

(2017) 01 CAL CK 0028

In the Calcutta High Court

Case No : APO No. 291 of 2016 In AP No. 167 of 2005

Gopal Chandra Mukherjee

APPELLANT

Vs

Food Corporation of India

RESPONDENT

Date of Decision : 17-01-2017

Acts Referred:

Arbitration Act, 1940 — Section 30

Citation : (2017) AIR(Calcutta) 110

Hon'ble Judges : Sanjib Banerjee and Siddhartha Chattopadhyay, JJ.

Bench : Division Bench

Advocate : Mr Tilak Bose, Senior Advocate, Mr Shaunak Mitra, Mr Biswanath Datta, Ms Shreya Singh and Ms Namrata De, Advocates, for the Appellant; Mr S. P. Majumdar, Senior Advocate and Mr Aniruddha Bagchi, Advocate, for the FCI

Final Decision : Dismissed

Judgement

Sanjib Banerjee, J.—The story may be narrated first and the legal context later. The sheer quality of the story demands this extraordinary treatment of the facts de hors the legal premise against which it has to be seen.

2. The appellant entered into an agreement with the Food Corporation of India in June, 1975 for, in effect, letting out his godown having nearly 73,000 sq. ft space for storage of food grain up to 12,000 MT at a time. The agreement was in the nature of an agency under which the appellant was to handle and receive only such consignments and bags of food grain as were to be allotted by FCI. As on October 10, 1988, only about 1900 MT of food grain remained at such Shibpur godown and the vast area of the godown remained unutilised. The agreement provided for the appellant to be paid on the basis of the quantity of the goods stored. The agreement also precluded the godown being let out to any other or the appellant storing any goods other than the FCI's therein. For a substantial period between October, 1988 and November, 1991 fresh stocks of food grain were not sent for storage at the Shibpur godown. By a letter dated November 2, 1991, the appellant terminated the agreement by giving two months' notice.

Thus, the agreement stood determined with effect from January 2, 1992.

3. Prior to the termination of the agreement, the appellant had invoked the arbitration clause contained in the agreement and referred several claims to arbitration. An arbitrator was appointed in February, 1990 and in course of the reference before such arbitrator additional claims were filed by amending the original statement of claim such that the claims of the appellant till May 31, 1997 formed the subject-matter of such initial arbitral reference.

4. The appellant succeeded substantially in such reference. The award was made a rule of court by repelling FCI's challenge thereto under Section 30 of the Arbitration Act, 1940. An appeal was carried to this court by FCI. For the moment, it may suffice to only notice that the appellant herein had claimed under two several heads for rent and compensation for the stock of food grain remaining in the godown and not being removed by the FCI despite notice. Godown rent was claimed from January 4, 1992 to May 31, 1996 at Rs.37,38,357.36/- and, simultaneously, compensation for the food grain not being shifted from the godown during the period January 1, 1992 to May 31, 1996 was claimed at Rs.1,12,24,365/-. It was further indicated that the goods continued to occupy the godown beyond May 31, 1996. This court held in the appeal that godown rent and compensation for the goods not being removed could not be claimed in the same breath. It was observed that the consideration of the claim on account of compensation was without jurisdiction. However, the relevant head of claim was not set aside as a consequence; but the matter was remanded to the arbitrator to examine several heads of claim in the light of the observations made in the judgment. In other words, quite astoundingly, the appellant earned rent for the entirety of the godown of a sum in excess of Rs.37.38 lakh merely by citing that about 1900 MT of food grain remained stored at the 73,000 sq. ft godown from October, 1988 to the end of May, 1997.

5. Buoyed by such remarkable success in the relevant appeal, the appellant lodged a further claim for the same stock lying in the godown from June 1, 1997 and sought a further sum of about Rs.1.33 crore till November 30, 2000. The arbitrator dutifully considered the claim over 29 pages and passed an award for a sum of Rs.1,01,24,012/- with interest at three per cent per annum from the date of the reference.

6. It is such award of February 23, 2005 that was challenged before the Single Bench, the rejection whereof has given rise to the present appeal. The Single Bench found the claim in the reference to be "absurd" and found fault with FCI for facilitating the appellant in making the claim and not taking appropriate steps. Indeed, the anguish of the Single Bench is evident from the following sentence: "The conduct of the officials of FCI is required to be investigated". The award was set aside.

7. The Single Bench held that there was no basis for the arbitrator allowing compensation at the rate of Rs.4/- per sq. ft per month. It was held in the order

impugned that "the award passed by the learned Arbitrator is without evidence, perverse and unreasoned".

