

(2009) 11 DEL CK 0298

In the Delhi High Court

Case No : I.A. No. 6042 of 1996 in C.S. (OS) No. 2516A of 1995

Gannon Dunkerley and Co. Ltd.

APPELLANT

Vs

National Thermal Power Corporation

RESPONDENT

Date of Decision : 05-11-2009

Acts Referred:

Arbitration Act, 1940 — Section 16, 30, 33
Limitation Act, 1963 — Article 147, 3, 4

Citation : (2009) 11 DEL CK 0298

Hon'ble Judges : Manmohan, J

Bench : Single Bench

Advocate : Vibhu Bakhru, for the Appellant; S.K. Taneja and Sanjay Kumar, Vaibhav Mishra and Tarun Kr. Tiwari, for the Respondent

Final Decision : Disposed Off

Judgement

Manmohan, J.—By way of the present application, plaintiff has challenged the Award dated 31st August, 1995 passed by the sole Arbitrator by filing objections under Sections 16, 30 and 33 of the Arbitration Act, 1940.

2. Briefly stated the facts of the present case are that in December, 1978, Defendant-NTPC invited item rate tenders for civil works for Circulating Water System Part-I for Korba Super Thermal Power Project. Though on 25th January, 1979, the tender was opened, it was only on 20th June, 1979 that a Letter of Intent was issued by the Defendant-NTPC to the plaintiff- Gannon Dunkerley & Company Limited.

3. Between September, 1979 and 29th May, 1983, the plaintiff- claimant executed the work. During the execution of the contract, the plaintiff-claimant not only raised periodic bills but also claimed labour escalation, material escalation and increase on account of price of fuel. Though, certain payments were made by Defendant-NTPC even with regard to these three additional claims, the plaintiff-claimant was not satisfied with the said payments.

4. On 5th March, 1986, the final bill was approved and determined by the Defendant-NTPC. In fact, the plaintiff-claimant signed the final bill under protest reserving its right to claim further payments under the afore-mentioned three additional claims.

5. On 10th March, 1988, the defendant-NTPC paid the amount as determined by it under the final bill. However, as the plaintiff-claimant was dissatisfied with the said payment, it invoked the arbitration clause on 18th June, 1990.

6. It was only in February, 1991 in reply to the statement of claim filed by the plaintiff-claimant that the Defendant-NTPC contended for the first time that labour escalation had been paid by it under a mistake. It is pertinent to mention that in the said reply, Defendant-NTPC had admitted that material and fuel escalation under the same clause was payable and the same was not arbitrable as there was no dispute with regard to these two claims.

7. However, as all the three plaintiff-claimants claims for escalation, namely, labour, material and fuel arose out of the same Clause 6 of the Special Conditions of Contract (in short SCC), in April, 1991 Defendant-NTPC claimed before the Arbitrator that even material and fuel escalation had been paid under a mistake and defendant was entitled to their refund.

8. The learned Arbitrator vide the impugned Award construed and interpreted Clause 53-A of the General Conditions of Contract (in short GCC) along with Clause 6 of the SCC. The learned Arbitrator rejected the plaintiff-claimants claims but while deciding the counter- claims observed as that the plaintiff-claimant was entitled to escalation under the three heads, namely, labour, material and fuel provided it proved its claims by filing documentary evidence. Learned Arbitrator further stated that if after receipt of documentary evidence, the plaintiff-claimant was still aggrieved by any decision taken by NTPC, it would be open to the plaintiff-claimant to agitate its grievances by even resorting to fresh arbitration.

9. At the outset, I must state that the intent and objective behind commercial arbitrations is to achieve finality of all disputes in the shortest possible time. If the arbitrators decide to merely lay down the law and leave the parties to subsequently prove their claims by way of another arbitration, then, in my opinion, the entire objective and intent of arbitrations would be defeated.

10. In the present case, the sole Arbitrator after construing the contractual provisions had asked one of the parties after twelve years of completion of the contract to produce evidence of amounts paid on account of increase in wages, materials and fuel and had further observed that after the documentary evidence had been produced, the other party should take a decision and if the first party was aggrieved, it could once again resort to arbitration.

11. Awards are intended to achieve finality as well as put an end to all the disputes that have arisen between the parties, and not to be agreement to re-

litigate. Accordingly, even if the Arbitrator wanted the petitioner-claimant to file documentary evidence and the defendant- NTPC to take a decision thereon, the Arbitrator should have passed an interim Award and thereafter proceeded to adjudicate the disputes finally between the parties. [Refer to National Highways Authority of India Vs. ITD Cementation India Ltd.,

12. Though the learned Counsel for the plaintiff submitted that the interpretation of Clause 53 of GCC and Clause 6 of SCC was not correct and on this ground alone the Award was liable to be set aside, I am of the view that construction of a contract is within the jurisdiction of the Arbitrator and interpretation of a contract is a matter for the Arbitrator to determine even if it amounts to determination of a question of law (refer to McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, Pure Helium India Pvt. Ltd. Vs. Oil and Natural Gas Commission, and D.D. Sharma Vs. Union of India (UOI), In any event, the interpretation of contractual provisions made by the Arbitrator cannot certainly be said to be one that is perverse or contrary to the terms of the contract. Accordingly, in my opinion on this ground the Arbitrators Award is not liable to be set aside.

