Nanalal M. Varma and Co. Ltd. Vs Alexandra Jute Mills Limited

Court: Calcutta High Court

Date of Decision: May 14, 1987

Acts Referred: Arbitration Act, 1940 â€" Section 14, 30
Limitation Act, 1963 â€" Article 119, 12

Citation: AIR 1989 Cal 6

Hon'ble Judges: Chittatosh Mookerjee, C.J; Sudhanshu Sekhar Ganguly, J

Bench: Division Bench

Advocate: Bimal Kumar Chatterjee, for the Appellant; B.K. Bachawat and Barin Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

Chittatosh Mookerjee, C.J.
On April 19, 1973 the appellant and the respondent whose management had been taken over by the Central

Government u/s 18A of the Industrial (Development and Regulation) Act, 1951 had entered into a contract under which the respondent had sold

to the appellant goods whose agreed value was Rs. 84,867.71. In spite of demand the appellant did not pay the said amount. Purporting to rely

upon the arbitration clause contained in the contract, the respondent had applied to the Bengal Chamber of Commerce and Industry for

adjudicating by Tribunal of Arbitrators the dispute in respect of the non-payment of the said amount. Upon the receipt of the notice the appellant

had disputed the authority of the Tribunal of Arbitrators to adjudicate the said dispute, inter alia, on the ground that the subject-matter of reference

was not covered by the arbitration clause inasmuch as the said nonpayment did not amount to a dispute within the arbitration clause in question.

The Tribunal proceeded with the Reference and the appellant did not participate in the same.

2. The award having been given the appellant was served with a notice u/s 14(1) of the Arbitration Act. It had filed in this Court an application

under Sections 30 and 31 of the Arbitration Act for setting aside the said award. The appellant impugned the award on the ground that there was

no dispute within the meaning of the arbitration clause and, therefore, the award was without jurisdiction and was liable to be set aside.

3. By the order and judgment complained of in this appeal the learned trial Judge dismissed the appellant''s application for setting aside the award

on two grounds. In the first place, according to the learned trial Judge, the application for setting aside the award was filed beyond the time

prescribed by Article 119 of the First Schedule to the Limitation Act, 1963. Secondly the learned trial Judge was of the view that the nonpayment

of the said amount of Rs. 84,867.71 p. was a dispute within the meaning of the arbitration clause and, therefore, the award which was not

otherwise invalid was perfectly legal and binding upon the parties.

4. Mr. Chatterjee, learned counsel who has appeared on behalf of the appellant, has rightly pointed out that in computing the period of limitation

prescribed by Article 119 of the Limitation Act the appellant was entitled u/s 12 of the Limitation Act to exclusion of time taken by it in obtaining

the certified copy of the award. In the instant case the appellant had applied for a certified copy and after taking into reckoning the time spent in

obtaining a certified copy thereof the application u/s 30 of the Arbitration Act, filed by the appellant was within a period of 30 days from the date

of service of notice u/s 14(1) of the Act. This legal position is not disputed by Mr. Bachawat who has appeared on behalf of the respondent.

5. We have considered the matter ourselves and we hold that the learned trial Judge was not right in finding the application for setting aside the

award to be barred by limitation.

6. Having given our anxious consideration to the matter we are of the view that the learned trial Judge had applied the correct principles of law in

finding that in the instant case a dispute did arise between the parties which was covered by the arbitration clause of the contract and, therefore, the

award was not liable to be set aside on the ground that the same was beyond the scope of the arbitration clause. The learned trial Judge has

elaborately set out the case law on the point. Therefore, we do not propose to again set out the judicial precedent on the point in extenso,

particularly when the learned counsel appearing in either side relied on the same set of authorities which lay down the relevant principles. It is the

settled law that the existence of a dispute covered by the relevant arbitration clause in question is an essential condition and pre-requisite for

assumption of jurisdiction by an Arbitrator. A dispute implies an assertion of a right by one party and repudiation thereof by another, vide

observation in the case of Chandmull Goneshmull Vs. Nippon Munkwa Kabushiki Kaisha, and also the observation of Bachawat, J. in the case of

Nandram Hanutram Vs. Raghunath and sons Ltd., .

7. The material point in this case was whether by not paying the price of the commodities supplied, the appellant had repudiated the contract dated

the 19th April, 1978. Mr. Chatterjee, learned counsel for the appellant, was not very wrong when he submitted that every kind of non-payment of

the price stipulated in a contract containing arbitration clause cannot be considered to be a repudiation giving rise to a dispute. A non-payment may

arise by reason of one''s inability to pay while not disputing liability thereof. A non-payment, on the other hand, may be the result of repudiation or

denial of its liability to pay. Thirdly, a non-payment of price may mean failure to fulfill ones obligation under the contract to pay within the time

stipulated. When there is no repudiation or denial of liability a simpliciter non-payment or default in payment may not give rise to a dispute which

can be referred to arbitration. On the other hand, when there is denial of liability and by reason thereof payment is not made by a party from whom

demand is made by the other party, the same would be a case of repudiation. In our view the third kind of case mentioned by us, that is, failure to

pay within the time provided in the contract resulting in breach of terms of the contract depending upon the terms of the particular arbitration clause

could be validly the subject-matter of a reference to arbitration. In this connection we may refer to the observation of Rankin J. as his Lordship

then was, in the case of Mohini Kanta Saha Chowdhry and others Vs. Preonath Niyogi and others, Mohesh Chandra Das and others, Sheikh

