

(2001) 07 CAL CK 0049

Calcutta High Court

Case No: A.P.O. No. 623 of 1998, A.Company No. 107 of 1999, A.Company No. 51 of 1998
and A.P. No. 74 of 1995

Food Corporation of India

APPELLANT

Vs

Suphala Laminators

RESPONDENT

Date of Decision: July 17, 2001

Acts Referred:

- Arbitration Act, 1940 - Section 14(1), 14(2), 41
- Civil Procedure Code, 1908 (CPC) - Section 151
- Limitation Act, 1963 - Section 5

Citation: (2001) 2 ILR (Cal) 126

Hon'ble Judges: S.N. Bhattacharjee, J; Ajoy Nath Ray, J

Bench: Division Bench

Advocate: Kamal Kr. Chattopadhyay, for the Appellant; Partha Sarathi Basu and K.R. Das,
for the Respondent

Final Decision: Dismissed

Judgement

Ajoy Nath Ray, J.

This is an appeal from a judgment and order passed by the Hon"ble Mr. Justice Amitava Lala, on March 17, 1998 dismissing an application made by the Appellant for transfer of an original Award dated December 14, 1985 made by the sole Arbitrator R.N. Mishra, to the City Civil Court from here.

2. With respect, we are in full agreement with the conclusions reached by his Lordship and we are of the opinion that the appeal should be dismissed. We give the facts and our reasons below.

3. The Arbitrator was a person working in the Department of the Appellant and his whereabouts to-day are not known. There is no statement in the pleadings as to whether he is to-day alive or dead, or where he resides now.

4. It is only known that one Ram Bahadur, is his successor in office, in the department of the Appellant, and that sometime on or about the May 2, 1995, under cover of his letter, the said Ram Bahadur, erroneously describing himself as the Sole Arbitrator, tendered the original Award and the correspondence to the Registry of this Court.

5. The Respondents had several contracts with the Food Corporation ; although disputes had arisen in regard to the present contract, containing the Arbitration Clause, attempts were made for withholding monies due in regard to other contracts of the same Respondent contractor.

6. Being aggrieved by these actions of the Food Corporation, the Respondent filed a writ petition in our Court, on or about the May 19, 1989 and was successful both before the First Court on November 10, 1994 and before the Court of Appeal on July 1, 1998. In both these judgments passed on the writ matter leave was granted by the Court for filing of the Award in question as per law.

7. The submission of the Food Corporation has been that the pecuniary jurisdiction of this Court being far above the subject-matter involved in the present reference, the Award should be transmitted to the City Civil Court, having pecuniary jurisdiction, so that the decree upon the Award does not, even if passed by the Court, remain challengeable as to jurisdiction, even after such passing of the decree upon Award.

8. The Respondents in appeal have submitted that the Award is not acceptable to them ; that if it had been filed in the proper Court, they would have, in any event, challenged the Award and asked for its setting aside. But according to them, the present application of the Food Corporation is subject to other challenges too and the application should fail, even if the Award is assumed to be good.

9. For the Appellant the case of [Satwant Singh Sodhi Vs. State of Punjab and Others](#), was relied upon. Paragraphs 6 and 7 from the judgment were placed. It was submitted that after the making of the Award, which is the signing and publishing of it, the Arbitrator becomes. functus officio. It was argued on that basis, in our opinion wrongly, that if the Arbitrator is functus officio, anybody and everybody can file the Award in Court. This is clearly wrong, and it is nowhere laid down in the said Supreme Court case.

10. This is an appropriate place to state why the said proposition is wholly against well-known arbitration law. One need merely look at Sub-section (2) of Section 14 of the erstwhile Arbitration Act, 1940 to see that primarily, it is the duty of the Arbitrator to file the award in Court.

11. Sub-sections (1) and (2) of Section 14 of the Arbitration Act, 1940 are set out below:

14. Award to be signed and filed.-

(1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award ;

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

12. It was next contended by the Appellant on the basis of the case of [Federal Republic of Germany Vs. S. Dey and Associates and Another](#), that making of the award available to Court is all that is needed for compliance of the arbitrator's duty to file in Court. Paragraph 51 of the judgment delivered by Dipak Kumar Sen, J. (as his Lordship then was) was placed before us.

