

(1993) 06 BOM CK 0013

In the Bombay High Court

Case No : Appeal No. 197 of 1989 in Arbitration Petition No. 70 of 1985 in Award No. 20 of 1985

Food Corporation of India

APPELLANT

Vs

R.M. Pathare

RESPONDENT

Date of Decision : 30-06-1993

Acts Referred:

Arbitration Act, 1940 — Section 17, 20, 30, 37(4)
Bombay High Court (Original Side) Rules, 1980 — Rule 787(5)

Citation : (1994) 2 BomCR 41 : (1994) 96 BOMLR 408

Hon'ble Judges : Sujata Manohar, J;N.D. Vyas, J

Bench : Division Bench

Advocate : Ranbir Krishnan and K.N. Vaishnav, instructed by J.M. Ramchandani, for the Appellant; N.N. Vepari, for the Respondent

Final Decision : Dismissed

Judgement

Sujata Manohar, J.—Two cross petitions were filed in this Court to challenge the validity of an Award dated 12th of June, 1984 given by the Sole Arbitrator, Mr. N.C. Gupta, under which he had directed the appellants, Food Corporation of India to pay to the respondents M/s R.M. Pathare a sum of Rs. 5,74,008.02. The learned Single Judge dismissed both the petitions. The appellants have filed the present appeal challenging the said Award while the respondents have filed cross-objections in the appeal raising various issues, including a dispute regarding not granting of interest to them.

2. Under a Contract dated 14th of December 1973, the appellants entered into a contract with the respondents under which the respondents were entrusted with the work of clearing and transporting cargo from Marmagao Port to the appellant-Corporation's godowns and other places in the territory of Goa for a period of three years. The period of contract was extended from time to time.

3. The labourers employed by the respondents went on an illegal strike from March 23, 1975 to May 14, 1975. During this period the work of transportation

could not be handled by the respondents. The appellants were required to get the work of transportation done through some other contractors during this period. Disputes arose between the parties in respect of the expenses incurred by the appellants during the period of the strike. There were also certain other disputes between the parties. Ultimately, the appellants addressed a letter dated 3rd of December, 1979 to the respondents in which the appellants set out that they had incurred losses under 22 heads which are set out in this letter amounting to Rs. 9,80,407.90 on account of the failure and/or default on the part of the respondents in carrying out their obligations under the contract, and the respondents were liable to pay the same to the appellants. The letter further sets out, "As against the above liabilities the following amounts have already been recovered and/or withheld from you by our Corporation". The amounts so withheld are set out under seven heads totalling Rs. 4,44,134.51. By this letter the appellants asked the respondents to pay the balance amount of Rs. 5,36,273.36 on or before 9th of December, 1979. The letter, inter alia, stated that in case the respondents were not agreeable to pay the said amount, they should agree on or before 9th of December, 1979 for referring their claims to Arbitration as per the Contract.

4. The clause which deals with Arbitration under the Contract between the parties is Clause XX. It is as follows:

"XX, Arbitration:

All disputes and differences arising out of or in any way touching or concerning this agreement whatsoever (except as to any matter the decision of which is expressly provided for in the contract) shall be referred to the sole arbitration of any person appointed by the Managing Director of the Food Corporation of India. It will be no objection to any such appointment that the person appointed is or was an employee of the Corporation he had to deal with the matters to which the contract relates and that in the course of his duties as such employee of the Corporation he had expressed views on all or any of the matters in dispute or difference. The award of such Arbitrator shall be final and binding on the parties to this contract.....

Provided further that any demand for arbitration of any claim(s) of the contractors under the contract shall be in writing and made within one year of the date of termination or completion (expiry of the period) of the contract and where such demand is not made within the period, the claim(s) of the contractors shall be deemed to have been waived and absolutely be barred and the Corporation shall be discharged and released of all liabilities under the contract in respect of those claims."

