
(1982) 07 CAL CK 0034
In the Calcutta High Court
Case No : Award Case No. 230 of 1981

Indian Iron and Steel Co. Ltd.

APPELLANT

Vs

C.G. Engineering Private Ltd.

RESPONDENT

Date of Decision : 08-07-1982

Acts Referred:

Arbitration Act, 1940 — Section 30
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 7
Limitation Act, 1963 — Section 21, 5
Specific Relief Act, 1963 — Section 10

Citation : AIR 1983 Cal 6 : (1982) 2 CompLJ 291 : 87 CWN 61

Hon'ble Judges : Pratibha Bonnerjea, J

Bench : Single Bench

Advocate : Ajoy Mitter and Umesh Banerjee, for the Appellant; Moni Sarkar and Maitrayee Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Pratibha Bonnerjea, J.—This is an application for setting aside the award No. CG/19/79/381 dated 2-9-1981 made and published by the Tribunal of Arbitrators of Indian Chamber of Commerce.

2. The petitioner is a manufacturer of iron and steel materials and the respondent is a dealer of iron and steel materials as well as of Galvanized corrugated sheets. Since July 1973, the respondent has business transactions with the petitioner's branch in Calcutta. On 15-12-76, the petitioner allotted in favour of the respondent 2 wagons of defective G. C. Sheets 0.63 mm. and 2 wagons of defective B. P. Sheets 16/24 G to be supplied on a "priority" basis from Burnpur Works. Two works orders being MDS/ W. BEN/A/10685 and MDS/ W. BEN/A/ 10686 both dated 29-12-T6 were issued by the petitioner in favour of the respondent. After all the formalities were completed, the petitioner despatched 2 wagons of defective B. P. Sheets against works order No. A10686. It is the respondent's case that the petitioner failed and neglected to despatch 2 wagons of defective G. C. Sheets of 0.63 mm. against works order No. A 10685

dated 29-12-76. Due to the aforesaid breach of contract by the petitioner, the respondent suffered damage. In terms of Clause 24 of the works order, the respondent referred the dispute for arbitration of the Indian Chamber of Commerce. The respondent filed a statement of claim, claiming damage of Rs. 43,400 being the difference between the agreed price and the market rate of the goods. The petitioner then filed an application under Ss. 5 and 33 of the Arbitration Act in the City Civil Court praying for a declaration that there was no binding arbitration agreement between the parties and obtained an order of injunction restraining the respondent from proceeding with the reference. The respondent applied for revision of the said order of injunction by this Court and by an order dated 15-12-1980, the said order was set aside holding that the arbitration clause was binding and the Arbitrators were competent to decide the claim for damage referred to them. Under the circumstances, the petitioner filed its counter-statement on 11-2-81 denying the respondent's claim for Rs. 43,400. On 28-2-1981 the respondent filed its rejoinder. By a letter dated 3-3-81 the petitioner was intimated by the Tribunal that they had received the final statement from the claimant and no further statements from the parties were called for. This letter is annex. "B" to the petition. On 12-5-81, the respondent submitted before the Arbitrators an amended statement of claim introducing a claim for specific performance of the contract No. A 10685 dated 29-12-76 by specific delivery of 2 wagons of defective G. C. Sheets. According to the petitioner, the Tribunal of Arbitrators without any notice to the petitioner and without hearing them, allowed the said amendment ex parte by accepting the amended Paras 19 (a) and 19 (b) of the respondent's statement of claim. By a letter dated 13-5-81, the Tribunal informed the petitioner that they had received an amended statement of claim from the respondent and sent a copy of the same to the petitioner but did not direct the petitioner to file any counter-statement dealing with the amended portion. On 14-8-81, the Arbitrators held a sitting, heard the parties and made and published their award on 2-9-81 directing specific delivery of 2 wagons of goods under works order No. A 10685 dated 29-12-76. The award was duly filed and notice of filing of the award u/s 14(2) of the Arbitration Act was received by the petitioner on 24-12-81. The present application was taken out by the petitioner for setting aside the said award on 9-2-82 which is clearly beyond 30 days from the date of receipt of the notice. In para 13 of the present petition, the petitioner tried to explain the reasons for not filing the petition in time and prayed for condonation of delay. In para 14 of the petition, the grounds for setting aside the award were set out. The grounds (a), (b), (c), (d), (k) and (1) were pressed before me. In grounds (a) and (b), the petitioner attacked the award on the allegation that the goods were readily available in open market and damage was adequate compensation. The learned Arbitrators erred in law by directing specific performance of the contract. In grounds (c), (d) and (k) the petitioner alleged that the Arbitrators misconducted the proceeding by allowing amendment and introducing a claim for specific performance without hearing the petitioner. In ground (1) the petitioner alleged that there was error on the face of the award. In the affidavit-in-