13. However, in my opinion, the Arbitrators Award with regard to NTPCs Counter-Claims for refund of material and fuel escalation is liable to be set aside on the ground that it suffers from an error apparent on the face of the record as the learned Arbitrator has arrived at a contradictory finding inasmuch as there was no question of asking the plaintiff-claimant to prove its payments under these two claims, specially when the Arbitrator while dismissing the plaintiff-claimants claim with regard to these two items itself had concluded that they were not arbitrable as the defendant-NTPC had not disputed the said two claims. I may mention that I am setting aside the Arbitrators conclusion with regard to these two Counter-Claims because the findings of the learned Arbitrator are contradictory on the face of the Award itself and I do not have to scrutinise either merits of the documents or the material on record. In my opinion, learned Arbitrator could not have reached the conclusion under the head of Counter-Claims 2 and 3 that the said amounts had been paid under a mistake because in the earlier portion of the Award, the Arbitrator himself had concluded that there was no dispute with regard to payments of material escalation or fuel escalation. Accordingly, the Arbitrators conclusion with regard to Counter-Claims No. 2 and 3 are set aside.

14. As far as the finding reached by the learned Arbitrator with regard to defendant NTPCs Counter-Claim for refund of excess of amount paid on account of labour escalation is concerned, I find that the said Counter-Claim was clearly barred by limitation as admittedly the final bill had been approved and determined by Defendant-NTPC as it deemed fit and proper on 5th March, 1986. It was only in February, 1991 that for the first time the defendant-NTPC in its reply to statement of claim averred that it had made excess payments to the plaintiff- claimant under the head of labour escalation.

15. Though facts were not disputed, Mr. Taneja, learned senior counsel for defendant-NTPC submitted that this Court should not reject the Arbitrators conclusion with regard to its Counter-Claim No. 1 on the ground of limitation as this defence had not been taken by plaintiff- claimant in its reply to the Counter-Claim. In this context, Mr. Taneja placed reliance upon a judgment of Patna High Court in the case of Pioneer Engineering Works Vs. Union of India (UOI), , wherein it has been held as under:

The argument of the learned Government Advocate on behalf of the appellant is that the claim of the respondent with regard to over payment have been made on 7-1-1954, and not 18-2-1954, and that the counter-claim of the respondent with regard to over payment was barred by time. We do not accept the submission of the learned Government advocate as right. It appears from the record of the case that the appellant took no objection before the arbitrator that the counterclaim was made by the respondent beyond the time granted by the arbitrator nor did it make any complaint before him, whether any prejudice was caused to it because of the delay made by the respondent in making their claim.

xxx xxx xxx It appears to us, therefore that the appellant was full aware of the counter claim made by the respondent and it sought to lead evidence before the arbitrator to show that the counter-claim was not substantiated. It appears to us that the irregularity, if any, made by the arbitrator in accepting the counter claim beyond the time fixed by him in Ex. 2 has been waived by the appellant who took part in the proceedings before the arbitrator with full knowledge of the irregularity and without protest.

It is well settled that in such a case the Court will not permit any of the parties to lie by or act in an indecisive manner so as to obtain the benefit of the award if it is in his favour and endeavour to set it aside if it is not. That is the view taken by Tinddal, C. J., in *Bignall v. Gale* (1841) 10 LJCP 169 at p. 171, where he says as follows:

In coming to a determination upon this case, I cannot get rid of what makes a great impression upon my mind, that the defendant for three weeks knew of every objection which has now been urged to this award, and gave no notice of his intention to dispute it on those grounds. He knew on the 17th of December, these witnesses had been examined in his absence. What right had he then to lie by with his grievance dormant in his own bosom, and now dispute for the first time, the validity of the authority which has been exercised? He ought at the time to have made his election, and to have insisted on another meeting at which he might have been confronted with the witnesses and given his explanation of their testimony. But this case may be decided on another ground. xxx xxx xxx In view of this principle, we hold that the appellant cannot be permitted to raise the objection in the present appeal, and the objection must be overruled. In our opinion, the lower Court was right in dismissing the application of the appellant and passing a decree in terms of the award. We do hold that there is no substance in this appeal. It is accordingly dismissed with costs.

16. In my opinion, though a decree or award passed in a suit/petition barred by limitation is not a nullity, but still the defence of limitation can be raised or agitated if it is only a question of law which arises on admitted facts. Relevant portion of Section 3 of Limitation Act, 1963 reads as under:

3.Bar of limitation:-(1)Subject to the provisions contained in Sections 4 - 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence.

(2) For the purposes of this Act

xxx xxx xxx (b) any claim by way of a set off or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted

(i) in the case of a set off, on the same date as the suit in which the set off is pleaded;

(ii)in the case of a counter claim, on the date on which the counter claim is made in court;.

