

(1997) 12 BOM CK 0003
In the Bombay High Court
Case No : Artiration Petion No. 91 of 1994

Ashok Industries

APPELLANT

Vs

Steel Indutries of India

RESPONDENT

Date of Decision : 04-12-1997

Acts Referred:

Arbitration Act, 1940 — Section 16, 30, 33, 34, 41
Arbitration and Conciliation Act, 1996 — Section 34
Civil Procedure Code, 1908 (CPC) — Section 151
Stamp Act, 1899 — Section 35

Citation : (1998) 100 BOMLR 179

Hon'ble Judges : A.P. Shah, J

Bench : Single Bench

Judgement

A.P. Shah, J.—This is a petition u/s 30 (now 34(2)) read with (new Section 34 of Act 26 of 1996) Section 33 of the Arbitration Act, 1940 (Act 10 of 1940) for setting aside the award passed by the sole Arbitrator Mr. Suresh Deorah.

Permission now withdrawn and the Power is now conferred on Arbitration Tribunal.

2. Briefly stated, the facts and circumstances leading to this petition are as follows :

The petitioner Nos. 1 and 2 are partnership firms registered under the Partnership Act, 1932. The respondent is also a partnership firm registered under the Partnership Act. The petitioners are manufacturers of iron and steel goods. The petitioners import raw materials for manufacturing of iron and steel goods. During 1979-80 the petitioners had obtained import licence from the Import Control Authorities for the import of raw materials. For importing raw materials, the petitioners had engaged the services of the respondent and for that purpose the petitioners had issued a letter of authority to the respondent. During the period 1979-80 the petitioners imported through the respondent iron and steel goods worth Rs. 38.30 lakhs of CIF value and Rs. 39.50 lakhs of CIF value. In

1982 the petitioners filed refund applications before the customs authorities for refund of the customs duty. The customs authorities rejected the refund applications as barred by limitation. The petitioners, therefore, approached Calcutta High Court by filing four separate writ petitions claiming refund of Rs. 68.90 lakhs and Rs. 71.00 lakhs, respectively. The petitioners also moved for interim reliefs before the Calcutta High Court and an interim order came to be passed on the application made by the petitioners directing the custom authorities to refund the excess duty realised from the petitioner upon furnishing bank guarantees in favour of the customs, department.

3. On 15th April, 1983 the respondent addressed a letter to the Assistant Collector of Customs, Mumbai stating that refund should not be made to the petitioners as the actual import was made by the respondent and not by the petitioners. The petitioners, however, maintained before the customs department that all customs duty expenses, port charges, etc., had been paid by the petitioners and the respondent were merely acting as a letter of authority holder for and on behalf of the petitioners. On 21st April, 1983 the petitioners and the respondent signed an agreement where under the petitioners agreed to assign a sum of Rs. 45,90,000/- to the respondent subject to terms and conditions of the agreement.

4. It appears that again there arose a dispute between the parties on account of implementation of the agreement dated 21st April, 1983. After exchange of few letters the parties agreed to refer the dispute to the sole arbitration of Mr. Suresh Deorah. On 23rd August, 1988 the sole Arbitrator made the award which has been described by him as "oral judgment". It is a common ground that pursuant to the award made by the sole Arbitrator the petitioners made certain payments towards interest to the respondent against the bank guarantees executed by the respondent as per the award of the sole Arbitrator.

5. On 28th February, 1992 writ petitions filed by the petitioners were allowed by the Calcutta High Court but the said order could not be implemented because of statutory bar incorporated under the Customs Act. It seems that after the writ petitions were disposed of, the respondent through its attorneys called upon the petitioners to pay a sum of Rs. 22,50,00/- with interest accrued at the bank rate. The said letter was followed by a reminder dated 3rd December, 1992 issued by the attorneys of the respondent. On 30th July, 1992 the sole Arbitrator wrote a letter to the petitioner advising them to settle the matter amicably. Again on 12th May, 1993 the sole Arbitrator wrote a letter to the petitioners seeking an explanation from the petitioners as to why the award was not implemented by them. It may be mentioned at this stage that the original award passed by the sole Arbitrator was not written on a stamp paper. The sole Arbitrator after re-writing the award on a stamp paper on 3rd November, 1993 filed the said re-written award in this Court. Along with the award the sole Arbitrator filed an affidavit mentioning therein that he has re-typed award on a stamp paper and signed the same on 3rd November, 1993.

