and not an abnormally high interest rate.

9. Per contra, Mr. Venkatavaradhan, learned Counsel for the respondents, pointed out that the agreement between the parties dated 9.3.1996

was on very wide terms. He submitted that the parties specifically agreed that the cut-off date for the purposes of arbitration was 31.3.1995.

Pointing out to the balance sheet which was placed before the Arbitrator for his consideration as regards the claims and counter claims, he

submitted that the schedule of sundry creditors in the case of the appellants included the name of the respondents herein, specifiying the amount

due. He submitted that the claim of the parties was decided in terms of the balance sheets of the parties herein; as such, no exception could be

taken to the award passed in terms of the acknowledged liability of the appellants.

10. Pointing out to the jurisdiction of this Court u/s 34 of the Arbitration and Conciliation Act, 1996, learned Counsel placed reliance on the

decision reported in Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., that the Apex Court has interpreted Section 34 of the Arbitration

Act, 1996 that the jurisdiction of this Court is not that of an appellate Court and that the jurisdiction is corrective only to the extent laid down u/s

34 as explained by the Apex Court. He submitted that the learned single Judge had correctly held that the jurisdiction u/s 34 was not that of a

Court of appeal and hence, no exception should be taken to the view of the learned single Judge in dismissing the petition filed by the appellants.

11. We heard the argument of the learned Counsel on either side and perused the materials on record. Before dealing with the contention of the

counsel herein, the provision of Section 34 of the Arbitration and Conciliation Act, 1996 relating to the scope of jurisdiction of this Court need to

be noted.

12. The relevant clauses of Section 34 of the Arbitration and Conciliation Act reads as follows:

34. Application for setting aside arbitral award:

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section

(2) and Sub-section (3).

(2) An Arbitral award may be set aside by the Court only if-

(a) the party making the application furnishes proof that-

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the

time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise

unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains

decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award

which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement

was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part;

or

(b) the Court finds that-

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation:- Without prejudice to the generality of Sub-clause (ii) of Clause (b), it is hereby declared, for the avoidance of any doubt, that an

award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of

Section 75 or Section 81.

(3) ...

(4) ...

13. Thus, it could be seen that an application u/s 34 of the Arbitration and Conciliation Act, 1996 can be filed only for setting aside the arbitral

award.

14. Dealing with the scope of Section 34 of the Arbitration and Conciliation Act, 1996, the Apex Court in the case of McDermott International

Inc. Vs. Burn Standard Co. Ltd. and Others, held thus:

In terms of the 1996 Act, a departure was made so far as the jurisdiction of the court to set aside an arbitral award is concerned vis-a-vis the

earlier Act. Whereas under Sections 30 and 33 of the 1940 Act, the power of the court was wide, Section 34 of the 1996 Act brings about

certain changes envisaged thereunder. Section 30 of the Arbitration Act, 1940 did not contain the expression ""error of law...."" The same was

added by judicial interpretation.... The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to

ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural

justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it

is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as the parties

to the agreement make a conscious decision to exclude the court''s jurisdiction by opting for arbitration as they prefer the expediency and finality

offered by it.... The arbitral award can be set aside if it is contrary to (a) fundamental policy of Indian law; (b) the interests of India; (c) justice or

morality; or (d) if it is patently illegal or arbitrary. Such patent illegality, however, must go to the root of the matter. The public policy violation,

indisputably, should be so unfair and unreasonable as to shock the conscience of the court. Lastly, where the arbitrator, however, has gone

contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute, would come within the purview of Section 34

of the Act.

15. It is a well established legal principle that so long as the arbitrator has decided the matter in accordance with the terms of the contract and has

acted within his authority, and according to the principle of fair play, the award of the arbitrator is ordinarily final and conclusive and power of the

Court to set aside the award is restricted to the instances set out u/s 34 of the Arbitration and Conciliation Act and the reappraisal of the evidence

by the Court is not permissible. Useful reference can be had to the judgments of the Supreme Court in M/s. Ispat Engineering and Foundry

Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro, and Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes

Ltd., .

16. Thus, under the provisions of the Act, if any one of the above contingencies is there in the award passed by the arbitrator, the Court exercising

the jurisdiction u/s 34 of the Act can set aside the award. However, it cannot take the role of the Arbitrator and pass an award.

17. As to the merits of the contentions on the question of plea of limitation raised by the appellants, it is seen that the learned single Judge pointed

out that the appellants had filed their balance sheet before the Income Tax authorities, wherein, there was a specific admission as regards the

liability towards the respondents herein, which amounted to sufficient acknowledgment of debts. Going by the cut off date agreed to between the

parties and considered by the learned Arbitrator, the learned single Judge rightly upheld the award holding that the claims were not hit by the

provisions of the Limitation Act.

18. However, we do not find any ground to uphold the contention of the appellant herein that the award was unsustainable on grounds of limitation

and hence the same suffers from patent illegality.

19. It may also be noted that the Arbitrator had rightly considered the balance sheet as a whole and reduced the outstanding amount payable by

the respondents to the appellants to arrive at the final figure. Learned single Judge, in paragraph 15 of the judgment, dealt with this aspect and

upheld the award. We confirm the order of the learned single Judge.

20. On the question of interest, it is not denied by the parties herein that there was no specific prohibition on the award of interest in the agreement.

Noting the same, learned single Judge rightly held that the award of interest could not be held to be contrary to the provisions of the Act.

21. Learned Counsel for the appellant, however, pointed out that as per the decision reported in Krishna Bhagya Jala Nigam Ltd. Vs. G.

Harischandra Reddy and Another, , the award of interest at 18% per annum for the period prior to and post award is totally against the decision of

the Apex Court. He placed reliance on paragraph 11 of the said decision to impress on the fact that in the overall scenario witnessing a reduction in

the interest rate, the learned Judge should have reduced the rate of interest and hence, seeks reduction of the same in terms of the said decision.

22. A perusal of the Apex Court judgment referred to above shows that taking note of the fact that after the economic reforms in our country, the

interest rates had substantially reduced, the Apex Court reduced the awarding of interest at 18% per annum during the pre-arbitration period, for

the pendente lite period and the future interest to 9% per annum. Taking note of the said decision of the Apex Court, we agree with the plea of the

learned Counsel for a reduction in the rate of interest that as against the interest awarded at 18% per annum by the Arbitrator, confirmed by the

learned single Judge for the period from 9.9.1996 to the date of award, i.e., 24.4.1999 and from the date of the award till the date of payment, be

reduced to 9% per annum. In the above circumstances, except for the reduction in the rate of interest awarded, we do not find any ground to

interfere with the order of the learned single Judge. Hence, the appeal stands dismissed. No costs. Connected C.M.P. Nos. 656 and 5698 of

2003 are closed.