

(1998) 08 CAL CK 0044
In the Calcutta High Court
Case No : A.P. No. 1 of 1998

Food Corporation of India

APPELLANT

Vs

Dilip Kumar Dutta

RESPONDENT

Date of Decision : 11-08-1998

Acts Referred:

Arbitration Act, 1940 — Section 28, 37(2), 37(3)
Arbitration and Conciliation Act, 1996 — Section 21, 85
Evidence Act, 1872 — Section 115

Citation : AIR 1999 Cal 75 : (1999) 2 ARBLR 67 : 1 CWN 400

Hon'ble Judges : Amitava Lala, J

Bench : Single Bench

Advocate : Mukul Prakash Banerjee and Kamal Kumar Chattapadhyaya, for the Appellant; HIRAK KUMAR MITRA, AMIT KUMAR LAHIRI and SWAPAN BANERJEE, for the Respondent

Final Decision : Dismissed

Judgement

1. This is an application under Sections 30 and 33 of the Arbitration Act, 1940 challenging the award passed by the Arbitrator on 2nd Dec. 1997.

2. By making this application Mr. Mukul Prakash Banerjee, learned Senior Counsel of this Court raised the following points :

(1) Whether the proceeding can be proceeded under the old Act i.e. the Arbitration Act, 1940;

(2) After becoming functus officio whether the Arbitrator can suo motu extend the time period for proceeding with the arbitration;

(3) Whether the claim of the claimant i.e. the contesting respondent herein is barred by law of limitation;

(4) Whether the Arbitrator exceeded the scope of reference;

(5) Whether the reference is invalid;

(6) Whether Union of India instead of Food Corporation of India was made the party wrongly or erroneously.

3. Mr. Banerjee fairly submitted before this Court that although seven points were raised by him his real attack is restricted on point Nos. 1,2 and 4 as above.

4. He contended that originally a writ petition was moved by the respondent before this Court making the petitioner party therein claiming, inter alia, a monetary relief to the extent of Rs. 5,97,585,63 paise only on account of storing agency at Asansol.

5. On 30th Nov. 1995 the writ petition was disposed of upon observing an Arbitration Clause exist in respect of dispute in between the parties and directing the Food Corporation of India to refer the matter to the Arbitrator in terms of the agreement at an early date and preferably within a period of four weeks from the date of the communication of the order, wherein the Food Corporation of India may raise its counter claim.

6. In view of such order, Managing Director of Food Corporation of India by his letter dated 14th May, 1996 appointed the present sole Arbitrator to adjudicate the disputes between the parties.

First paragraph of such letter is quoted here-under:

"In compliance with the orders dated 30-11-1995 passed by High Court at Calcutta in C.O. No. 18791 (W) of 1992 Sh. Dilip Kumar Dutta, Storing Agent at Asansol v. FOL (Copy enclosed) and in accordance with Clause 41 of the Agreement dated 12-12-1966 between FCI and Sh. Dilip Kumar Dutta, Storing Agent, I, Managing Director, FCI, New Delhi do hereby appoint Sh. Ashutosh Mukherjee, Retd. Distt. Judge, "NIRUPAMA", AE-579, Salt Lake City, Calcutta-700 064 as Sole Arbitrator to adjudicate the dispute and differences between the parties herein"

7. From the above quoted portion of the reference it is abundantly clear that the dispute was referred in compliance with the order passed on 30th Nov., 1995 in disposing the writ petition by the High Court as well as in accordance with the Clause 41 of the agreement dated 12th Dec. 1966 between Food Corporation of India and Shri Dilip Kumar Dutta, Storing Agent.

8. Upon perusing Clause 41 of the agreement it appears that all disputes and differences arising out of or in any way touching or concerning the arbitration agreement whatsoever excepting as to the matter expressly provided in the agreement shall be referred to the sole arbitration of any person appointed by the Managing Director of the Food Corporation of India.

9. The Arbitration Clause is very much exhaustive. At the end of the such clause the following sentence is available "subject as aforesaid the Arbitration Act, 1940, shall apply to the arbitration proceeding under this Clause ."

10. It is to be noted herein that normally Arbitration Clause speaks about the

applicability of the Arbitration Act, 1940 with applicability of the amended act but I found the same is speaking about applicability of the Arbitration Act, 1940 alone. Moreover both the parties have acted upon on the basis of the order of this High Court as well as the order of the reference made by the concerned officer of the respondent. The order of reference speaks about the order of the Court as well as applicability of the Clause 41 of the agreement dated 12th December, 1966 between the parties. Therefore, it is pertinent to mention that the order of the High Court dated 30th Nov. 1995 as well as Clause of the arbitration became operative much prior to the date of effect on 25th January, 1996.