5. On 13th of December, 1979 the appellants filed Arbitration Petition No. 1932 of 1972 u/s 20 of the Arbitration Act, 1940. In this petition the appellants have set out the loss suffered by them on account of the illegal strike by the labourers of the respondents. They have reiterated that the respondents failed to pay an

aggregate sum of Rs. 9,80,407.87. They have also stated, "The petitioners recovered about Rs. 4,44,134.51 from the admitted dues to the respondents from the running bills in the Contract and from the security deposit paid by the respondents." They have stated that were entitled to recover the balance amount of Rs. 5,36,273.36 from the respondents. The appellants, therefore, prayed that the Arbitration Agreement contained in the Contract consisting of the Tender by the respondent and its acceptance by the petitioners be allowed. This was prayer (a). Prayer (b) was to the effect that the Court may direct the appointment of a Managing Director of the petitioners as per the Contract Clause XX to adjudicate upon the disputes between the petitioners and the respondent including the said claims of the petitioners. Prayer (c) was as follows : "That the said disputes and differences between the petitioners and the respondent including the said claims of the petitioners be referred to the said Arbitrator under the provisions of the Arbitration Act, 1940" and prayer (d) was for costs. (underlining ours)

6. In the written statement dated 5-9-1980 which was filed by the respondent, the respondent, inter alia, stated that they had several claims against the petitioners aggregating to Rs. 13,48,216.36 for wagon demurrage, illegal and wrongful deduction towards alleged shortage in transportation, salvaging operations, etc. They, therefore, denied the claim of the petitioners. In paragraph 13 of the reply, the respondents have stated that without prejudice to all the aforesaid contentions they are willing to have the alleged claim of the petitioners as set out in the petition and the claim of the respondent against the petitioners as set out in the Written Statement referred to arbitration by a Sole Arbitrator or two Arbitrators in whose appointment the respondent has common rights and privileges with the petitioners.

7. Thereafter by its order dated 17th of October, 1980, the petition was made absolute in terms of prayers (a), (c) and (d). As a result of this order, "all disputes and differences between the parties, including the claim of the petitioners" (prayers) were referred to Arbitration. From the pleadings of the parties in this petition, it is clear that the petitioners had not contended before the learned Single Judge who heard the petition that by virtue of the proviso to Clause XX of the Arbitration Act the claims of the respondents were barred and they could not be referred to Arbitration.

8. It is submitted by Mr. Ramchandani, learned Advocate for the appellants that this reference to Arbitration should be read in the light of Clause XX. The proviso to Clause XX clearly sets out that any demand for arbitration of any claim of the contractors should be in writing and should be made within one year of the date of completion of the contract and where such demand is not made within the prescribed period the claim of the contractors shall be barred and the Corporation shall be discharged in respect of all liabilities under the contract in respect of this claim. In the present case, the contract was completed on 8th of May, 1977. The appellants, therefore, contend that the claims which were raised by the respondents in their Written Statement cannot be and should not have

been gone into. This submission, however, ignores the provisions of section 37(4) of the Arbitration Act, 1940. Section 37(4) provides as follows:

"Section 37(4) : Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper".

The Court, therefore, has power to extend the time for making a reference to Arbitration even though the Contract may provide that the claim would be barred unless notice to appoint an Arbitrator is given within a stipulated time. This power is reposed in Court to prevent undue hardship. In the present case, from the manner in which the appellants have raised their claim for the balance amount, after adjusting against it "the admitted dues" of the respondents, shows that according to the appellants themselves, a sum of Rs. 4,44,134.51 was admittedly due by the appellants to the respondents. They, however, withheld payment of this amount because of their claim for recovery of over a sum of Rs. 9 lakhs from the respondents. This is expressly so stated not merely in the petition but is also so stated in the earlier letter of demand dated 3-12-1979 referred to hereinabove and is so stated before the Arbitrator himself. Therefore, until the appellants sent the letter of 3rd December, 1979 when the appellants, for the first time, raised a demand for payment of over Rs. 9 lakhs and withheld payment of the above sum of Rs. 4,44,134.51, there was no dispute that the appellants were liable to pay the above sum of Rs. 4,44,134.51 to the respondents.

