M/s. Textile Machinery Corporation Ltd. Vs M/s. Kichcha Sugar Company Ltd.

Court: Calcutta High Court

Date of Decision: Jan. 31, 1989

Acts Referred: Arbitration Act, 1940 â€" Section 30
Contract Act, 1872 â€" Section 74

Citation: (1989) 2 CALLT 101

Hon'ble Judges: Siba Prasad Rajkhowa, J; Monoranjan Mallick, J

Bench: Division Bench

Judgement

Monoranjan Mallick, J.
This is an appeal against the judgment and decree passed by the Assistant District Judge, 5th Court, Alipore on

10th March, 1988 in Title Suit No. 12 of 1985 directing the Respondent to get a decree of Rs. 1 lac against the appellant with costs together with

interest on the basis of the award passed by the Arbitrator, Mr. Justice L. P. Nigam on 12th February 1985 and partially setting aside the part of

the award by which the Arbitrator rejected the claim of the petitioner/respondent regarding the claim of the liquidated damages and directing the

remission of the award for reconsideration of the Issues Nos. 3 and 4 decided against the respondent by new and qualified Arbitrator as to be

decided by the contesting parties through their mutual consent.

2. The facts may be briefly stated as follows:

By an agreement, dated 3.2.72 between the plaintiff/respondent and the defendant/appellant, dated 3.2.72 the appellant agreed to supply, erect

and commission machinery and equipment specified in schedule "A" to the said Agreement and items and matters incidental thereto and agreed to

erect and commission with entire satisfaction of M/s. Textile Corporation Ltd. for a total consideration of Rs. 1,57,96,300 on terms and conditions

as contained in the agreement. It has, inter alia, been agreed that the machinery and equipment would be given at the site by 15th October, 1973

and in which respect time shall be the essence of contract, that the guarantee shall not be deemed to have been fulfilled until within one full crushing

season available after commissioning of the machinery and equipment it handles and processes through 2000 tonnes sugar cane for a period of 7

consecutive days, that the sellers shall provide guarantee that the machinery and equipment to be supplied by them will be of standard quality,

design and workmanship and that the parties agreed to and pre-estimated and determined the quantum of liquidated damages to be paid by the

respondent to the petitioner in case the respondent defaulted in completing the installing and commissioning of the materials and equipment by the

agreed date. It has also been agreed upon that in case of any default the liquidated damages and compensation payable to the respondent shall be

calculated at the rate of 1/2% for the delay of every fortnight subject to a maximum of Rs. 7,89,832 being 5% of the entire contract price and that

the respondent would furnish a bank guarantee for a Sum of Rs. 7,89,832 assuring the performance of the agreement.

3. In order to ensure due performance of the agreement on the part of the appellant, the appellant executed two guarantee bonds. The appellant is

alleged to have committed breach of contract and to have made default by not completing the erection and installation and failed to make

commissioning of the plant and machinery within 15.10.73. The same was commissioned after delay of more than 10 fortnights, i.e., on 10th

March 1974 thereby causing loss and damages to the production and as such the agreed amount of Rs. 7,89,832 by way of compensation

became due and payable to the respondent in terms of the said agreement which sum or portion thereof the appellant failed to pay inspite of

repeated demands.

4. There was another agreement, dated 28.7.72 by and between the parties by which the appellant agreed to supply, erect and commission

machinery and equipment specified in Schedule "A" annexed to the said agreement that the time agreed upon for commissioning of the boiler under

the agreement, namely, by 15,10.73 was important and that is why it was made the essence of the contract.

5. By an agreement, dated 1.2.79 made between the parties a reference of dispute between the parties was made to Mr. Justice L. P. Nigam,

retired, on terms and conditions contained therein. By the award the sole Arbitrator has awarded to and in favour of the Respondent a sum of Rs,

1 lac with interest at the rate of 6% per annum to be calculated from 1.2.1979 till the date of payment or the date of decree that may b- passed on

the basis of the award whichever is earlier. The Arbitrator rejected the claim of the respondent on account of admitted delay in commissioning the

plant, machinery and boilers. It is complained that the learned Arbitrator misdirected himself by holding that the time was not the essence of the

contract and that the Respondent was not entitled to the agreed pre-estimated liquidated damages.

6. This suit has, therefore, been filed by the Respondent before the learned Judge praying for passing a decree to the extent of Rs. 1 lac and

interest at the rate of 6% as awarded by the Arbitrator and also for setting aside that portion of the award in which the prayer for liquidated

damages for non-commissioning of the plant and machinery within specified period was refused by the Arbitrator.