8. The essence of the claim needs to be emphasised, just in case the narration of this story may have been inadequate to bring it out: for a paltry quantity of 1900 MT (may have actually been much less) of food grain received at the godown by October, 1988, the appellant considered it his sacred duty to guard and protect the same for a period of 12 years by keeping his 73,000 sq. ft space otherwise idle only because a clause in the agreement of 1975 which stood terminated in 1991 precluded the appellant from dealing with the stock supplied to the godown except as per the instructions of FCI. Such reverential adherence to a contractual term may be praiseworthy, but it cannot bring any more cheer to the appellant than he has undeservingly enjoyed till May 31, 1997.

9. After all, one cannot miss the woods for the trees in failing to notice that the stock of goods last received in October, 1988 was a consignment of food grain. It is inconceivable that such food grain was fit for human consumption even at the time that the termination of agreement of 1975 was effected on January 2, 1992. By showing such useless stock and the sanctimonious obeisance to a term in a contract that already stood terminated, the appellant hit a jackpot in the claim under the ninth head in the initial reference not being set aside. Thankfully, the game has been seen through this time and the appellant not permitted to make merry at the expense of the public exchequer.

10. The appellant exhorts that the authority available under Section 34 of the Arbitration and Conciliation Act, 1996 is limited and the traditional approach has always been to assess the award by merely reading it and not digging any deeper to find fault with it. From persuasion to intimidation, the appellant has attempted every trick to reduce judges of a superior court to mere by-standers maimed by the command of the statute irrespective of whatever the consequences may be. Indeed, the appellant extols the virtue of treating all litigants as the same without giving any latitude to a public body, regardless of whether public funds are involved. The appellant says that the court may not have sympathised with the respondent if it had been a private concern. The appellant maintains that when considering an award founded on a contract, no distinction can be made between a private concern and a statutory or a public body.

11. The appellant refers to the tone of admonition in Supreme Court judgments when it found needless interference in arbitral awards by High Courts. A recent judgment reported at (2015) 3 SCC 49 (Associate Builders v. Delhi Development Authority) has been placed, apart from the legal principles enunciated therein, to emphasise on the tenor of the observation at paragraph 56 of the report:

"56. Here again, the Division Bench has interfered wrongly with the arbitral award on several counts. It had no business to enter into a pure question of fact to set aside the arbitrator for having applied a formula of 20 months instead of

25 months. Though this would inure in favour of the appellant, it is clear that the appellant did not file any cross-objection on this score. Also, it is extremely curious that the Division Bench found that an adjustment would have to be made with claims awarded under Claims 2, 3 and 4 which are entirely separate and independent claims and have nothing to do with Claims 12 and 13. The formula then applied by the Division Bench was that it would itself do "rough and ready justice". We are at a complete loss to understand how this can be done by any court under the jurisdiction exercised under Section 34 of the Arbitration Act. As has been held above, the expression "justice" when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the arbitrator's view and does what it considers to be "justice". With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact."

12. It is necessary that the judgment in Associate Builders be noticed in some detail, as to the enunciation of the law therein qua the authority of the court to interfere with an arbitral award under the Act of 1996. But there can be no appreciation of the instructive judgment in Associate Builders without reference to the judgment reported at (2003) 5 SCC 705 (ONGC v. Saw Pipes Limited). A small prelude may be unavoidable before discussing Saw Pipes and the apparent reiteration of the same principles in Associate Builders. Traditionally, and certainly by judicial custom established over a century, courts have been diffident in receiving challenges to arbitral awards. The degree of circumspection with which a challenge to an arbitral award would be received may have been prompted by the fact that when the parties had contracted to have their disputes resolved by a forum of consensus in preference to the sovereign forum of a civil court, they ought to be left to the consequence thereof. The primary ground for challenging an arbitral award available under Section 30 of the Arbitration Act, 1940 was that the arbitrator or umpire had misconducted himself or the proceedings. The second ground pertained to an award being made despite the supersession of the arbitration or it being invalid by virtue of legal proceedings upon the whole of the subject-matter of the reference being commenced and notice thereof being given to the arbitrator or umpire. The third ground under the old regime was when an award had been improperly procured or it was otherwise invalid. Judicial interpretation of the grounds for challenge ranged from the strictest where even errors of law would not be corrected to the more amenable tests of reasonableness; but, at any rate, appreciation of the evidence or the assessment of the quality or the quantity thereof were, by and large, prohibited areas for a court to venture into in course of a challenge to an arbitral award.