Monaruddi and another and Mohesh Chandra Das and others to the effect that the existence of a dispute was an essential condition for the

Arbitrator''s jurisdiction, the dispute may be either in the acknowledgment of debts or as regards the mode and time of satisfying it. Incidentally

these observations were quoted in paragraph 6 of the Supreme Court judgment in the Union of India (UOI) Vs. Birla Cotton Spinning and

Weaving Mills Ltd., upon which Mr. Chatterjee learned counsel for the appellant placed very strong reliance. The decision of the Supreme Court

in the said case of Union of India v. Birla Cotton & Weaving Mills Ltd. (supra) was clearly distinguishable. In the said case before the Supreme

Court the Union of India while admitting the liability for the sum of Rs. 12,943.89 p. due to the other side withheld payment on the plea that a sum

of Rs. 10,625/- was due to the Union under another contract between the parties. Incidentally in paragraph 1 of the judgment of the Supreme

Court it was noticed that the dispute regarding the said amount of Rs. 10,625/- had been already referred to arbitration, but its proceedings had

remained adjourned sine die. The Supreme Court upheld the order of the High Court which in its turn had dismissed the Union of India''s appeal

against rejection by the trial Court of its prayer u/s 34 of the Arbitration Act for stay of the suit brought by the respondent for recovery of Rs.

12,943.89 p. In paragraph 3 of the judgment of the Supreme Court the terms of the agreement which contained the arbitration clause were set out.

The Supreme Court also indicated the three conditions which must co-exist for stay of a suit u/s 34 of the Arbitration Act, the second condition

being that the subject-matter in dispute in the proceedings sought to be stayed must be within the scope of the arbitration agreement. In paragraph

5 of their judgment the Supreme Court expressed their inability to agree with the contention urged on behalf of the Union that the refusal in the said

case to pay the amount was sufficient to raise a dispute ""in connection with the contract"" within the meaning of clause 21 of the agreement. The

Union of India having admitted its liability to pay the amount claimed in the suit brought by the company, the plea of the Union to appropriate the

sum due towards another claim under another independent contract was held to be not within the scope of the dispute ""under or in connection

with"" the contract under which the liability sought to be enforced had arisen. It may be also observed that in paragraph 6 of their judgment the

Supreme Court had distinguished the judgment of this Court in Uttam Chand Saligram v. Jewa Mamooji (AIR 1920 Cal 143) (supra) on the

ground that the Union in the case before the Supreme Court was not seeking to withhold under a claim of a right so to do. What the Union were

contending was that under the contract they were liable to pay the amount due but they will not pay because they had another claim unrelated to

the claim in suit against the company.

8. Viewed in the background of the above legal principles we have perused the correspondence between the parties and we are satisfied that prior

to the reference the appellant had been seeking to withhold payment under a claim of right to appropriate the amount towards its other dues. In

that sense there was a denial of the right of the respondent to receive payment under the contract which incidentally stipulated that the terms and

conditions of the transferable specific delivery contracts of the East India Jute & Hessian Exchange Ltd., Calcutta would apply to the contract

between the parties. Under the said terms the payment was to be made in the manner set out in R. 4 of Chapter 7.

9. Both parties relied upon the correspondence which passed between them. It would appear therefrom that after the respondent had performed

its part of the contract had demanded payment from the appellant. The appellant did not pay. Originally it had claimed that it would pay as arid

when it would receive payment from the Director General of Supply and Disposal, Govt. of India. Even after receiving the payment the appellant,

according to the respondent, did not pay. Thereafter on 31st August, 1978 the respondent had submitted a bill to the appellant for Rs. 84,867.71

p. The same remained unpaid. By writing various letters the appellant continued to exercise its purported right to withhold the said bill and

demanded the respondent to issue the Sales Tax Declaration Form or, in the alternative, to pay equivalent sum allegedly paid by the appellant as

sales tax in respect of the other transactions of the appellant and the mill before its management was taken over.

10. It is unnecessary to deal with separately these letters which passed between the parties. Upon a proper construction of these letters there can

be no escape from the conclusion that there was a denial on certain grounds on the part of the appellant. In (to) pay the amount claimed by the

respondent in terms of the contract of supply. It is no longer relevant that the said grounds were untenable. Therefore we conclude that there was a

dispute within the meaning of the arbitration clause and, therefore, the award was competent and otherwise valid.

11. In the result this appeal fails and is accordingly dismissed with costs.

Sudhanshu Sekhar Ganguly, J.

12. I agree.