7. The suit has been contested by the present appellant by submitting an affidavit-in-opposition contending, inter alia, that the time was not the

essence of the contract, that there was no pre-estimation of damages, that the stipulated amount in the contract was by way of penalty and not by

way of genuine pre-estimated damages, that the decision of the Arbitrator on the disputes is final and binding and the same cannot be reopened

and that the Court cannot sit in over the decision of the Arbitrator. It has, further, been contended by the present appellant in the affidavit-in-

opposition that the parties were agreed to abide by the decision of the Arbitrator, that the delay in commissioning of the plant was due to the

circumstances beyond the control of the appellant as has been held by the Arbitrator, that the respondent/plaintiff has totally failed to prove before

the Arbitrator that it had suffered any loss or damage, that the appellant was willing to give performance trial but the plaintiff/respondent did not

give proper opportunity for making performance trial, that the contract between the parties and the repeated extensions of time will show that

neither the parties cited or considered that the time was of the essence of contract and that factual delay does not mean delay in law under the

terms of the contract due to the facts and circumstances beyond the control of the appellant. It was also denied that the finding of the Arbitrator

was perverse or based on speculation or conjecture and was contrary to the facts and evidence on record and that the Arbitrator committed any

error in rejecting the claim for liquidated damages, compensation and interest.

8. Against such affidavit-in-opposition, the Respondent has also filed a rejoinder affidavit which is an affidavit-in-reply in which all the allegations

contained in the original application before the learned Trial Judge have been reiterated. The Trial Judge has in his judgment upheld that part of the

award in which the Arbitrator has awarded of Rs. 1 lac in deciding the issue Nos. 5 and 6. He has, however, held that the Learned Arbitrator was

not right in holding that the time was not the essence of the contract, that the decision in regard to the Issue Nos. 2 and 3 does not appear to be

well reasoned and in the facts and circumstances the Learned Trial Judge set aside those two issues and remitted that part of the dispute between

the parties for decision by a new Arbitrator to be appointed with the consent of both the parties and upheld that part of the award of the Arbitrator

in Which he has awarded a compensation of Rs. 1 lac together with interest and has passed a decree for that amount on the basis of that part of

the award with interest and set aside the other part of the award on the finding that the portion that has been affirmed and that has been set aside is

severable.

9. Being aggrieved by the above order passed by the Learned Trial Judge that appellant M/s. Textile Machinery Corporation Ltd. now known as

Texmaco Ltd. has preferred this appeal. Affidavit of Service has been filed by the appellant to show that the notice of this appeal has been duly

served upon the Respondent but the Respondent has not entered appearance to contest this appeal.

The appeal has, therefore, been heard ex parte.

10. It is urged on behalf of the appellant that the Court cannot sit in appeal over the award of the Arbitrator, that the petition of the respondent did

not disclose any valid ground for setting aside the award, that the decision of the Arbitrator on the question of facts are final and binding and cannot

be reopened and such decision on the question of facts is not a ground for setting aside the award, that the decision of the Arbitrator on question of

law which have been specifically referred to him are final and binding even if they are not legal, that the judgment and decree of the Learned Judge

is inconsistent as he has held that the award of Rs. 1 lac made by the Learned Arbitrator is arbitrary but has upheld the said portion of the award,

that the award was not severable and the Learned Judge should not have severed the award and upheld the portion of the awar6 which was in

favour of the respondent and that the Learned Judge has no jurisdiction to change the Arbitrator appointed by the parties as mentioned in the

agreement by new and qualified Arbitrator and the expression in the judgment namely, ""a new and qualified Arbitrator"" is also vague and uncertain.

