
(2006) 01 KAR CK 0033

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 200 of 2003

Maharashtra Apex Corporation Limited

APPELLANT

Vs

Sandesh Kumar A. and Others

RESPONDENT

Date of Decision : 18-01-2006

Acts Referred:

Arbitration (Protocol and Convention) Act, 1937 — Section 7 (1)

Arbitration and Conciliation Act, 1996 — Section 13 (5), 16, 24, 28 (3), 34

Citation : AIR 2006 Kar 138 : (2006) 2 ARBLR 282 : (2006) 2 KarLJ 55 : (2006) 3 KCCR 1389

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : K. Raghavendra Ran, for the Appellant; K. Chandranath Ariga, for Respondents-1 to 4, for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—The appellant is a non-banking financial institution. It had provided respondent 1, an. Ambassador car under a hire-purchase agreement. Respondents 2 to 4 had stood as guarantors to secure the due repayment in terms of the agreement and had executed the same along with Respondent 1. Respondent 1 had defaulted in payment of the installments as provided under the agreement. Consequently, the appellant seized and took possession of the vehicle and brought the same to public auction. The amount realised by way of auction sale was insufficient to satisfy the outstanding liability of respondent 1. Therefore, in terms of the agreement, the appellant referred the matter to arbitration under the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act" for brevity) and raised a claim. The named Arbitrator having passed an award in favour of the appellant directing respondent 1 to pay Rs. 84,022/- with interest at 24% per annum along with costs of proceedings, the respondent had petitioned the Court of the District Judge to have the same set aside u/s 34 of the Act.

2. The lower Court had framed the following issues for its consideration.--

(1) Whether the petitioner proves that the Arbitrator has not properly appreciated the materials on record and as such the award is erroneous?

(2) Whether the petition filed u/s 34 of the Arbitration and Conciliation Act is in time?

(3) Whether the award is liable to be interfered with in any manner by this Court? If so, to what extent?

(4) To what reliefs and decree, the parties are entitled for?

The lower Court has, while holding that issue 1 does not survive for consideration, and holding issue 2 against the respondents and answering issue 3 partly in the affirmative, has proceeded to partly allow the petition and has modified the award to direct respondent 1 to pay Rs. 28,160/- with interest at 9% per annum from 19-6-1999 till 1-4-2000, the date of award and thereafter at the rate of 18% per annum thereon till realisation, together with costs of the arbitral proceedings shown in the award. The appellant has questioned this order of the lower Court on various grounds.

3. Sri Raghavendra Rao, appearing for the appellant, would contend that the primary question that arises for consideration is the scope of Section 34 of the Act. He would submit that having regard to the language of Section 34 and the dicta of the Courts in interpreting the same, the order of the lower Court was clearly without jurisdiction and is liable to be set aside. He relies on the following authorities.--

Rail India Technical and Economic Services Limited Vs. Ravi Constructions and Another, , wherein it is laid down that the claim for setting aside of the award on the ground of it being erroneous, illegal and opposed to public policy, would not be maintainable u/s 34 of the Act. The award can be challenged only on the grounds enumerated therein. The scope of the provisions for setting aside an award under the Act is far less than the scope under Sections 30 and 33 of the Arbitration Act of 1940.

And Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan and Others,

Sri Raghavendra Rao contends that having regard to the facts and circumstances of the case, the appeal would require to be allowed on this short ground.

4. Per contra, Sri K Chandranath Ariga, appearing for the respondents, would seek to support the order of the lower Court.

5. On these rival contentions, the order of the lower Court is considered with reference to the scope of Section 34 of the Act. For ready reference, Section 34 of the Act is extracted below:

34. Application for setting aside arbitral award.--(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such

award in accordance with Sub-section (2) and Sub-section (3),

(2) An arbitral award may be set aside by the Court only if.--

(a) the party making the application furnishes proof that.--

(i) a party was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

(iii) the party making the application was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

(v) the composition of the arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not ___ in accordance with this part; or

(b) the Court finds that.--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force; or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.--Without prejudice to the generality of Sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made u/s 33, from the date on which that request had been disposed of by the arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under Sub-section (1), the Court may, where it is

appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral Tribunal will eliminate the grounds for setting aside the arbitral award".