6. Mr. Doctor, learned Counsel appearing for the petitioners raised several submissions before me requesting to set aside the award of the sole Arbitrator. It is not necessary to recapitulate all the submissions made by Mr. Doctor since I am inclined to accept the principle submission of the learned Counsel that the impugned award which has been re-written on a stamp paper and filed in this Court, is not a valid award. The submission of Mr. Doctor is that once the award is signed the Arbitrator, he becomes functus office. He is not entitled to re-write the award on a stamp paper subsequently and file the same in the Court to get over the objection as to want of a stamp paper. Mr. Doctor has placed heavy reliance on a decision of the Supreme Court in *Rikhabdas Vs. Ballabhdas and Others*, . On the other hand, Mr. Tulzapurkar, learned Counsel appearing for the respondent contended that the re-writing of the award on a stamp paper is only a ministerial act and therefore the sole Arbitrator has not committed any illegality in re-writing the document on a stamp paper and filing the same in the Court. Mr. Tulzapurkar relied on the decisions of the Bombay High Court and Madras High Court reported in *Parshottamdas v. Kakhushru* AIR 1934 Bom. 6 : 35 Bom. L.R. 1091 : 149 I.C. 317 and *Dasaratha Rao v. Ramaswamy* AIR 1956 Mad134 respectively.

7. The short question which falls for consideration is whether the award re-written by the sole Arbitrator on the stamp paper on 3rd November, 1993 is a valid award in the eyes of law. In *Rikhabdass v. Ballabhdass* (supra), the Supreme Court was considering a case where the award was unsigned and unregistered. The award was filed in the Court when an objection was taken to a judgment being passed on such an award. Thereupon, the trial Court remitted the award to the Arbitrator for re-submitting it to the Court on a duly stamped paper and after getting it registered. The question that was urged before the Supreme Court was the correctness of the stand that want of stamp paper would be an illegality apparent on the face of the award and therefore in exercise of the powers u/s 16(1)(c) power now withdrawn. See Section 34(4) of the Arbitration Act, the Court would be justified in remitting the award to the Arbitrator for reconsideration. The Supreme Court took the view that when the document was not filed on a stamp paper as it ought to be, the remitting of the award to the Arbitrator cannot be for re-consideration as there is nothing to reconsider excepting re-mentioning the award on a stamp paper which cannot be characterised as reconsideration. It is in this view that the Supreme Court held that in such a case remitting of the award to the Arbitrator is not proper. That of course, may not be of much relevance for the purpose of the present case but the Supreme Court proceeded to consider another contention urged in that case which has material bearing on the present case. The contention was that even though the case may not fall within Section 16(1)(c) of the Arbitration Act, such a remitting may be called for and justified by a reference to the inherent powers of the Court saved in Section 151 of the Civil Procedure Code, Dealing with this the Supreme Court observed that when once the award had been made by the Arbitrator, he becomes functus officio and if he wants to be called to re-write the

award on a stamp paper it would be calling upon the Arbitrator to prepare another award which would be incompetent. In paragraph 8 the Supreme Court observed :

Mr. Pathak contended that even if the case did not come within Section 16(1)(c) of the Arbitration Act, the order in the present case can be supported u/s 151 of the CPC which preserves the inherent power of a Court to make such orders as maybe necessary for the ends of justice. It is true that Section 41 of the Arbitration Act makes the provisions of the CPC applicable to proceedings before a Court under the Arbitration Act. But it is well known that after making his award the arbitrator is *functus officio*. To cite one authority for this proposition we may quote the observations of Melish L.J. in *Mordue v. Palmer* 1870 (6) Ch A 22.