13. With the intervention of the court in matters pertaining to arbitration being statutorily restricted by the regime under the 1996 Act, it may have been

excusable for Section 34 of the Act of 1996 to be initially regarded as narrower than Section 30 of the Act 1940 in the matter of the court's authority to interfere with an arbitral award. The judgment in *Saw Pipes*, with its reference to Section 28 of the Act 1996 and the apparent expansion of the expression "in conflict with the public policy of India", came as a panacea for disgruntled award-debtors to implore courts of law to assess arbitral awards with a greater degree of freedom. *Saw Pipes* essentially instructs that patent errors and palpably wrong awards may be corrected by probing slightly deeper, if warranted, than what Section 34 of the Act of 1996 may have been originally seen to have permitted.

14. *Associate Builders* accepts, as a Bench of coordinate strength had to, the law laid down in *Saw Pipes*; but the approaches in the two matters are distinct. *Saw Pipes* points to the extent of the authority available to a court to interfere with an arbitral award in an appropriate case, while *Associate Builders* instructs that interference must only be when completely avoidable. Philosophically, the approaches in the two judgments are as disparate as the eternal conundrum of the glass being half empty and it being half full.

15. *Associate Builders* recognises that the dictum in *Saw Pipes* has been "consistently followed till date." It then refers to later judgments that interpreted *Saw Pipes* and regarded *Saw Pipes* to have expanded the meaning of the expression "in conflict with public policy of India" to the exalted status conferred to the comparable expression "contrary to public policy" in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 as interpreted in the judgment reported at (1994) Supp (1) SCC 644 (*Renusagar Power Co. Limited v. General Electric Co.*). The judgment in *Associate Builders* refers, inter alia, to the decision reported at (2006) 11 SCC 181 (*McDermott International Inc v. Burn Standard Co. Limited*) where patent illegality was judicially recognised to be an additional ground for setting aside an arbitral award provided such "patent illegality" went to the root of the matter. As to the degree of violation of public policy that would prompt a court to interfere with an arbitral award, *Associate Builders* reiterates the law declared in *McDermott International*, inter alia, in the following sentence: "The public policy violation, indisputably, should be so unfair and unreasonable as to the shock the conscience of the court."

16. This interpretation has to be seen in the light of the substance of Section 34(2)(b)(ii) of the Act of 1996 and the Explanation thereto. The provision mandates that "An arbitral award may be set aside by the court only if ... the court finds that ... the arbitral award is in conflict with the public policy of India." The Explanation to the expression "award is in conflict with the public policy of India" may be seen in its entirety as it stood prior to the amendment of 2015 since such the amended provision is inapplicable to the present case by virtue of Section 26 of the Amending Act of 2015:

"Explanation 1.-For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.-For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

17. Paragraph 24 of the report in Associate Builders summarises the principles involved in assessing an arbitral award and the scope of interference therewith. It is of significance that the ground of violation of public policy has been seen from the perspective of patent illegality. Simultaneously, a separate category of grounds for challenge has been carved out: "so unfair and unreasonable that it shocks the conscience of the court." Thus, the apparent implication is that when an award shocks the conscience of the court, only by virtue thereof and without invoking any of the other grounds, including the ground of violation of public policy, an arbitral award may be interfered with. The relevant passage from paragraph 24 of the report in Associate Builders is set out:

"24. In DDA v. R.S. Sharma and Co., (2008) 13 SCC 80, the Court summarized the law thus: (SCC pp. 91-92, para 21)

"21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties; is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently

illegal and opposed to the public policy of India.

..."

18. To emphasise the point, it is evident from the recent pronouncement of the Supreme Court in *Associate Builders*, particularly in it quoting paragraph 21 of the judgment in *R. S. Sharma*, that there are four broad heads under which an arbitral award may be interfered with by a court under the said Act of 1996. On an apparent reading of paragraph 21 of the judgment in *R. S. Sharma* as quoted with approval in *Associate Builders*, there appear to be four broad heads under which arbitral awards may be set aside under the Act of 1996. These heads are covered by clauses (a) to (d) of paragraph 21 of *R. S. Sharma*. However, a more careful scrutiny reveals that clause (d) overlaps with and incorporates what has already been included in sub-clauses (iii) and (iv) of clause (a) of the relevant paragraph in *R. S. Sharma*. Even then, it appears that there may be three broad heads under which interference with an arbitral award may be warranted; and the third of them is the ground that it shocks the conscience of the court in its unfairness and unreasonableness. Again, on the face of it, such ground permitting interference appears to be divorced from and independent of the ground pertaining to violation of public policy.

