Shiva Jute Baling Ltd. Vs Hindley and Company Ltd.

Court: Calcutta High Court

Date of Decision: Feb. 4, 1953

Acts Referred: Arbitration (Protocol and Convention) Act, 1937 â€" Section 5, 6(2), 7(1)
Arbitration Act, 1940 â€" Section 33, 34, 35, 35(7), 36(2)
Contract Act, 1872 â€" Section 73, 74
Sales of Goods Act, 1930 â€" Section 61

Citation: (1953) 1 CALLT 65 : 57 CWN 573 : (1955) 1 ILR (Cal) 29

Hon'ble Judges: Chakravartti, C.J; Sarkar, J

Bench: Division Bench

Advocate: S.M. Bose, General and R.C. Deb, for the Appellant;H.N. Sanyal and R.K. Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

Chakravartti, C.J.
Two points have been urged in this appeal on behalf of the Appellant, while the Respondent has urged a point of its

own. The Appellant has contended that the award sought to be enforced is void, (a) because it was given after proceedings u/s 33 of the Indian

Arbitration Act had been commenced by the Appellant and notice of such proceedings had been given to the arbitrators, and (b) because the

award allows damages in contravention of the Indian Contract Act. The Respondent has contended that no appeal lies.

2. The facts are as follows: On June 18, 1946, the Appellant company, as the seller, entered into a contract for the sale of a quantity of jute to the

Respondent as the buyer, the goods to be shipped to Rio de Janeiro. The contract provided that the shipment was to be ""when freight available"".

There was a default clause which provided that in the event of default of tender or delivery, the seller would pay to the buyer ""as and ""for liquidated

damages 10 s. per ton plus the excess, if any, ""of the market value over the contract price"". The contract proceeded to provide that the market

price to be taken into consideration would be the price prevailing in London on the date following the date of default and it provided further that

the contract would he deemed to be performed in London and would be governed by the English Law. It is not disputed that the Appellant

delivered only thirty-nine of the five hundred bales contracted to be sold and did not deliver the balance on the plea that the contract had lapsed.

On July 14, 1949, the Respondent referred the dispute between the parties to the arbitration of the London Jute Association, as provided for in the

contract, and notice of the reference was served on the Appellant on July 27, 1949. It appears that on August 10, 1949, the Appellant retaliated

by commencing a proceeding u/s 33 of the Arbitration Act in this Court and gave notice of that proceeding to the arbitrators in London, first, by a

telegram on August 13, 1949, and, secondly, by a letter on August 17 following. In spite of the notice of the proceeding u/s 33 having been given,

the arbitration proceeded and an ex parte award was made on October 17, 1949. The application u/s 33, after having been adjourned from time

to time, was finally adjourned sine die on November 23, 1949. It will be noticed that before the application u/s 33 was finally adjourned, the

award had already been made.

3. The award is one to which the Arbitration (Protocol and Convention) Act, 1937, applies. On November 30, 1951, the Respondent made an

application to this Court u/s 5 of the Act, praying that the award be filed in this Court, that notice be issued to the Appellant to show cause why the

award should not be filed and that judgment be pronounced in accordance with the award and a decree be passed accordingly. The notice of

motion served in connection with that application, however, stated merely that the Appellant was to show cause why the. award should not be

filed.

4. Before the learned Judge who had occasion to consider the application, the same two points as urged before us were taken. He overruled them

both and by his judgment, dated January 14, 1952, made an order that the award should be filed and that there should be a judgment in terms of

the award. The decree, as drawn up, however, omitted the direction regarding the filing of the award, but at the same time provided for the costs

of filing it. It is from that judgment that the present appeal has been preferred.5. It was contended on behalf of the Respondent that no appeal lay at

all, inasmuch as the learned Judge had not made any. order for filing the award which had been incorporated in the decree. It was also contended

that a decree having already been passed in terms of the award no appeal could lie any longer at all, except to the extent provided for in Section

6(2) of the Arbitration (Protocol and Convention) Act, which was not the case here. In my opinion, this contention is not correct. The present case

is not governed by the Arbitration Act and, therefore, strictly speaking, the question as to whether an order directing the award to be filed had

been specifically passed or not is not very material. It is not as if a right of appeal is given by the statute only from an order filing or refusing to file

an award, and no such order was passed. But I might observe that in cases arising under the Second Schedule to the CPC before its repeal, it had

been held that a mere omission to make a specific order directing the award to be filed would not defeat a right of appeal from such an order

when, in fact, a judgment had been passed on the award. The reasoning of those decisions is that a judgment having been passed in accordance

with the award, it could have been passed only upon the footing that the learned Judge held that the award ought to be filed and that being so, the

omission to give a specific direction to that effect would be only an accidental one which could not affect the right of appeal which a party had

under the statute. Those decisions will not in terms apply to the present case, inasmuch as Section 39 of the Indian Arbitration Act which provides

for appeals from certain orders made under that Act has no application here. The present appeal can be defended, if at all, under Clause 15 of the