I think the result of the cases at law is that when an arbitrator has signed a document as and for his award. He is *functus officio*, and he cannot of his own authority remedy any mistake.

In the present case, *ex hypothesi*, the award has already been made and the arbitrator has therefore become *functus officio*. It is that award which requires stamp. Section 151 of the Code cannot give the Court power to direct the arbitrator to make a fresh award; that would be against well-established principles of the law of arbitration. It would again be useless to have another copy of the award prepared and stamped for the copy would not be the award and no action in a Court can be taken on it. The order cannot therefore be supported by Section 151 of the Code. It is of some interest to read here the following passage from *Russel on Arbitration* (14th Ed.) p. 325:

The usual practice in preparing an award is to have two copies made of it. One the arbitrator signs, which then becomes the original award, and this is delivered to the party who takes up the award. The other copy is available for the other parties if they apply for it.

The original award, before it is available for any purpose whatsoever, must be duly stamped, but there is no obligation upon the arbitrator to stamp it, and he does not usually do so.

We should observe here that the last paragraph in the aforesaid quotation does not appear in the 16th editions of *Russel's* work. Perhaps this is because in England an award is no more required to be stamped by virtue of Section 35 Sched. 8 of the Finance Act, 1949 which was passed after the 14th edition was published.

8. The decision is a complete answer to the contention of Mr. Tulzapurkar that the Arbitrator was entitled to re-write the award on a stamp paper and file the same in this Court. Mr. Tulzapurkar made strenuous efforts to distinguish this case on the ground that the observation referred to above are obiter and that the only question that arose for decision in the said case was whether the Court has

jurisdiction to remit the award u/s 16(1)(c) of the Arbitration Act. I am not inclined to accept this contention. The Supreme Court decision decide in clear terms that the unstamped document was the award when it was duly signed by the Arbitrator. The Supreme Court also made it clear by observing that as soon as the Arbitrators signed the award they become functus officio and that they had no right to re-write the same on a stamp paper and file it in the Court.

9. Mr. Tulzapurkar brought to my notice the decision of this Court in Parshottamdas v. Kekhushru (supra). It is undoubtedly true that in that case the Division Bench has held that where an award is passed writing out of it on a stamp paper which would be necessary before it could be filed in Court, is merely a ministerial act. Similar is the view taken by the Madras High Court in Dasaratha Rao v. Ramaswamy (supra). In my opinion, the above two decisions relied upon by Mr. Tulzapurkar are no longer good law in view of the decision of the Supreme Court in Rikhabdass v. Ballabhdass. I am supported in my view by the decisions of the Andhra Pradesh High Court in Indurthi Srinivasa Rao Vs. Indurthi Venkata Narasimha Rao and Another, (see also in this connection: Puthivapuravil Pocker and Others Vs. V. Khalid and Another, Balu Mal Vs. J.P. Chandani and Others, . Pravakar Baral Vs. Lakhimidhar Naik and Others, .

10. Mr. Tulzapurkar then urged that the argument that the Arbitrator becomes functus officio after making of the award and cannot re-write the award on a stamp paper is not a correct statement of law in view of the decision of the Supreme Court reported in Mattapalli Chelamayya and Another Vs. Mattapalli Venkataratnam and Another, in which after making the award a copy of the award was stamped by the Arbitrator and the same was made rule of the Court. It is not possible to accept the argument of Mr. Tulzapurkar. In M. Chelamayya (supra) the original award was not engrossed on stamp paper but a true copy of it was engrossed on stamp covers of the value more than the stamp duty and penalty required for the document was filed in the Court along with the original award. It was contended before the Andhra Pradesh High Court that the award was not duly stamped and was not therefore admissible in evidence in view of Section 35 of the Stamp Act. The High Court relying upon proviso (a) to Section 35 of the Stamp Act, held that although the original award cannot be regarded to have been duly stamped, there should not be any serious objection in the circumstances of the case to treat the stamp on the copy of the award as intended to serve as payment of stamp duty and penalty under proviso (a) to Section 35 of the Stamp Act so as to enable the original award to be admitted in evidence. The view taken by the High Court was approved by the Supreme Court. The learned Judges observed :