6. It is to be noticed that Clauses (i) to (v) of Sub-section (2)(a) of Section 34 of the Act are self-explanatory. The lower Court has not found a case for the respondent under any of the above clauses. The lower Court has however proceeded to examine the transaction between the parties -- firstly with regard to its nature and has found that the transaction was not a hire-purchase transaction but was in fact a loan transaction and therefore; the appellant could not have enforced liability under several heads of account, on the respondent, such as "finance charges", on "overdue compensation", apart from imposing an exorbitant rate of interest and the lower Court has accordingly modified the award. The lower Court has not stated that it has exercised its discretion under Sub-clauses (i) and (ii) of Sub-section (2)(b) of Section 34 of the Act. However, having regard to the facts of the case, the lower Court has presumably proceeded under the said provision. The lower Court could set aside the award if it was in conflict with the "public policy of India",

7. Mulla's commentary on Indian Contract and Specific Relief Acts, Twelfth Edition, contains the following elucidation under the heading "Agreements opposed to public policy", it is stated as follows.--

Agreements opposed to public policy.--Public policy is the principle which declares that no man can lawfully do that which has a tendency to be injurious to the public welfare. *Ex dolo malo non oritur actio* (A right action cannot arise out of fraud. Per Lord Mansfield in *Halman v. Johnson* (1775) 1 Cowp 341 : 98 ER 120. Public policy comprehends the protection and promotion of public welfare. It is a principle of law, under which freedom for contract or private dealings is restricted by the law for the good of the community. Reference to public policy requires taking into account the interest of persons other than the parties.

The Supreme Court has stated: Public policy or the policy of the law is an illusive concept; it has been described as "untrustworthy guide", "Variable quality, "uncertain one", "unruly horse", etc.; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy. The doctrine of public policy is extended not only to harmful cases but also to harmful tendencies;.... The principles have been crystallised under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though heads (of public policy) are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of

society not to make any attempt to discover new heads in these days. (See: Gherulal Parakh Vs. Mahadeodas Maiya and Others, ; Chitty on Contracts, 28th Edition, page 836-837, para 17-003; Wilkinson v. Osburne (1915)21 CLR 89 : Multiservice Bookbinding Limited v. Marden (1979) Ch D 84 : (1978)2 All ER 489 : Newland v. Simons and Wilier (Hairdressers) Limited 1981 ICR 521 : Enderby Town Football Club Limited v. Football Association Limited (1971) Ch. 591 : (1971)1 All ER 215:

But a statutory provision cannot be struck down on the ground of being opposed to public policy. (Sudha alias Gulabi v. Sankappa Rai 1963(1) Mys. L.J. 437 : AIR 1963 Mys. 245).

Public Policy.--The Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, these expressions are incapable of precise definition. The Supreme Court has held that public policy is not the policy of a particular Government. It connotes some matter which concerns the public good and public interest. (Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another,),

A contract which has the tendency to injure public interest or public welfare is one against public policy. What constitutes an injury to public interest or welfare would depend upon the times and the claims. The social milieu in which the contract is sought to be enforced would decide the factum, the nature and the degree of the injury. The concept of public policy is not immutable, since it must vary with the changing needs of the society. (Bhagwant Genuji Girme Vs. Gangabisan Ramgopal, . These values may sometimes get incorporated in the legislation, but sometimes they may not. The Legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary, but obligatory on the Courts to step in to fill the lacuna. (Rattan Chand Hira Chand Vs. Askar Nawaz Jung (Dead) by Lrs and Others, per Sawant J. at 77; Gurmukh Singh Vs. Amar Singh,),

But, the Courts should use extreme reserve in holding a contract as void against public policy, and should do so only when the contract is incontestable and on any view inimical to the public interest. Doctrine should be invoked only in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds (Gulabchand Gambhirmal Vs. Kudilal Govindram and Another, .

8. The meaning that could be assigned to the phrase "public policy of India" as appearing in Section 34 of the Act, has been examined by the Supreme Court in the case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., . The Apex Court has, after discussing the relevant portions of the judgments dealing with the concept of public policy, namely, Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , has held:

92. The Indian Contract Act, 1872 does not define the expression "public policy".

From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the Courts and similarly where there has been a well-recognized head of public policy, the Courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought -- "the narrow view", school and "the broad view" school. According to the former, Courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Limited* 1902 AC 484 : (1900)3 All ER 426 : 87 LT 372: "Public policy is always an unsafe and treacherous ground for legal decision". That was in the year 1902. Seventy-eight years earlier, Burrough, J., in *Richerdson v. Mellish* (1824)2 Bing 229 : 130 ER 294, described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you". The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great Taming Bucephalus, he said in *Enderby Town Football Club Limited v. Football Association Limited* 1971 Ch. 591, "With a good man in the saddle, the unruly horse can be kept in control."