Letters Patent, which gives a right of appeal from a judgment of a Judge, sitting singly, on the Original Side of this Court. There can be no doubt

whatever that there has been a judgment in this case Mr. Sanyal contended that although a judgment had been delivered, something else had been

done, namely, a decree had been passed and since a judgment could not be dissociated from a decree and since no appeal could lie from the

decree itself, in the circumstances of the present case by reason of Section 6(2) of the Arbitration (Protocol and Convention) Act, 1937, there

could be no independent right of appeal from the judgment. He also contended that by a mere order directing the award to be filed, assuming that

such an order could be read into the terms of the decree and its existence in the judgment could be recognised, no rights of the parties had been

finally determined and consequently such an order could not be treated as a judgment. I am unable to accept either of those contentions. It is quite

true that a decree has been passed, but the decree has not wiped out the judgment. Besides, the bar that when a decree has been passedÃ¯Â¿Â½an

appeal lies only against the decree on a limited ground but no other appealÃ¯Â¿Â½applies only when there is a valid agreement and a valid reference

and cannot apply when the validity of the reference itself is challenged. In the second place, it is not correct to say that an order, directing an award

to be filed, does not determine any rights of the parties. The present case is a good illustration of the fact that very substantial rights of the parties

may be determined, because unless the Court holds the award to be a good award, when it is challenged, it cannot direct it to be filed at all. In the

present case there had been, if I may use the expression, a two-pronged attack on the award, both of which were repelled by the learned trial

Judge and when he finally directed the award to be filed, as he certainly did at least by his judgment, he, in my view, determined the rights of the

parties and pronounced what can properly be called a judgment for the purposes of Clause 15 of the Letters Patent. I, accordingly, hold that the

contention of the Respondent that no appeal lies is not tenable.

6. Passing on now to the points urged by the Appellant, the first one can, in my view, be disposed of briefly and on the same ground as that given

by the learned trial Judge. The point is that the Appellant had made an application u/s 33 of the Arbitration Act and had given notice of that

application to the arbitrators in London. It was contended that since even after having received such notice, they had gone on with the proceedings

and made their award, the award came within the mischief of Section 35(7) of the Act. That section is in the following terms:

No reference, nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the

reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the

reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of

proceedings is granted u/s 34, be invalid.

7. The contention of the Appellant is that his proceeding u/s 33 was not stayed and, therefore, all proceedings had in the arbitration matter after

service of notice on the arbitrators were invalid.

8. Speaking for myself, I have very great doubt as to whether an application u/s 33 at all lay in the circumstances of the present case, where the

English Law applied and the contract was to be performed and the arbitration, if any, to be held in London. The Arbitration Act applies only to

India and I would require very strong reasons to hold that a proceeding u/s 33 of the Act is intended to affect and invalidate arbitration

proceedings held after its commencement in another country, or that the effect of Section 35 can be to render an award given in such proceedings

invalid. The learned Advocate-General conceded that, by itself, a proceeding u/s 33 of the Indian Act could not operate in any manner upon

arbitration proceedings had in England, but what he contended was that when the party in whose favour the award was given came to India to

enforce it here, Section 35 could at that stage be set up against him and he might be confronted with the effect which that section had brought

about. As I have said, I have grave doubts as to whether Section 35 of the Indian Act can have that result on an English award, but it is not

necessary for me to pursue that point further, inasmuch as, in my view, the Appellant''s argument defeats itself. As the learned trial Judge has

pointed out, in order that Section 35 may apply, it is necessary that the legal proceedings contemplated by the section must be ""upon the ""subject-

matter of the reference"", and unless the subject-matter of the legal proceedings and that of the arbitration proceedings were identical, or, at least,

unless the subject-matter of the legal proceedings covered the subject-matter in the other proceedings, the section could not possibly operate. The

prayers in the application u/s 33 in the present case were for a declaration that the arbitration agreement, if any, was void ab initio on the ground of

uncertainty, a further declaration that there was in fact and in law no contract between the parties on account of mutual mistake and for an

adjudication upon the existence and validity of the arbitration agreement. The learned trial Judge has held that the relief asked for in the proceeding

u/s 33 was a declaration of the initial and fundamental invalidity of the arbitration agreement and that question, he has held, could not be, and was

not, the subject-matter of the reference. The learned Advocate-General tried to meet that reasoning of the learned Judge by saying that so far as

the first declaration was concerned, namely, the declaration as to the invalidity of the agreement on the ground of uncertainty, it raised, in view of

the facts stated in para. 6 of the application, only a question of construction. He pointed out that the uncertainty pleaded was the uncertainty

attaching to the clause ""when freight available"", and his argument was that that clause might, on one construction, be read as contemplating a case

where freight would be available within a reasonable time, although on another construction it might be read as contemplating a case where freight

might be available at some indefinite point of time in future. That being the nature of the uncertainty pleaded, the learned Advocate-General''s

contention was that the question was merely one of the true construction of the agreement, which was within the powers of the arbitrators under

the general law and also within their powers under the arbitration clause in the present case. That clause, I might point out here, speaks of ""any

claim or, dispute ""whatever arising out of or in relation to this contract or its ""construction or fulfillment. Assuming that the learned Advocate-