9. The respondents became aware of the dispute relating to payment of the sum of Rs. 4,44,134.51 on receipt of the letter of 3rd of December, 1979. In their Written Statement which is filed within less than a year of 3rd of December, 1979, they, therefore, made a claim for recovery of the sum of Rs. 4,44,134.51 along with certain other claims. In any event, in view of the disputes raised by both the parties in their pleadings in Petition No. 1932 of 1979, the learned Judge directed that these disputes including the claim of the petitioners (i.e. appellants) be referred to arbitration. In doing so, he has exercised his powers u/s 37(4) of the Arbitration Act, 1940 by implication. The learned Single Judge has, in this connection, rightly come to the conclusion that because of the order of the Single Judge of 17th of October, 1980, the proviso to Clause XX of the Arbitration Act does not now operate as a bar to the Arbitrator in deciding the claims of the respondents raised in their Written Statement.

10. Dr. Ramchandani relied upon a decision of the Full Bench of the Punjab High Court in Pearl Insurance Co. Vs. Atma Ram, . The Full Bench considered a

somewhat similar clause in an insurance policy. A clause in the policy limiting the period of enforcement to one year was construed as extinguishing the liability of the insurance company. The Court said that since the clause extinguished the liability and did not limit the time within which the insured could enforce his rights it was not hit by the provisions of section 28 of the Contract Act. The ratio of this judgment will have no application to an arbitration clause of the kind we have in view of the provisions of section 37 of the Arbitration Act.

11. Our attention is also drawn to a judgment of the Delhi High Court in the case of Union of India Vs. Rishi Raj and Co., Delhi, where an identical arbitration clause in the contract was considered by a learned Single Judge. The learned Single Judge said that such a clause restricting by consent the right to make an application within the prescribed period was valid. The Court said that such a restriction which is willingly placed by consent of both the parties, is not opposed to public policy and is not void. In the present case, however, a suit was filed u/s 20 of the Arbitration Act, 1940 to enforce the arbitration clause; and while passing the order of reference, the learned Judge has by implication exercised his powers u/s 37(4) of the Arbitration Act, 1940 and has allowed all disputes between the parties which would necessarily include the disputes raised by the respondents in their Written Statement, to be referred to arbitration irrespective of the time when the disputes were raised. These two judgments, therefore, do not assist the appellants in the present case.

12. It is also urged before us by the respondents that the claims raised by them are by way of set-off as against the claims raised by the appellants. A claim of set-off is not covered by the proviso to Clause XX of the Arbitration Act. Since the learned Judge has permitted the claims of the respondents to be referred to arbitration, we need not examine further whether the proviso to Clause XX does or does not cover a set-off.

13. The appellants, therefore, are not right in contending that the Arbitrator has exceeded his jurisdiction in examining the claims raised by the respondents.

14. The appellants further contended that the Award is bad in law because the Arbitrator has not interpreted the Contract correctly while considering the claims of the appellants and the respondents. They contend that in view of the terms of Contract the claim of the appellants should have been granted. We are not sitting in appeal over the decision of the Arbitrator. The Arbitrator has pointed out that the appellants did not produce any material before him to substantiate their claim. They merely reiterated that the Regional Manager had decided that the sum of Rs. 9,80,407.87 was recoverable from the respondents and that the decision of the Regional Manager was binding. The learned Arbitrator has rightly rejected this contention, especially when this claim was disputed by the respondents and was referred to arbitration. The Arbitrator was required to decide whether this claim should be allowed or not on merit. When the appellants failed to produce any material to substantiate their claim, no fault can be found with the Arbitrator for not granting the claim. The Award, in so far as it is against

the appellants, cannot be considered as perverse or suffering from any error of law apparent on the face of it.