And in the case of *Renusagar Power Co. Ltd. Vs. General Electric Co.,* , this Court considered Section 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which inter alia provided that a foreign award may not be enforced under the said Act, if the Court dealing with the case is satisfied that the enforcement of the award will be contrary to the public policy. After elaborate discussion, the Court arrived at the conclusion that public policy comprehended in Section 7(1) (b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 is the "public policy of India" and does not cover the public policy of any other country. For giving meaning to the term "public policy", the Court observed thus: (SCC p. 682, para 66)

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognised and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate

that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Arbitration (Protocol and Convention) Act of 1937. This would mean that "public policy" in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality

The Court finally held that: (SCC p. 685, para 76)

76. Keeping in view the aforesaid objects underlying FERA and the principles governing enforcement of exchange control laws followed in other countries, we are of the view that the provisions contained in FERA have been enacted to safeguard the economic interests of India and any violation of the said provisions would be contrary to the public policy of India as envisaged in Section 7(1)(b)(ii) of the Act.

And in *Murlidhar Aggarwal and Another Vs. State of Uttar Pradesh and Others*, , while dealing with the concept of "public policy" observed thus: (SCC pp. 482-483, paras 31-32)

31. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.

32. ... The difficulty of discovering what public policy is at any given moment certainly does not absolve the Judges from the duty of doing so. In conducting an enquiry, as already stated, Judges are not hidebound by precedent. The Judges must look beyond the narrow field of past precedents, though this still leaves open the question, in which direction they must cast their gaze. The Judges are to base their decisions on the opinions of men and the world, as distinguished from opinions based on legal learning. In other words, the Judges will have to look beyond the jurisprudence and that in so doing, they must consult not their opinion at a given moment, or what has been termed customary morality. The Judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results.... The point is rather that this power must be lodged somewhere and under our Constitution and laws, it has been lodged in the

Judges and if they have to fulfil their function as Judges, it could hardly be lodged elsewhere .

The Apex Court has then, in Oil and Natural Gas Corporation Limited's case, held thus:

22. ... From the judgments discussed above, it can be held that the term "public policy of India" is required to be interpreted in the context of the jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the Court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the CPC that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the Appellate Court or the Court exercising revisional jurisdiction, the jurisdiction of such Court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory. Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the Arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that: "Arbitral Tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the Arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of Sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that the Arbitrator shall decide *ex aequo et bono* (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided u/s 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of "patent illegality".

And further at para 28 as follows.--

28. From this discussion it would be clear that the phrase "public policy of India" is not required to be given a narrower meaning. As stated earlier, the said term

is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. Hence, the award which is passed in contravention of Section 24 28 or 31 could be set aside. In addition to Sections 34 and 13(5) of the Act also provides that Constitution of the Arbitral Tribunal could also be challenged by a party Similarly, Section 16 provides that a party aggrieved by the decision of the Arbitral Tribunal with regard to its jurisdiction could challenge such arbitral award u/s 34. In any case, it is for Parliament to provide for limited or wider jurisdiction to the Court in case where award is challenged. But in such cases, there is no reason to give narrower meaning to the term "public policy of India" as contended by learned Senior Counsel Mr. Dave. In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice. This Court in *Rattan Chand Hira Chand Vs. Askar Nawaz Jung (Dead) by Lrs and Others*, , observed thus: (SCC. pp. 76-77, para 17)

17. ...It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes.... The Legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the Courts to step in to fill the lacuna. When Courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society".

and the Apex Court has concluded thus:

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 Power Co. Ltd. Vs. General Electric Co.*, , it is required to be held that the award could be set aside if it is patently illegal. The 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.

9. In the light of the above judgment, the lower Court not having found the award to be contrary to the fundamental policy of Indian law or that it is patently illegal, the lower Court was clearly in error in proceeding to modify the award in the manner and for the reasons that it has assigned. The case-law relied on by the lower Court in exercising its power is entirely out of context and cannot sustain the order.

10. One other contention raised by the Counsel for the respondent in this case is that it is permissible for the Court to modify the award and reduce the rate of interest u/s 34 of the Act and in this regard, he has relied upon the following judgments.--

State of Rajasthan and Another Vs. Nav Bharat Construction Co., , and in the case of Ashutosh Vs. State of Rajasthan and Others, .

11. This submission is not tenable as the power of the Court of the District Judge u/s 34 of the Act or that of the Appellate Court u/s 37(1)(b) of the Act cannot be equated with the power of the Supreme Court under Article 136 of the Constitution of India, in reducing the rate of interest in the above cited cases. Hence this contention is not tenable.

12. In the result, the appeal is allowed and the impugned order of the lower Court is set aside.