19. However, *Associate Builders* has also referred to and endorsed the law laid down in *Saw Pipes*. And, *Saw Pipes* did not carve out a specific genus of grounds for interference with the arbitral award if it shocks the conscience of the court. Indeed, the species of the ground of "shocking the conscience of the court" has been included in *Saw Pipes* in the genus of "opposed to public policy". So much is apparent from paragraph 31 of the report in *Saw Pipes* and in the ground of "shocking the conscience of the court" not being included in the summary at paragraph 74 of the same judgment. In *Saw Pipes*, the ground of "shocking the conscience of the court" has been included in the ground of "patent illegality" and the ground of "patent illegality" comes under the broad head of "opposed to public policy". The passage towards the end of paragraph 31 of the report is eloquent on such aspect:

"31. Therefore, in our view, the phrase "Public Policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in *Renusagar's* case (*supra*), it is required to be held that the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

20. For the completeness of the discussion, another a recent judgment of the Supreme Court rendered in the context of Section 48(2)(b) of the Act of 1996, dealing with the enforcement of a foreign award, may be noticed. Though Saw Pipes referred to Renusagar to expand on the import of the expression "in conflict with the public policy of India" appearing in Section 34(2)(b)(ii) of the Act of 1996, in the judgment reported at (2014) 2 SCC 433 (Shri Lal Mahal Limited v. Progetto Grano SpA) a three-judge Bench held that the interpretation of the expression "public policy" in Section 7(1)(b)(ii) of the repealed Act of 1961 would govern the meaning of the similar expression in Section 48(2)(b) of the Act of 1996; but the "wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in Saw Pipes is not applicable where objection is raised to the enforcement of the foreign award ..."

21. It may not amount to mere semantics in trying to discover whether the ground of shocking the conscience of the court would be independent of the ground of patent illegality or that of being opposed to public policy. It is not necessary that an award has to be patently illegal for it to shock the conscience of the court; it may be shocking though there could be an arguable case of legality made out in support thereof. The present case may be an example of such kind.

22. The appellant claims that for a few sackfuls of rotten grains languishing in one corner of his sprawling godown, FCI had to continue paying rent for the entire godown for years together after the agreement was terminated. In a sense, the award has been sought to be justified on the ground that the claim for rent till the end of May, 1997 was permitted by the appellate order of March 17, 2003. Seen in such light, and the apparent term in the terminated agreement of 1975 that no goods would come in to or go out of the godown with FCI's permission, neither the claim nor the award may appear to be patently illegal. Yet, both the claim and the consequent award would shock the conscience of any reasonable person that for a few sackfuls of rotten grains carelessly left behind by FCI or deliberately abandoned, it would result in lakhs of rupees being paid on a monthly basis for years together.

23. It is evident from the award that for the period prior to three years before

the commencement of the arbitral proceedings, the claim was not entertained by the arbitrator. The claim was entertained and allowed for the period commencing immediately three years prior to the reference being made till the date of the removal of the food grain by FCI. Since any financial liability of FCI would hardly affect the pay-packets or the other benefits earned by its employees, no attempt was made before the arbitrator to ascertain whether the appellant herein allowed the huge Shibpur godown to remain unused for the entire period of 12 years that it retained the few bags of rotten food grain thereat. Such question did not dawn on the arbitrator either.

24. Just as the Single Bench found the claim to be absurd, it shocks the conscience of this court that such a claim could be taken seriously and an award in excess of Rs.1 crore passed thereon. If there was a clause in the 1975 agreement, which stood terminated by the beginning of 1992, that precluded the appellant herein from disposing of the goods received at the godown without reference to FCI, the obligation may have ended upon the termination of the agreement; or, at any rate, within three years or so after the acceptance of the termination. The acceptance of the termination was in September, 1992.

25. Ordinarily, courts in this country may scarcely distinguish between one party and another based on its status as to whether it is a State or an instrumentality of the State within the meaning of Article 12 of the Constitution. But when it comes to squandering public money or defrauding public exchequer, as has been attempted by this appellant, courts have a bounden duty under our constitutional scheme to arrest the mischief. It would be opposed to the public policy of India to allow public funds to be plundered or squandered. It would also be patently illegal, going to the very root of the matter, to read a clause in a dead and spent agreement to imply that the obligation of retaining rotten food grain would continue ad infinitum. In a matter of the present kind it is the obligation of the court to sift through the maze of legal hurdles that the disingenuous may present to strike at the root and uproot the mischief.

26. Since the substantive matter on merits was taken up for consideration in this appeal, the other issue as to the very maintainability of the reference, particularly in the light of clause 41 of the agreement, has not been considered.

27. The order impugned in so far as it set aside the palpably unconscionable arbitral award is affirmed. APO 291 of 2016 is dismissed with costs assessed at Rs.5 lakh to be paid by the appellant to FCI within eight weeks from date, in default whereof FCI will be at liberty to execute such direction for payment as a decree in accordance with law.

28. Copies of this judgment be forwarded by the Registrar, Original Side to the Chairman of FCI and to the Central Vigilance Commission for appropriate action.

29. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Sanjib Banerjee, J.—I agree.