opposition all these grounds were denied and the respondent alleged that the application was barred by limitation. 3. So the point of limitation is taken first for decision. The petitioner received the notice u/s 14(2) on the eve of Christmas vacation. It appears that after reopening of the court in Jan. 1982, the petitioner on 16-1-82 handed over the papers to M/s. Fowler & Co for taking necessary steps. A counsel was briefed for giving opinion and on 20-1-82 he advised the petitioner to apply for setting aside the award. On 21-1-82 the same counsel was briefed for drafting the petition but on 22-1-82. the brief was returned due to the serious illness in the counsel's family. The time expired on 23-1-1982, 23rd and 24th Jan. were holidays due to Netaji's birthday. On 25-1-82 smother counsel was briefed for drawing the petition and the draft was made ready by 29-1-82. 30-1-82 was Saraswati Puja and 31-1-82 was a Sunday. On 1-2-82 a senior counsel was briefed to settle the draft. He held two conferences on 4th and 6th Feb. 1982 and handed over the settled draft on 8-2-82 and the application was taken out on 9-2-82. According to Mr. Sarkar. the counsel for the respondent, the time taken by the lawyers was unreasonable and did not amount to sufficient cause. On the contrary it proves the negligence on the part of the lawyers. According to him they ought to have drafted and settled the petition in hot haste in view of the fact that the time had already expired on 23-1-82 and on the facts of this case the application should be dismissed in limine. Mr. Sarkar cited Ramlal, Motilal and Chhotelal Vs. Rewa Coalfields Ltd., Bhakti Bh. Mondal Vs. Khagendra K. Bandopadhyaya and Others, Mahant Bikram Dass Chela Vs. Financial Commissioner, Revenue, Punjab, Chandigarh and Others, and The Rajputana Trading Co. Pvt. Ltd. Vs. Malaya Trading Agency, on the point of limitation and in support of his contention that lawyer's negligence would not amount to sufficient cause. Mr. Alay Mitra, counsel for the petitioner submitted that before giving opinion or drawing or settling the petition, the lawyers concerned had to go through the entire records before the arbitrators, the entire proceeding before the City Civil Court as well as the records of revision case before the High Court. The matter became more complicated on the point of law due to the amendment introducing an alternative case for specific performance in a claim simpliciter for damage. He invited my attention to the fact that the present petition was heard for 7 days and most of the time was taken by Mr. Sarkar himself in defending the amendment allowed by the learned arbitrators. This fact alone would justify the time taken by the lawyers. There is a lot of force in the submissions of Mr. Mitter. He further pointed out that there was no allegation of negligence, inaction or bad faith against the applicant and as such Section 5 of Limitation Act should be construed liberally in the present case. He strongly relied on Soorajmull Nagarmal Vs. Golden Fibre and Products, in support of his contention :

"Where no negligence, nor inaction, nor want of bona fides can be imputed to the applicant, a liberal construction of the section has to be made in order to advance substantial justice."

4. I accept the submission of the petitioner's counsel that there was no

negligence or laches on the part of the lawyers and the time taken by them was reasonable and necessary. The petitioner has satisfactorily explained the delay and the delay must be condoned.

5. The next point for consideration is whether the Tribunal of Arbitrators misconducted the proceeding or not. In the original statement of claim the respondent's case was that due to the breach of contract committed by the petitioner the respondent had suffered damages to the extent of Rs. 43,400/- being the difference between the agreed rate and the market price of the said goods. This claim for damage could be made by the respondent on the basis that he had accepted the breach and had treated the contract as at an end. In case of a breach of contract, the innocent party has two courses open to him viz. to accept the breach by treating the contract as at an end and claim damage available under the common law or demand specific performance of the contract by waiving the breach and treating the contract as subsisting. In case of claim for specific performance, the plaintiff can also claim damages in addition to specific performance or in substitution to specific performance. These two types of damages are given by the Court u/s 21 of the Specific Relief Act 1963 (Section 19 of the old Act). If the court thinks that specific performance will not be sufficient to satisfy the justice of the case it will allow damage in addition to specific performance of the contract, similarly the court, in spite of its finding that there was a concluded contract and the defendant had committed breach thereof may refuse to grant specific performance on the facts of the case before it as the relief is discretionary and award damage in substitution and/or in lieu of specific performance. These two types of damages are specific reliefs different from the damage under common law for breach of contract and are awarded by the court on different legal principles. This will be clear from the case reported in AIR 1949 Cal. 128 where the suit was instituted for specific performance of a contract for sale of a land but the defendant had in the meantime sold the land to a third party. The plaintiff claimed damage in lieu of specific performance. The law was summarised neatly in head note (A) of this case.