11. The first point far decision in this appeal is whether the Learned Assistant District Judge, Alipore was justified in passing a decree in respect of

the part of the award and setting aside the decree in respect of other part and remitting the same for fresh decision by any other qualified and

competent Arbitrator. Ordinarily, the whole award is liable to be set aside in whole when it can be struck down under any of the Clauses of

Section 30 of the Arbitration Act, but the Supreme Court has approved the setting aside the part of the award where the error which has occurred

in the award relates to a matter which is definite and separate from the rest of the award, the part of which is involved being separable from that

which is valid. In such case, the Supreme Court has observed that there is no justification for setting aside the entire award. This is what has been

decided in The Upper Ganges Valley Electricity Supply Company Ltd. Vs. The U.P. Electricity Board, and Mattapalli Chelamayya and Another

Vs. Mattapalli Venkataratnam and Another, In this case the award of the Arbitrator shows that the two board claims of the respondent was

referred for adjudication before the Learned Arbitrator, namely, (1) the claim for liquidated damages of Rs. 7,89,832 on account of non-

commissioning of the plant and machinery as per agreement dated 3rd February 1972 far which the Bank guarantee No. 106 of 1972 was

furnished and (2) claim for Rs. 7,89,832 on account of failure to give guaranteed performance as per the said agreement for which the Bank

guarantee No. 220 of 1973 was furnished. As regards the first claim the Learned Arbitrator dismissed it in view of his finding in the Issue Nos. 1

and 2.

12. As regards the second claim he came to the finding that the present appellant failed to give guaranteed performance but for the absence of any

sufficient evidence being adduced by the present respondent as regards the quantum of damages assessed the damages at Rs. 1 lac and awarded

the same in favour of the respondent and against the appellant with interest as stated in the above.

13. Therefore, it is clear that the two claims were definite and separate claims and thus two claims were severable and the Learned Assistant

District Judge did not commit any illegality by upholding the award in part.

14. Therefore, only because be has not set aside the whole award and only set aside the part of the award the judgment passed by the Learned

Assistant District Judge cannot be held to be vitiated in view of the above decisions of the Supreme Court. Secondly, Mr. Mitra appearing on

behalf of the appellant has raised a serious challenge to the judgment of the Learned Assistant District Judge on the ground that he has committed a

great illegality in setting aside the award taking the view that the Arbitrator was not justified in holding that the time was not of the essence of the

contract. He has also submitted that there was no error on the face of the award and the Learned Assistant District Judge could not sit in appeal

over the award passed by the Arbitrator. He has also urged that even though there was no obligation on the part of the Arbitrator to assign any

reason for the award the Arbitrator while deciding the issues framed by him gave cogent reasons for taking the view which he did and in such

circumstances where there was no error apparent on the face of the award the Learned Assistant District Judge committed a great illegality by

sitting over the award of the Arbitrator as a Court of appeal and in the facts and circumstances the present respondent not having shown anything

to hold that there was any error apparent on the face of the award, the Learned Assistant District Judge aught to have upheld the award in full and

could not have set aside the part of the award and to have remitted that part for decision by a new and competent Arbitrator.

15. In Union of India (UOI) Vs. A.L. Rallia Ram, the Supreme Court has observed that the award of the Arbitrator is ordinarily final and

conclusive, unless a contrary intention is disclosed by the agreement, that it is the decision of the domestic tribunal chosen by the parties and the

Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards cannot exercise appellate powers over the

decision and that whether wrong or right the decision is binding, if it be reached fairly after giving adequate opportunity to the parties to place their

grievances, in the manner provided by the Arbitration agreement. It is now firmly established that an award is bad on the ground of error of law on

the face of it, there is found some legal proposition which is the basis of the award and which is erroneous.

16. This principle has been laid down in the following decisions of the Supreme Court, namely, N. Chellappan Vs. Secretary, Kerala State

Electricity Board and Another, and Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others, It has been held that it

is only when the erroneous proposition of law is stated in the award and it is the basis of the award that the award can be set aside or remitted on

the ground of error of law apparent on the face of the record.

17. The Learned Assistant District Judge has observed that the Arbitrator committed illegality in not following the provisions of Section 74 of the

Indian Contract Act in referring to award liquidated damages to the respondent and thus has acted contrary to the provisions of Section 74 of the

Indian Contract Act. But from the perusal of the award, we are unable to find that the Arbitrator held anything contrary to the provisions of Section

74 of the Indian Contract Act. Section 74 of the Indian Contract Act provides for compensation for breach of contract where penalty is stipulated

in the agreement but while interpreting the provisions of Section 74 of the Indian Contract Act it has been clearly held by the Supreme Court in

Fateh Chand Vs. Balkishan Das, and in Kesoram Industries and Cotton Mills Ltd. Vs. Commissioner of Wealth Tax, (Central) Calcutta, and also

in Union of India (UOI) Vs. Raman Iron Foundry, that so far as the law in India is concerned, there is no qualitative difference in the nature of the

claim whether it be for liquidated damages or for unliquidated damages and a claim for liquidated damages stand on the same footing as a claim for

unliquidated damages, that a claim for liquidated or unliquidated damages does not give rise to a debt until the liability is adjudicated upon and the

damages assessed and that a party in breach of contract does not automatically incur and pecuniary obligation nor docs he incur debt and he has

only to be used for damages and have them adjudicated upon. Therefore, even in case Section 74 applies the party has to prove general damages.