11. A point has been taken by Mr. Banerjee that since the order of reference was made by the Managing Director of Food Corporation of India on 14th May, 1996 when the Arbitration and Conciliation Act, 1996 had came into force, the old Act is not applicable, but the same cannot be, prima facie, a valid point in view as above.

12. In spite of such observation this Court also gone through the Section 37(3) of the Arbitration Act, 1940 as well as Sections 21 and 85 of the Arbitration and conciliation Act, 1996, which are relative for the purpose, to give more strength to the observation of this Court.

13. Section 37 of the Arbitration Act, 1940 speaks about the limitation under which part of Sub-section (3) speaks that "for the purposes of this Section and the Indian Limitation Act, 1908, an Arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an Arbitrator".

14. Section 85 of the Arbitration and Conciliation Act, 1996 prescribing for repealing and saving of the earlier acts including Act, 1940 with a non-obstinate clause which is as follows :

"(1) The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Regulation and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.

(2) Notwithstanding such repeal,.

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this act came into force unless otherwise agreed by the parties but this act shall apply in relation to arbitral proceedings which commenced on or after this act comes into force."

15. Section 21 of the Arbitration and Conciliation Act, 1996 prescribing for commencement of arbitral proceedings under the new Act which is as follows :

"Commencement of arbitral proceedings --

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date of which a request for that dispute to

be referred to arbitration is received by the respondent."

16. Let us confine to our repeated readings of the aforesaid three sections of old Act vis-a-vis the new Act. Section 37(3) of the old Act prescribes the arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring appointment in whatever manner prescribes thereto. So far as the Section 21 of the new Act is concerned the date of commencement is the date on which notice of commencement is received by the respondent stands almost on a similar line with Section 37(3) of the old Act so far this case is concerned.

Non obstante clause of Section 85 of the new Act says that the provision of the old Act shall apply in relation to arbitral proceedings which commenced before this act came into force.

18. Therefore a question arose in the mind of the Court as to whether there is a vacuum of reference in between the old Act and the new Act or not. In a case where the dispute in between the parties are subsisting but no notice of commencement was served or received and new Act came to play, can the dispute be said to be existing under the new Act by virtue of Section 85 automatically? As and when Section 85 of the new Act restricting the parties about commencement of the arbitral proceedings came into force but the commencement under the new Act will take effect only from the receipt of the notice of commencement by the opposite parties u/s 21 of the new Act, therefore; if the dispute exists under the old Act but the notice of commencement has not yet served, can the parties be forced to bring the dispute under the new Act? My answer is parties should have to be guided by the date of dispute i.e. cause of arbitration which will ultimately lead to the commencement to the satisfaction of both the S. 37(3) and 21 of both the Acts respectively. Section 85 of the new Act does not speak about notice of commencement but about commencement of arbitral proceeding under the old Act alone, which does not necessarily mean notice of commencement under the new Act. Therefore, if the dispute then prevailing it should be construed as dispute under the old Act commenced, otherwise vacuum will be subsisting. The cause of arbitration arises when the claimant becomes entitled to raise the question i.e. when the claimant acquires the right to require arbitration otherwise Section 37(3) of the old Act but for the purpose of limitation will also be nugatory which is not the import Section 85 of the new Act. Therefore "..... arbitral proceedings which commenced before this Act came into force" means arising of cause of arbitration in between the parties before the Act came into force. This principle has to be applicable in everywhere to draw a line in between the applicability of old Act and new Act irrespective of factual position herein.

19. In the instant case dispute as to the Act arose long prior to the coming of the new Act on 25th January, 1996. Such dispute led to an application under Article 226 of the Constitution of India wherein an order was passed by the Court on 30th Nov. 1995 directing the respondent to refer to the matter to the Arbitrator

in terms of the agreement preferably within the four weeks from the communication of the order with further direction that the Food Corporation of India, the petitioner herein may raise its counter claim.

20. The order was complied with on 14th May, 1996. The Arbitration Clause provides for applicability of the Arbitration Act, 1940 alone. Parties have acted upon on the basis of the agreement. The petitioner filed its counter claim before the Arbitrator. Parties have allowed the proceedings before the Arbitrator appointed under the old Act.

21. Under such circumstances, it cannot be said that merely because the letter was written by the authority of the petitioner appointing an Arbitration on 14th May, 1996 it could be presumed that such date is the date for commencement of the arbitration proceedings under the new Act.

22. Next vital point I have to adjudge that as to whether the arbitration proceedings was proceeded by consent of the parties by extending the time after the expiry of the period for publishing the award by the Arbitrator and whether the Arbitrator can extend such time even after expiry of such period by consent of the parties and, if not, what should be the role of the Court now.