"When in a suit for specific performance of an agreement to sell land, the plaintiff is content with compensation in lieu of specific performance u/s 19, the land having been found to have been sold to third person, the suit is still a suit for specific performance. In such a case the decree will award compensation as specific relief on the footing that the agreement is subsisting and not damage as for breach of contract."

Similarly it was held in Kuncha Ramakrishnayya Vs. Kondamudi Sreeramulu and Another, at head note (B) :

"The award of damages u/s 19 cannot be claimed by a plaintiff who by his own conduct has disentitled himself to claim specific performance."

6. The damage in addition or in lieu of specific performance can only be granted by the court, on the basis that the contract is alive and subsisting and the

plaintiff is entitled to specific performance whereas the damage for breach of contract is awarded on the basis that the contract is dead.

7. It is therefore clear that the common law damage for breach of contract and the damages by way of specific relief under old Section 19 and the present Section 21 of 1963 Act are totally different in nature and character. In a claim for damage for breach of contract the plaintiff comes to court with a case that the contract is no longer subsisting. Is it then open to the plaintiff to introduce an alternative claim for specific performance by amending the pleading? In my opinion, it cannot be done. Once the plaintiff elects to treat the contract as at an end and claim damage for its breach, he will be precluded from asserting that the contract is still alive and ask for its specific performance. The plaintiff cannot breathe hot and cold at the same time. In *Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another*, the question arose whether a plaintiff suing for a declaration that a certain contract against him is void and inoperative having been obtained by undue influence can in the same suit in the alternative ask the relief of specific performance of the same contract. It was held, at page 1356 in para 5 :

"It is expressly provided by this Section (Section 37 of Specific Relief Act 1877) that a plaintiff suing for specific performance of the contract can alternatively sue for the rescission of the contract but the converse is not provided. It is therefore not open to a plaintiff to sue for rescission of the agreement and in the alternative sue for specific performance."

(words in the bracket supplied)" "But there is no provision in this section (Section 35 of Specific Relief Act) or any other section of the Act that a plaintiff suing for rescission of the agreement can sue in the alternative for specific performance. In our opinion, the omission is deliberate and the intention of the Act is that no such alternative prayer is open to the plaintiff."

8. The reason is simple. If the plaintiff comes to court with a case that there is no contract or the contract is dead. he will not be entitled to assert that there is a contract or the contract is alive. Mr. Sarkar, counsel for the respondent submitted that under Order 7, Rule 7 of the C. P. C. a plaintiff is entitled to take alternative pleas and the respondent herein had asked for amendment to set up an alternative case. In *Prem Raj Vs. D.L.F. Housing and Construction Pvt. Ltd. and Another*, :--

"It is true that under Order 7, Rule 7 CPC it is open to a plaintiff to pray for inconsistent reliefs. But it must be shown by the plaintiff that each of the pledge is maintainable."

9. On the basis of the pleading before them, it was held that the plaintiff came to court with the case that contract was void and as such an alternative claim for "specific performance was not maintainable as will appear from head note (A):--

"A plaintiff suing for a declaration that a certain contract against him is void and

inoperative having been obtained by undue influence cannot in the same suit in the alternative ask for the relief of specific performance of the same contract."

In (1928) 55 I.A 360 : AIR 1928 208 (Privy Council) it was held at page 373 (of I. A.) : (at p. 216 of AIR) :--

"Where the injured party sued at law for damage for a breach, going, as in the present case, to the root of the contract, he thereby elected to treat the contract as at an end and himself discharged from its obligation. No further performance by him was either contemplated or had to be tendered. In a suit for specific performance on the other hand he treated and was required by the Court to treat the contract as still subsisting. a definite election to treat the contract as at an end no suit for specific performance,... ..could be thereafter be maintained by the aggrieved plaintiff."

10. On the basis of the aforesaid authorities I have no hesitation to hold that by claiming damage for breach of contract, the plaintiff disentitles himself, on account of his own election to treat the contract as at an end. from claiming specific performance of the same contract as an alternative case either originally or subsequently by way of amendment. Such conflicting claims are not permitted under Order 7. Rule 7 of C.P.C. In this view of the matter, in my opinion, the arbitrators allowed an amendment not permitted by law and thereby legally misconducted the proceeding.