17. The Hon"ble Supreme Court in Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, has held as under:

12. Therefore, the period of limitation for commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of civil actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

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14. The law of Arbitration by Justice Bachawat in Chapter XXXVII at p.549 it is stated that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date when the claim accrues, as also in the case of arbitrations the claim is not to be put forward after the expiration of a specified number of years from the date when the claim accrues. For the purpose Section 37(1) "action" and "cause of action" in the limitation Act should be construed as arbitration and cause of arbitration. The cause of arbitration, therefore, arises when the claimant becomes entitled to raise the question, i.e. when the claimant acquires the right to require arbitration. The limitation would run from the date when cause of arbitration would have accrued, but for the agreement.

15. Arbitration implies to charter out timous commencement of arbitration availing the arbitral agreement as soon as difference or dispute has arisen. Delay defeats justice and equity aid the promptitude and resultant consequences. Defaulting party should bear the hardship and should not transmit the hardship

to the other party, after the claim in the cause of Arbitration was allowed to be barred...

18. The Supreme Court in *Rama Shankar Singh and Another Vs. Mst. Shyamlatadevi and Others*, has observed as under:

3. The High Court was right in allowing the defendant to raise the point of limitation, though the plea was not taken in the written statement. u/s 184 of the Bihar Tenancy Act a suit instituted after the expiry of the period of limitation is liable to be dismissed though limitation has not been pleaded learned Counsel for the appellants could not tell us what further evidence his clients could adduce on this point. In the circumstances, the absence of the plea of limitation in the written statement did not cause the appellants any prejudice.

19. In the case of *Balaram v. Mangta Dass* reported in (1907) ILR 34 Cal 941, a similar issue arose for consideration and the majority view of the Full Bench was as under :

3. There is, no doubt, a conflict of rulings between this Court and the Bombay High Court on this point. The Bombay High Court has ruled that Article 147 of the second schedule to the Limitation Act applies to a suit like the present, in which case no doubt this suit would not be barred by limitation. But we are bound by the Full Bench ruling of this Court, and must hold that the period of limitation is 12 years, and that the suit accordingly is barred. This question of limitation was never raised in either of the Courts below; nor has it been raised in the memorandum of the appeal to this Court. But we have felt ourselves constrained to allow it to be taken, although at a very late stage, in accordance with the provisions of Section 4 of the Limitation Act. The provisions of that section appear to us to be mandatory; and in accordance with them, we are bound to hold that the suit is barred by limitation and to dismiss it accordingly

20. The concurring view of Justice Mookerjee is also reproduced herein below:

14. If the determination of the question of limitation turns upon facts which were not investigated by reason of the omission of the defendant to take the plea of limitation in the Court of first instance, the Court of appeal cannot be invited to entertain the point and remand the case for fresh investigation; if, however, the point arises on the face of the pleadings or on the facts found, the question must be considered. The true rule is laid down by Mr. Justice Banerjee in the case of *Nadhu Mandal v. Kartick Mandal* (1903) 9 C.W.N. 56, where that learned Judge observed that Section 4 of the Limitation Act, which requires that the Court should give effect to the rules of limitation even though limitation may not be set up in defence, applies to a Court of Appeal when the point appears on the face of the record and does not stand in need of being developed by evidence. This distinction, which appears to me to be well founded on reason, principle and convenience, is recognised in the cases *Mapan v. Manny*, *Sasi Baw* (1901) 2 U.B.R. 446, *Mangun Jha v. Dolhin Golab Koer* (1898) ILR 25 Cal. 692, 695, *Harak Chand v. Deo Nath Sahay* (1897) ILR 25 Cal. 409, 410, and *Dso Narain*

Chowdhury v. Webb (1900) ILR 28 Cal. 86. The cases of Atma Ram v. Sardar Koer (1884) 4 All. W.N. 327, Ahmad Ali v. Waris Husain (1893) ILR 15 All. 123, Dattu v. Kasai (1884) ILR 8 Bom. 585, Shivapa v. Dod Nagaya (1886) ILR 11 Bom. 114 do not lay down any inconsistent principle; they only show that a Court of Appeal will not entertain a question of limitation for the first time, when to do so would render necessary a fresh enquiry into the facts.

21. Keeping in view the aforesaid Supreme Court and Calcutta High Court Judgments, I am of the opinion that even if the plea of limitation had not been raised by the plaintiff-claimant before the learned Arbitrator it can still be raised before this Court in Sections 30 and 33 petition as the facts in the present case are not disputed and the issue of limitation appears on the face of the record. Since in the present case final bill was approved on 5th March, 1986 and the said Counter-Claim was filed for the first time in February, 1991, the defendant NTPCs Counter-Claim with regard to refund of excess payment on account of wage escalation is clearly barred by limitation. Accordingly, the impugned Award to that extent is also set aside.

22. Consequently, in my opinion, none of the parties would be entitled to any further amount by way of claim or Counter-Claim.

23. In view of the aforesaid, the impugned Award with regard to the Counter-Claims is set aside and the Registry is directed to prepare a decree sheet in accordance with the aforesaid judgment stating that no further amount is payable to either of the parties.

24. Accordingly, the present application and suit stand disposed of.