23. I have carefully considered the reasons given in the award by the Arbitrator and it appears to me that on the day of filing the claimant's rejoinder i.e. on 7th May, 1997 it was discussed before the Arbitrator that the award could not be passed within the time left. On the next date of hearing i.e. 9th May, 1997 the claimant i.e. respondent herein had given consent for extending the time for passing the award, but the learned Advocate appearing for the Food Corporation of India categorically submitted that they are not agreeable to extend the time. Consequently the arbitration could no longer proceed from that stage as the Sole Arbitrator became functus officio after 9th May, 1997. Subsequently on 24th Nov. 1997 the Food Corporation of India produced Memo No. 3-SA/DKD/92/1466 dated 13-15th Nov. 1997 for extending the time for fifteen days from the date of communication thereof to complete the arbitration. On 24th Nov., 1997 on receipt of such memorandum the Arbitrator had given another opportunity to the parties to put their respective cases in nutshell and in the manner aforesaid the Arbitrator proceeded treating such letter of the respondent as consent of extending the time for passing the award.

24. As referred, I have perused Section 28 of the Arbitration Act, 1940 which is as follows :

"Power to Court only to enlarge time for making award -- (1) The Court may, if it thinks fit, whether the time for making the award had expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(2) Any provision in an arbitration agreement whereby the Arbitrators or Umpire may, except with the consent of all the parties to the agreement, enlarge the

time for making the award, shall be void and of no effect."

25. Schedule 1, paragraph 3 of the Arbitration Act, 1940 which says

"(3) Arbitrators shall make their award within four months after entering on the reference and after having been called upon to act by notice in writing from any party to the said agreement or within such extended time as the Court may allow."

26. By analysing the two parts of the Section read with the paragraph under schedule it appears to this Court that although it is not clear that whether Arbitrator can suo motu extend the time after expiry with the consent of the parties but for schedule 1, para 3 of the Act even then Court can extend the time even after passing of the award.

27. With regard to the effect of participation when Arbitrator become functus officio Mr. Banerjee cited a decision reported in State of Punjab Vs. Hardy, and relied upon paragraphs 11 and 13 therein to establish that once law precludes parties from extending time after the matter has been referred to the Arbitrator, it will be contradiction to hold that the same result can be brought by the conduct of the parties. The age-long established principle is that there can be estoppel against statute. It is true that initially the time fixing the period for making the award was one of agreement between the parties but it does not follow that even after a clear prohibition by law that the time fixed under clause 3 of the schedule can only be extended by the Court and not by the parties at any stage, it still remains a matter of agreement and the rule of estoppel operates. It need hardly be emphasised that the Act has enjoined the Arbitrator to give an award unless the same is extended by the Court. The Arbitrator has not jurisdiction to make an award after the fixed time. If the award made beyond the time is invalid. The parties are not estopped by their conduct from challenging the award on the ground that it was made beyond time merely because of their having participated in the proceedings before the Arbitrator after the expiry of the prescribed period. He further contended that the ratio of the judgment is still good law.

28. On the other hand, Mr. Hirak Kumar learned Senior Counsel cited a judgment reported in The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others, and submitted that first schedule to the Arbitration Act specifies the implied conditions of the arbitration agreement. Because of Condition No. 3 the Arbitrator has to make award within four months of his entering upon the reference or after having been called upon to Act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow. In other words, the power to extend the time of four months has been vested" in the Court, otherwise the award after expiry may become invalid. But the condition has to be read along with Sub-section (1) of Section 28 which vests power in the Court to enlarge the time for making the award from time to time. Sub-section (2) of Section 28 says in clear and unambiguous terms that

any provision in an arbitration agreement, whereby the Arbitrators or Umpire can enlarge the time or making the award shall be void and of no effect "except with the consent of all the parties to the agreement". Subsection (2) of Section 28 has been the subject matter of controversy, as to whether even if the time is extended with the consent of both the parties, the restrictions prescribed in Subsection (1) of Section 28 and under Condition No. 3 of the first schedule are contravened.

29. Mr. Mitra further contended that in that case, like here, it was not in dispute that both the parties had agreed for extension of period for making the award after the Arbitrator entered into reference. As such the award cannot be held to be invalid on that ground. Mr. Mitra contended that by virtue of this decision at any point of time Arbitrator can extend the time for making the award if the consent are given. Flavour of his argument is that an Arbitrator's right cannot be finally-ceased when he became functus officio. Therefore the right of Arbitrator exists. Hence, if the parties agreed to extend the time for making and publishing the award by the Arbitrator, the Arbitrator can extend such time by virtue of Section 28(2) of the Arbitration Act, 1940. Section does not say anything with regard to enhancement of period when Arbitrator becoming functus officio but within the time alone.