11. It is submitted by Mr. Sarkar that the petitioner contested the respondent's claim for specific performance before the Arbitrators and thereby waived the irregularity of absence of notice before allowing the amendment. The petitioner is not entitled to agitate this question at this stage. I accept this submission on behalf of the respondent. But this waiver of irregularity of service of notice or its absence will not help the respondent in the present case as the Arbitrators have legally misconducted the proceeding by allowing amendment not maintainable in law.

12. The last question to be decided in this case is whether there is any error apparent on the face of the award. According to the petitioner's counsel defective galvanized corrugated sheets are ordinary articles of commerce available in open market. A breach of contract to transfer such movables can be adequately compensated by allowing damage. He invited my attention to the statement of claim of the respondent where difference between the agreed rate and the market rate was claimed by way of damage. In support of his contention the petitioner's counsel strongly relied on Expl. (ii) to Section 10 of the Specific Relief Act of 1963 :

Expln. : Unless and until the contrary is proved the Court shall presume.

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and

(ii) that breach of a contract to transfer movable property can be so relieved

except in the following cases;

(a) Where the property is not an ordinary article of commerce or is of specific value or interest to the plaintiff or consists of goods which are not easily obtainable in the market;

13. Mr. Mitter strongly urged that unless the Arbitrators would hold that the goods come within the exception mentioned in Expln. (a) to Section 10 of the Act, they would have no jurisdiction to allow specific performance of a contract to transfer movable goods. There is a statutory bar due to statutory presumption mentioned in Explns. (i) and (ii) to Section 10 of the Act No such finding appears on the face of the award in dispute and as such the award is bad in law. He cited S.B. Dutt Vs. University of Delhi, in support of his submission. In this case the Arbitrator granted a declaration to a dismissed professor that he continued to be in service of the University and to hold the post which he formerly did. No reason was given in the award, nor was there any statement of law in the award. Still it was held that since the award directed specific performance of personal service, it involved a legal proposition which was in the face of Clause (b) of Section 21 of the Old Specific Relief Act, clearly erroneous and that the error appeared on the face of the award,

14. Mr. Sarkar on the other hand argued that the award in dispute was a non-speaking award. The error of law apparent on the face of the award means that the wrong legal proposition which is the basis of the award, can be found out in the award itself or in a document actually incorporated thereto or in a note appended by the Arbitrator with the award containing the reason for his judgment which can be said to be erroneous. No such thing can be found out in the present case. The award does not reveal on what basis specific delivery was directed by the Tribunal, In support of his contention, Mr. Sarkar cited twelve cases on the same point starting from A.M. Mair and Co. Vs. Gordhandass Sagarmull, and ending with AIR 1979 SC 403, (sic) According to him the court should not try to fathom the mind of the Arbitrators. Nobody can dispute the legal propositions laid down in these authorities and it is not necessary to deal with these cases. Mr. Sarkar also cited AIR 1977 Bom 214 (sic) where the Arbitrator allowed specific performance of a contract for transfer of rail scraps. It was a non speaking award. This award was challenged but it was upheld. Strongly relying on this case, Mr. Sarkar submitted that there was no finding of the arbitrator in this case that the goods came within the exception as argued on behalf of the petitioner but the award was upheld.

15. The award in the present case is a non-speaking award. But the description of the goods mentioned in the award itself leaves no doubt in my mind that the goods are ordinary articles of commerce freely sold and purchased in the open market. The respondent themselves admitted the goods to be so by claiming damage for breach of contract on the basis of agreed rate and the prevailing market rate of the goods. In AIR 1977 Bom 214 (sic) the very description of the goods "rail scraps" in the award proved that they are of special quality goods

available only from the Railways and cannot be called as ordinary articles of commerce. I accept the submission of Mr. Mitter and hold that the legal proposition laid down in S.B. Dutt Vs. University of Delhi, applies in this case. In my opinion, even in case of a non-speaking award, it is the duty of the Arbitrator to hold that the movable goods come within the Exception (a) to the Explanation to Section 10 of the Specific Relief Act of 1963, before allowing specific performance of such a contract unless the description of the goods in the award proves to be so. Since the Arbitrators, in the present case have directed specific performance of a contract to transfer movable goods, without holding that goods come within the exception mentioned in Section 10, it involved a legal proposition which in the face of Expln. (ii) to Section 10 of the Act is clearly erroneous and this error is appearing on the face of the award. In my opinion the judgment is also perverse as the Arbitrators have legally misconducted the proceeding. Hence the award fails and is set aside. The respondent will pay the cost of this application to the petitioner.