Lastly it was contended that the award was inadmissible in evidence in view of Section 35 of the Stamp Act. It is true that the award in the original is not engrossed on a stamp paper. What the arbitrators had done at the time of filing the award was to file the original award along with a true copy of it engrossed on a stamp paper of Rs. 2,856/-. It is not disputed that an instrument of this kind

can be admitted in evidence after proper duty and penalty is paid. The High Court has rightly pointed out that the intention of the arbitrators in engrossing a copy of the award on the stamp paper and producing the same attached to the original award dt. 10.11.1955 was merely to show that the required stamp duty and penalty had been paid. It is not disputed that the actual value of the stamp used covers more than the stamp duty and penalty required for the document and, therefore, there is no difficulty in holding that the award is admissible in evidence and cannot be rejected on the ground that the proper duty and penalty has not been paid.

The above decision is clearly inapplicable to the facts of the present case. The Arbitrator has not filed the original award in the Court. What is filed in the Court is the award re-written by the Arbitrator on stamp paper on 3rd November, 1993. It is, therefore, clear that the impugned award is void ab initio and a complete nullity. It cannot be recognised as an award in the eyes of law.

11. Mr. Tulzapurkar also sought to rely upon a decision of the Supreme Court in *Hindustan Steel Ltd. Vs. Messrs Dilip Construction Company*, . In that case the award was made and published by the umpire. An application was filed for setting aside the award under Sections 30 and 33 of the Arbitration Act. One of the contentions raised was that the award was unstamped and on that account "invalid and illegal and liable to be set aside." The other side then applied to the District Court that the award be impounded and validated by levy of stamp duty and penalty. Accordingly, the District Judge directed that the award be impounded. He then called upon the respondent to pay the appropriate stamp duty on the award and penalty and directed that an authenticated copy of the instrument be sent to the Collector, together with a certificate in writing stating the receipt of the amount of duty and penalty. Against that order the appellant moved the High Court of Madhya Pradesh in exercise of its revisional jurisdiction. The High Court rejected the petition and the appellant then appealed to the Supreme Court in special leave. The Supreme Court held that the Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponents. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Needless to mention that in the present case the unstamped award has not been filed before this Court at all and therefore, the above ruling is clearly inapplicable. Mr. Tulzapurkar lastly contended that the petitioners have accepted the award and in fact they have implemented the directions in the award to certain extent and therefore, they are not entitled to challenge the award. In this connection Mr. Tulzapurkar relied upon the decision of the Madhya Pradesh High Court in *Ramsahai Sheduram Vs. Harishchandra Dullchandji and Another*, and a decision of the Calcutta High Court in *Kripa Sindhu Biswas Vs. Sudha Sindhu Biswas and Others*, . I do not think that Mr. Tulzapurkar is right in his contention. The question is not whether the petitioners

are entitled to challenge the award but whether the award which has been re-written by the Arbitrator on a stamp paper can be regarded as a valid award. As indicated earlier, an arbitrator becomes functus officio after passing the award and he has no power to re-write the award on a stamp paper for the purpose of presenting it in Court or submitting the same for registration. Now the only question that survives is whether it is necessary to set aside the award filed by the sole Arbitrator. In my opinion, the award filed by the Arbitrator is clearly a nullity and, therefore, there is no need to set aside the same. The proper course will be to direct the impugned award to be removed from the file of the Court. Petition is accordingly made absolute in terms of prayer Clause (c). No order as to costs.