30. No doubt the Court has power to extend) the time which is available u/s 28 as well as Schedule 1 paragraph 3 of the Act. It is also clear that Court can enlarge the time but Court must decide such question judicially. Therefore, factual position has to be ascertained before passing any order. In the instant case, no doubt, parties have participated in the arbitration proceedings before the expiry of the time and after the expiry of the time on the basis of the time extended at the instance of Food Corporation of India, petitioner herein. The petitioner, in one hand, volunteered before the Arbitrator for extending the time and has taken the plea reverse to such stand now before the Court to frustrate the award. Therefore conduct of the petitioner cannot be said to be good. Moreover such act is hit by principle of probat and reprobate. In the premises the conduct of the Arbitrator may be construed as irregular but not as illegal. Irregularity may be condoned but illegality is not.

31. Under such circumstances, I think it should not be fair on my part of say that award is illegal and to hold in favour of the petitioner. Therefore, defect, if any, is condoned and time to make and publish the award is formally extended under this order with the retrospective effect.

32. Next point as agitated by Mr. Banerjee is with regard to question of limitation. Mr. Banerjee contended that initially the claim was lodged by the respondent for a sum of Rs. 5,97,585.63 p. as on 22nd February, 1989 which ultimately became part and parcel of the writ petition of the year 1992 and on which an order dated 30th November, 1995 was passed directing the petitioners authority to refer the matter to the arbitration by the petitioners authority. Therefore the dispute is restricted only for such sum. Petitioners stated that by

the letter of the petitioners authority dated 14th May, 1996 when the Arbitrator was appointed he will be entitled to adjudicate upon the claim being the part and parcel of the writ petition for sum of Rs. 5, 97,585.63 paise. Since the Arbitrator has entered into the reference in the new claim over and above such claim then it is not only outside the scope of reference but also squarely barred by law of limitation. I am not, prima facie, satisfied with such submission of Mr. Banerjee because of the reason that admittedly a dispute as before the writ Court was not only for a sum of Rs. 5,97,585.63 p. but also for other claims as evident from paragraph 4 of the application for setting aside the award. Over and above that Food Corporation of India, being petitioner herein also made a counter claim for a sum of Rs. 3,12,045.45 paise.

33. It appears from the order of the writ Court that respondents therein being petitioner herein were directed to refer the matter to the arbitration in terms of the agreement but nowhere it is stipulated in the order that the arbitration will only be applicable as to the money claim made in the writ petition. Moreover the Managing Director of Food Corporation of India, petitioner herein referred the disputes not only in compliance of the said order of the writ Court dated 30th November, 1995 but also in accordance with the Clause 41 of the agreement dated 12th December, 1966 between the parties herein. Therefore scope of the arbitration was not at all restricted only to the extent of the writ petition alone.

34. It appears that the scope of arbitration is very much elaborate which speaks all disputes and differences arising out of or in any way touching concerning the agreement whatsoever can be referred to the arbitration by the Managing Director. Therefore the Arbitrator did not travel outside the scope of reference nor the reference was invalid nor the claim was barred by law of limitation since account in between the parties seems to be in the nature of running and continuous. That apart cause of action for the recovery of the intermediate bill and final bill may be different and the starting points of limitation may be on different dates. If any claim is not allowed against running bill that may be allowed against the final bill.

35. Mr. Banerjee, learned counsel appearing for the petitioner cited a judgment being reported in *The Union of India (UOI) Vs. Shri Om Prakash*, and upon relying upon paragraph 5 therein stated that there are three grounds of setting aside the award, (a) That an Arbitrator or Umpire has miscondacted himself or the proceedings; (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after proceedings have become invalid u/s 35(c) that an award has been improperly procured or is otherwise invalid.

36. I have no difference of opinion with regard to principles laid down by the Supreme Court of India but such principles or either one of those has to be applicable in the facts and circumstances of each case. At best it can be said that the present case proceeded nearer to ground (c) as above but not attracted. This is not a case of unfit inducement caused the entire proceeding null and void.

37. I, therefore, dismiss this application for setting aside the award but no order is passed as to costs.

38. As a consequence of dismissal of the application for setting aside the award decree is passed in terms of the award. Decree will carry interest at the rate of 12% per annum but at a simple rate. Cost assessed at Rs. 5,000/-. Decree will be drawn up expeditiously.

39. Department and all parties are to act on a signed copy minute of the operative part of the order.