15. It is also sought to be contended that the claims of the respondents should not have been considered in view of the terms of the Contract and that the Arbitrator has erred in law in interpreting the Contract. This contention, in so far as it requires us to examine the merits of the Award, cannot be accepted. The Arbitrator, however, has allowed the respondents' claim for Rs. 4,44,134.51 which is an amount admittedly payable to them in view of the contentions of the appellants themselves. This claim also includes a claim for refund of the security deposit. The other substantial claim is a claim for Rs. 1,05,573.47 which claim was also conceded as payable to the respondents before the Arbitrator by the appellants themselves. The only additional claims which are allowed by the Arbitrator are merely two small claims of Rs. 12,200/- and Rs. 11,600/- in respect of certain extra transport charges pertaining to transport which was not covered by the terms of the Contract. Even in this regard, certain amounts had been already paid by the appellants to the respondents. The Arbitrator has granted a slightly higher rate and has granted the differential amount. Looking to all these circumstances, it is not possible for us to hold that there are any errors of law apparent on the face of the Award or that the Award is either perverse or beyond the scope of the terms of reference.

16. The last point which requires consideration is the question of interest. The Arbitrator has considered this question and has said that the sum of Rs. 4,44,134.51 was withheld by the appellants under a mistaken belief that the appellants could adjust this amount against their claim which they did not substantiate simply because they felt that the Arbitrator could not scrutinize it. In view of this circumstance, the Arbitrator has declined to grant interest on the claims of the respondents till the date of the Award.

17. The question whether any interest should be granted to the respondents on their claims from the date when the claims arose till the date of the Award is a matter of substantive law. It is pointed out to us by Mr. Ramchandani that under Clause XVII(g) of the Contract, no interest is payable on any bill outstanding for payment,. The same position is reiterated in the Note below Clause XVII also. In addition, the Arbitrator has also taken the peculiar circumstances of the case into account in not granting interest till the date of the Award. We do not see any reason why we should set aside this part of the Award.

18. In respect of the period, however, from the date of the Award till the date of the decree or payment the Supreme Court, in the case of Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, , has said that interest can be allowed by the Court for the period from the date of the Award to the date of the decree. The Supreme Court has referred to section 34 of the Civil Procedure Code, the provisions of the Interest Act, 1978 and section 29 of the Arbitration Act, 1940, with its restricted scope. In view thereof, in the case of the Hindustan Construction Co. Ltd. v. The State of Jammu & Kashmir,

reported in J.T. 1992(5) S.C. 325, the Supreme Court in paragraph 5 of the judgment has referred to section 34 of the CPC and has said that section 34 provides both for awarding of interest pendente lite as well as for the post-decree period; and the principle of section 34 has been held applicable to proceedings before the arbitrator, though the section as such may not apply. The same principles of section 34 would continue to apply to proceedings under the Arbitration Act. Hence, apart from the arbitrator, the Court also has power in such proceedings to grant interest from the date of the Award to the date of the decree or realisation whichever is earlier. u/s 29 of the Arbitration Act, the Court also has power to award interest from the date of the decree till payment at such rates as it considers reasonable. We, therefore, grant interest on the claims granted by the Arbitrator in his Award at the rate of 18% per annum from the date of the Award till payment.

19. Under Rule 787(5) of the Rules of the Bombay High Court framed under the Arbitration Act, 1940, the Judge disposing of the petition to set aside or remit an Award shall have the discretion to pass a judgment and decree in terms of the Award immediately on delivery of his judgment refusing to set aside or remit the Award or on such date as he deems fit thereafter without requiring any written application from any of the parties interested in enforcing the Award. In view of this position, since we are dismissing the appeal to set aside the Award, we are entitled to pass a decree in terms of the Award forthwith.

20. In the premises, appeal is dismissed with costs. The order of the learned Single Judge dismissing the petition is upheld. There will be a decree in terms of the Award. The amount payable under the Award shall be paid by the appellants to the respondents together with interest thereon at the rate of 18% per annum from date of the Award till payment of realisation.