13. The above proposition, with respect, is perfectly acceptable. But this does not show that anybody other than the arbitrator can make the award available to Court in compliance with Sub-section (2) of Section 14 quoted above.

14. On behalf of the Respondent the case of [Kumbha Mawji Vs. Union of India \(UOI\)](#), was relied upon. It is a decision given by a Bench of strength three. There are clear indications in the sixth para, of the judgment that for a party to be allowed to file the award in Court in compliance with Sub-section (2), specific authority in that behalf must have been given to that party by the umpire. Mere handing over of the award, even a signed copy of it, is not enough for inferring that authority.

15. In our respectful opinion, the said case of Kumbha Mawji is clearly applicable to the facts of this case. The derivation of Ram Bahadur's authority to file the award in Court is limited to the pleading, that he is the departmental successor in office in a department of Food Corporation, where the arbitrator was earlier working. Such succession in service career has nothing to do with arbitral authority. If a Chief Engineer is an arbitrator, the succeeding Chief Engineer, without anything more, neither becomes an arbitrator by reason of his employment, nor is he entitled to transmit the award to Court, by virtue of his having become a Chief Engineer only.

16. Mr. Bose appearing for the Respondent next gave us the case of Panchanan Dey, a Division Bench judgment of our Court presided over by Chakravarti, C.J.

In that case, during the pendency of an application made u/s 14(2) for a direction upon the arbitrator to file the award in Court, the arbitrator died. The Division Bench opined that in these circumstances, a combined reading of Section 151 of the CPC and Section 41 of the Arbitration Act, 1940, sufficiently clothed the Court with power to direct another person than the arbitrator to file the award in Court.

17. The Court opined, and we are in full and respectful agreement, that the provisions of Sub-section (2) of Section 14 are not exhaustive but only permissive. The words of the Sub-section will apply in terms, depending upon the continued life and availability of the arbitrator, but not otherwise.

18. On the basis of the above case also, the non-availability of Mishra, and the full and complete reasons therefor, not being on record at all, there is no scope for invocation of Section 151 of the Code of Civil Procedure. Only when the Arbitrator is shown to be not available, and not merely no longer in service, that the Court can invoke the residuary provisions for doing justice between the parties.

19. A point arises, whether we should utilise the residuary power of Section 151 in this case to return the award to the Food Corporation so that it can proceed on the basis of the said award in accordance with law ; the point also arises, whether, if the result of the return would only mean their filing it on the next day in the City Civil Court, we should allow the application and transmit the award to the City Civil Court ourselves, again applying the law of doing complete Justice between the parties, if there is no legal bar against the proposed order.

20. Mr. Bose, relying upon certain doubts raised by the Division Bench in Panchanan Dey's case, raised a point of fine distinction here, and that arises in this way. He submitted that u/s 41(a) of the Arbitration Act, Section 151 can be invoked and the residuary powers of court used, but for that there must be a properly constituted arbitration already before the Court. In the Calcutta case of Panchanan Dey, the arbitrator died pending the proceeding, which was an application u/s 14(2) already filed. But in our case there is no admittedly properly commenced pending proceeding where Section 151 is to be invoked. But the application made by the Food Corporation itself is sought to be got entertained by us on the basis of Section 151. Section 41(a) does not permit this, that is Mr. Bose's argument. Clauses (a) and (b) of Section 41 of the Arbitration Act, 1940 are quoted below:

41. Procedure and powers of Court.-Subject to the provisions of this Act and of rules made thereunder-(a) the provisions of the Code of Civil Procedure, 1908 (5 of 1908), shall apply to all proceedings before the Court, and to all appeals, under this Act, and (b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court.

21. Mr. Bose also pointed out to us that under Clause (b) of the said section only the Second Schedule of the Arbitration Act is applicable and the sections of CPC including Section 151 are not in the Second Schedule of the Arbitration Act.