General has a plausible answer as regards the first declaration prayed for, he, in my view, has none as regards the second declaration. That, it will

be remembered, is a declaration that there was in fact and in law no contract between the parties on account of mutual mistake and it could not

certainly be said that the arbitrators could ever investigate the question as to whether the parties had contracted under a mistake or not. The

learned Advocate-General did make an attempt to argue that even this was a question of construction, but he said that the mistake pleaded being

that one party thought that certain terms and conditions would be a part of the contract, while the other party thought that they would not be such

part, the arbitrators could well investigate and determine what the real contract between the parties was. In my view, to put the dispute between

the parties, as envisaged in the application in that form, is not to represent it correctly. We are not concerned here as to whether the contention is

well-founded or not, but there can be no doubt that what the Appellant intended was to attack the very basis of the agreement and to establish that

no legal basis having ever existed, no contract ever came into existence at all. Such a question, it is needless to say, could never be within the

purview of any investigation by arbitrators. I am, therefore, of opinion that the learned Judge was right in holding that even on the assumption that

Section 35 was applicable, the terms of the section were not satisfied in view of the facts of the case. The first ground taken on behalf of the

Appellant must, therefore, be overruled.

9. The second ground relates to the damages awarded. I have already quoted the relevant provision in the contract. The award is expressed in the

following terms:

That sellers defaulted on May 3, 1949, and must pay to buyers the difference between the contract price of Ã¯Â¿Â½49-15 per ton plus 30 s. per ton

storage charges, namely, Ã¯Â¿Â½ 51-5 (fifty-one pounds five shillings) per ton and Ã¯Â¿Â½102 (one hundred and two pounds) per ton being the market

value on May 4, 1949, plus 10 s. per ton for liquidated ""damages in accordance with Clause 14(B)(i) of the L.J.A. Contract, say Ã¯Â¿Â½ 102-10 (one

hundred and two pounds ten shillings) per ton.

10. It was admitted before the learned Judge and also admitted before us that 14(B)(i) was a mistake for 12(a).

11. The Appellant''s argument was put in the following form. In order that a foreign award might be enforceable under the Arbitration (Protocol

and Convention) Act, it had to satisfy certain conditions laid down in Section 7(1) and the further condition that its enforcement was not to be

contrary to the law of India. The award in the present case was contrary to the law of India, inasmuch as, in addition to the difference between the

market price and the contract price, which the Respondent could be legally entitled to in the event of default under the law of India, it had also

been awarded a further sum which was called liquidated damages. The argument was that under Sections 73 and 74 of the Indian Contract Act, a

party could recover, upon a breach of contract, only reasonable compensation and reasonable compensation could be only the difference between

the market price and the contract price. But where an award gave the party entitled to claim damages not merely reasonable compensation as

warranted by Sections 73 and 74, but also something further, it plainly contravened the Indian law and was therefore, unenforceable u/s 7(1) of the

Arbitration (Protocol and Convention) Act.

12. Before S.R. Das Gupta, J., the argument does not seen to have been put forward in quite the same form. It seems to have been argued before

him that if the whole amount had been awarded as liquidated damages, it would be perfectly in order, but if what the arbitrators had done was to

award compensation and also liquidated damages, it would be contrary to law. On that contention being raised the argument seems to have

assumed a grammatical form as to whether the words ""for liquidated damages"" governed all the component sums of the total amount awarded or

were limited in their application to the ten shillings per ton. The construction which the learned Judge put upon both Clause 12(a) of the contract

and the award made by the arbitrators was that they purported to give, and had in fact given, the whole. amount as liquidated damages. Before us,

however, as I have already stated, the contention of the Appellant was put in a somewhat different form. It was said that as soon as the arbitrators

gave the Respondent the difference between the market price and the contract price, they exhausted all they could lawfully give under the Indian

Law and as soon as they added something further by way of liquidated damages, they overstepped the law and gave an award which was

unenforceable in India.