In this case, the Arbitrator came to the finding of fact on a construction of the two agreement dated 3.2.1972 and 28.7.1972 entered into between

the parties that the time was not of the essence of the contract. He has arrived at the finding on the evidence produced by the parties that the delay

was due to reasons beyond the control of the present appellant and as provided in Clause 15 of the two agreements, time stood extended till

13.3.1974 on the written request of the appellant, made in that behalf through their letter, dated 13.3.74 a copy of which has been produced

before the Arbitrator. Therefore, it is a case in which the Arbitrator came to a finding of fact on construing the agreements as well as the documents

produced by the parties that the time was not of the essence of the contract. This is a finding of fact based on evidence produced before the

Arbitrator. In Bata Krishna Roy and Company vs. H. Polesy and Company AIR 1975 Cal 167 and Damodar Valley Corporation Vs. Ikrah

Nandi Coal Co., it has been clearly decided by Calcutta High Court that the Arbitrators are the anal Judges of a matter of fact and so long as they

act within the Authority conferred upon them with fairness, the parties are bound by the decisions and it is not for a court to say that in its opinion

the evidence was not sufficient to establish the conclusion at which the Arbitrators arrived.

18. There is no doubt that the Court cannot set aside the findings of fact arrived at by the Arbitrator because the grounds on which the award may

be challenged are clearly mentioned in Clauses (a) to (c) of Section 30 of the Arbitration Act. It is only when a, finding of fact is arrived at without

any evidence the Arbitrator can be guilty of misconduct. This is what has been decided in Chhogamal Rawatmal vs. Sankalchand G. Shah and

Ors. reported in 53 CWN 828 . We have carefully considered the award passed by the Arbitrator, the Arbitrator has come to the ending of fact

that the time was not the essence of the contract on the basis of the relevant evidence. Therefore, the finding of the Learned Assistant District

Judge that the Arbitrator was not justified in holding that the time was not of the essence of the contract cannot be upheld because he sat over the

award of the Arbitrator as a court of appeal which he could not do in exercising his jurisdiction u/s 30 of the Indian Arbitration Act. There is no

doubt that as to whether the time is of the essence of the contract or not is essentially a question of fact. Even if it be specifically stipulated in the

agreement that the time is of the essence of the contract there is still scope for the Arbitrator while construing the agreement and on considering the

surrounding circumstances to decide as to whether the time was in the essence of the contract or not. This is exactly what the Arbitrator did. He

construed the concerned agreements and in the light of the surrounding circumstances came to this finding that the time was not of the essence of

the contract. So there was no error apparent on the face of the award. The prayer for damages on account of non-commissioning of the plant and

machinery within the time specified in the agreement is based on the allegation of the respondent that the time was of the essence of the contract

and the eight weeks delay was made by the present appellant in commissioning the plant. But the Arbitrator construing the agreement and also

considering the fact that the extension of the time was given on the prayer of the present appellant came to a finding of the fact that the time was not

of the essence of the contract. Such a finding of fact cannot be assailed by any Court of law by invoking the jurisdiction u/s 30 of the Arbitration

Act. In a recent decision reported in Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd., Indian Oil Corporation vs. Indian Carbon Ltd. the

Supreme Court has re-interacted that the Court does not sit in appeal over the award and review the reasons.

19. In the result, we are of the view that the Learned Assistant District Judge was not justified in setting aside that part of the award by which the

Arbitrator refused to award any damage for the non-commissioning of the plant as per the agreement, dated 3rd February 1972 for which a Bank

guarantee No. 106 of 1972 was furnished by the present appellant. In the result, the appeal be allowed. That part of the judgement passed by the

learned Assistant District Judge by which he has set aside the issue Nos. 2 and 3 of the Arbitrator and remitted those two issues to be decided by

appointing a new and qualified Arbitrator be vacated. The judgement and decree passed by the Arbitrator for a sum of Rs. 1 lac together with

interest is however, upheld.

There is no order as to costs.

Siba Prasad Rajkhowa, J.

20. I agree.