22. We are not minded to accede to this superfine distinction drawn by Mr. Bose. Whenever an application in an arbitration matter is made to Court, provided there is no conflict with any express provision of law, the power of the court to do complete

and substantial justice between the parties, and to pass orders for that purpose, are always preserved and never destroyed. It is not that only when a proceeding, under some provision of law already made is pending before the Court, that the Court can invoke its residuary powers to do justice. Even when no proceeding is pending, the Court can use its residuary powers for entertaining, and thereby commencing or continuing a proceeding itself, and thus under Sub-section (a) of Section 41 the Court would be empowered to entertain an application, even after the death of the arbitrator, for a direction upon some other appropriate person to file the award in court. All proceedings in Section 41(a) include both a proceeding which is, and a proceeding which is to be. We are thus of the opinion that Mr. Bose was not correct in submitting that the court is unable to exercise its powers u/s 151, either to return the award to the Food Corporation, or even itself to short-circuit the procedure and transmit the award to the City Civil Court. We could, therefore, in a proper case, where the arbitrator is shown to be simply not available, ever accept the award and the papers from an appropriate person, who is not, and who never was, the arbitrator. But there arises another point of very great substantial importance here.

23. The award, as we have said, was made on December 24, 1985. The Respondent's writ application was filed much more than three years later on May 19, 1989. We were not shown any order of restraint which prevented the filing of the award in Court even during the pendency of the writ proceedings. In spite of there being complete liberty to have the award filed in an appropriate court, nothing was done until Ram Bahadur wrote his letter in 1995. That was nearly 9/10 years after the award had been made.

24. Is it the law that an arbitrator, assuming that Ram Bahadur was the arbitrator, although he was not, can file an award in Court as late as he pleases ? Are ordinary time limits as prescribed by reason and the Limitation Act not applicable in this situation in any manner whatsoever ?

25. The standard law, as is usually stated, in our respectful opinion, without proper examination of the provisions, is that, there is no time limit for filing of the award by an arbitrator in Court.

26. We respectfully differ with this proposition. In our opinion, a transmission of an award by an appropriate person to the registry of our court is an application, for taking it on file, and proceeding upon it subsequently, within the meaning of the Limitation Act, 1963. The filing of a serious document in a Court department often attracts limitation. The basic example of this is a plaint. The plaint, on its tender and acceptance, causes the issuance of the writ of summons. The award, under the Act of 1940, on its transmission, causes the issuance of the Court's notice u/s 14(2), to the parties.

27. But even thereafter, if it appears that the award has been filed beyond the period of three years, which is the residuary period of limitation, the award would

have to be left unpronounced upon, as it has been tendered to court too late. Just as a plaint filed too late results ultimately in its dismissal, so also an award transmitted too late, would result in its stultification. We are of the opinion, that the transmission of an award to Court for filing, has in built within the process of transmission, an application to the court to take it on file, and to proceed on it, on the basis that it has been appropriately filed, upto the point of passing a decree upon it by way of a judgment, and then on to eviction also, if necessary.

28. One of the factors which the court will take into account, when considering whether the award has been appropriately filed or not, is whether it has been tendered within three years of the time when it could have been tendered in the first place. The tender of award not being a suit, it is subject to Section 5 of the Limitation Act but these questions of condonation do not arise at all in the appeal. We have taken the view of setting a time limit to the filing of an award, inter alia, because it is unwise and against public policy to let awards gather dust at the will of the arbitrator only (even if he has been fully paid), aided by the successful party, and if the losing party does not cause the award to be filed, to pare the possibility to that losing party being harassed, very ate, may be even after 10 years, by an old, but stile binding, award.

29. We are thus of the opinion that the award tendered by Ram Bahadur has become stultified. No question of its return or transmission arises.

30. The appeal is thus dismissed. The Respondent will be entitled to the costs both before us and in the court below.

31. Liberty is granted to the Appellant to take away from the court the original award upon filing loco copies.

32. All parties and all others concerned to act on a signed Xerox copy of this dictated order on the usual undertakings.

S.N. Bhattacharjee, J.

33. I agree.