13. It is perfectly clear that unless the Appellant company can make out that the award is on the face of it bad, in other words, that it cannot be in

accordance with the Indian Law in any circumstances, it cannot succeed. It is hardly necessary to point out that it is nowhere laid down in the

Indian Contract Act that the difference between the market price and the contract price is the invariable maximum which the party, entitled to

damages upon a breach of contract, can in any circumstances claim. As it has often been tersely put, the test is only a presumptive test. It follows

that merely because an agreement provides for, or an award gives, something more than the difference between the contract price and the market

price, it cannot be said that the provision or the award is contrary to the law of India.

14. Mr. Sanyal, who appears on behalf of the Respondent, pointed out that to the difference between the contract price and the market price,

some further amount might, in a particular case be added on account of special damages. He also drew our attention to Section 61 of the Indian

Sale of Goods Act which provides that, nothing in that Act shall affect the right of the seller or the buyer to recover interest or special damages in

any case where by law interest or special damages may be recoverable.

15. It is quite true that, taken by itself, Section 61 does not seem to have in view the terms which the buyer and the seller may put into a Contract,

but seems rather to be contemplating a further claim which the party entitled to damages may make after a breach has occurred. But, in any event,

it indicates that recovery of special damages is perfectly legal, notwithstanding the limits laid down in Sections 73 and 74 of the Indian Contract

Act and if that be so, provision for some amount in addition to the difference between the market price and the contract price, either in an

agreement or in an award, cannot be said to make the agreement or the award invalid on the face of it. It follows that so far as the scheme of the

damages provided for in the contract is concerned, there is nothing per se illegal in it. What amount will actually be claimable under it by one party

or the other, is essentially a matter for investigation and determination by the arbitrators upon a consideration of the facts of the case. Mr. Deb,

who appears for the Appellant with the learned Advocate-General, referred to the terms of the agreement and contended that, under those terms,

the buyer was to get ten shillings per ton as liquidated damages in any event, although the market price might go down. His contention was that if

the market price went down so that the difference between that price and the contract price would not be to the disadvantage of the buyer, the

agreement provided that even then the buyer would get a certain amount as liquidated damages and such a provision, he contended, was wholly

outside the contemplation of the Indian Contract Act. He reinforced his argument by saying that the language to be found in the agreement was the

language used by commercial people in respect of matters with which they were familiar and which always involved certain well-known concepts,

and since such commercial people were speaking of the difference between the market price and the contract price, they must be presumed to

have referred to that difference as the reasonable compensation, normally claimed and allowed and since they added something more, they must be

presumed to have provided for not merely reasonable compensation but something further which could only be something in the nature of a

penalty. In my view, the answer to that argument is plain. The market value might go down or it might not. Simply because in one of many possible

contingencies a part of the provision contained in the agreement might turn out to be such that effect could not be given to it, it can by no means be

said that the provision is, on the face of it, bad and must be bad in all circumstances. It cannot be denied that in the majority of the contingencies

that one can think of, the provision would be valid and whether, in the circumstances before them, the whole of the provision could be given effect

to it would be for the arbitrators to consider. I am clearly of opinion that the mere addition of some amount to the difference between the market

price and the contract price does not make the agreement or the award founded upon it invalid, because it can by no means be said that such a

provision must be in contravention of the Indian Law in all circumstances. What the agreement means evidently is that the parties took into account

the various incidents of the transaction, such as sub-sales and the like, as also the contemporary condition of the trade, and made a pre-estimate of

the possible loss that would occur in case of a breach which, they thought, would not or might not be co-extensive with the difference between the

contract price and the market price and for that reason they added a further sum. There is nothing in the law of India to forbid such a pre-estimate

or an award on its basis, if the relevant circumstances are found to exist.

16. Mr. Deb also contended that the award gave no reasons upon which its several component parts were based, but merely referred to the terms

of Clause 12(a). His argument was that the award could not be justified on the ground that the arbitrators had taken into consideration the special

circumstances of the case and that they had, in the exercise of their judgment, awarded various sums under various heads on a finding that

circumstances, such as would make the award of such sums valid under the Indian Law, existed. According to Mr. Deb, the arbitrators had merely

followed the terms of the agreement and, therefore, although theoretical reasons could be found for supporting the agreement as such, none could

be available in favour of the award. As I have already pointed out that even, taken by itself, the agreement cannot be said to be invalid on the face

of it and, therefore, even if the award be merely in terms of the agreement, Mr. Deb is not in a better position with regard to the award than he is

with regard to the agreement. The whole argument, however, it seems to me, is utterly unreal, inasmuch as the arbitrators were not required to give

any reasons and there is no ground for assuming that they had not found the relevant circumstances to be existing.

17. In my view both the grounds urged on behalf of the Appellant fail. The appeal is accordingly dismissed with costs.

18. Certified for two counsel.

Sarkar, J.

19. I agree.