
(1966) 08 BOM CK 0013

In the Bombay High Court

Case No : Appeal No. 17 of 1961 and Appeal No. 13 of 1961

M/s. Ram bahadur thakur and Co.

APPELLANT

Vs

M/s. R.B. Shreeram durgaprasad Private Ltd., Tumsar

RESPONDENT

Date of Decision : 09-08-1966

Acts Referred:

Arbitration Act, 1940 — Section 7
Civil Procedure Code, 1908 (CPC) — Section 28, 34
Limitation Act, 1963 — Section 3
Sales of Goods Act, 1930 — Section 61

Citation : (1967) MhLj 106

Hon'ble Judges : D.V. Patel, J;B.N. Deshmukh, J

Bench : Division Bench

Advocate : M.N. Phadke and N.S. Nandedkar, for the Appellant; A.S. Bobde and M.L. Vaidya, for the Respondent

Judgement

Patel, J.—These two Cross Appeals are filed against the order of the Civil Judge, Senior Division, directing a decree in terms of the award to be made. As the claim in appeal was substantial the matter was directed to be heard by a Division Bench. The dispute between the parties arose out of an agreement made by the defendant with the plaintiff, whereby the latter agreed to buy and the former agreed to sell 7500 tons of manganese ore of particular quality. The agreement Exhibit P-1 was signed on December 6, 1955 and the last date for the performance of the contract was January 31, 1957. Some quantity of ore was delivered by the defendant to the plaintiff. Dispute arose in respect of 4000 tons of manganese ore which was tendered by the defendant to the plaintiff on January 29, 1957 and the rest which the plaintiff contended, was never tendered to him, i. e. 987 tons. In terms of the contract, the plaintiff had to deposit 25% of the purchase price of the ore with the defendant and, as and when the ore was supplied, a proportionate price out of the same was to be appropriated towards the sale price and 90 per cent of the price was to be completed on the quantity of ore delivered. The rest was to be paid afterwards. The agreement

contained a term for reference of the dispute between the parties to arbitration.

2. The plaintiff made an application on June 18, 1957 to the Court for a direction for appointment of an arbitrator by the respective parties. After the arbitrator was appointed, he made his award in which he held that the defendant had tendered 4000 tons of manganese ore to the plaintiff who wrongfully refused to accept the delivery of the same. He further held that the defendant failed to deliver the balance of the ore, i.e. 987 tons to the plaintiff and, to that extent, the defendant committed breach of the contract. He directed the defendant, however, to refund the 25% of the price deposited by the plaintiff with the defendant for 4000 tons of manganese ore and also for the balance of the manganese ore, i. e. refund of Rs. 1,76,545.70 nP. He assessed the defendant to damages in respect of the breach of the contract by him to Rs. 23,932.78 nP. and further directed the defendant to pay interest to the plaintiff in the sum of Rs. 27,037.17 nP. and Rs. 12,031.86 nP. in respect of the advance price paid for 4000 and 987 tons of manganese ore respectively. He directed the defendant to pay to the plaintiff a total amount of Rs. 2,39,547.57 nP. This award when filed in Court was challenged by both parties. The Court after hearing the parties has confirmed the award and directed a decree in terms of the award. A. O. No. 13 of 1961 is by the defendant, the seller, and A. O. No. 17 of 1961 is by the plaintiff.

3. In defendant's appeal Mr. Phadke contends (i) that the arbitrator was not entitled to direct refund of the 25% of the purchase price that was deposited by the plaintiff with the defendant and (ii) that the arbitrator could not direct interest to be paid on the advance as he has directed and (iii) that no damages could be awarded to the plaintiff as the plaintiff himself had committed breach of contract in refusing to accept the delivery of 4000 tons of manganese ore. He says, the arbitrator's award is erroneous on its face in respect of these matters.

4. On the first point, his contention is that whatever may be the amount of deposit which was paid, if the deposit was paid as earnest, then under no circumstances the plaintiff was entitled to a refund. We will assume for the purposes of this case that earnest is not refundable. According to his argument, the question whether it is an earnest or a part of the purchase price, is a matter of intention between the parties and the arbitrator was bound to have held that this payment was earnest and, therefore, not refundable. The arbitrator has dealt with this question in paragraph 28 of his award. Now, the defendant in his statement before the arbitrator had merely stated that the plaintiff was not entitled to a refund. He did not state before the arbitrator at any stage of the proceeding that the amount deposited was intended to be earnest and, therefore, not refundable. The arbitrator followed the decision of the Privy Council in AIR 1943 34 (Privy Council) for directing refund of the initial deposit. It is impossible if the matter has to be explained and argued in order to find out whether or not it was a mere deposit to be accounted for by the defendant, or earnest to be appropriated by him in the event of a failure on the part of the plaintiff to complete the contract, to hold that the arbitrator's award discloses an

error apparent on the face of the record. Even apart from this, reading, the agreement itself, it is impossible to suggest that the intention was to make the deposit as earnest. It shows that the amount was paid as price of the. or. In this case, we do not decide and we are not called upon to decide that even if it were earnest the Court or the arbitrator would not have the power to order refund if he felt it necessary to do so. It is, therefore, not necessary to consider the decision relied upon by Mr. Phadke in Jagdishpur Metal Industries and Others Vs. Vijoy Oil Industries Ltd., .

5. Mr. Phadke's third contention is that the arbitrator was not right in allowing damages to the plaintiff for non-delivery of 987 tons because the plaintiff himself was in the wrong in refusing to take delivery of 4000 tons of manganese ore which was tendered to him on January 29, 1957. If the arbitrator has held that the contract was severable, it cannot be said that the arbitrator's conclusion was erroneous, or in any event that he committed an error apparent on the face of the record unless the whole question as to whether the arbitrator was wrong in holding that the contract was severable was investigated into and answered in favour of Mr. Phadke which cannot be done, in such a proceeding.

6. On the question of interest Mr. Phadke's contention is two-fold. The first contention is that interest is not to be allowed as a matter of course. It could be allowed only if there is some provision of law. There is no provision in law to allow interest on advance payment of price and therefore it was wrongly allowed. Secondly he contends that an arbitrator is not a Court and even if a Court is entitled to allow interest under the circumstances of this case, the arbitrator cannot.

7. In connection with the first branch of the argument the provisions of the Interest Act- are relevant. There is only one section in the Act and so far as relevant it is upon all debts or sums certain payable at a certain time or otherwise, the Court may allow interest to the creditor. of such debts or sums be payable "by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing. provided that interest shall be payable in all cases in which it is now payable by law.

8. In AIR 1938 67 (Privy Council) the suit was by a contractor, who had carried out certain work for the Government. On the amount which was found due to him, he had claimed interest on the ground that he was kept but of his money for an unduly long time by the Government and that he was entitled to interest as he had suffered loss of interest on that amount. The Judicial Committee disallowed interest and while doing so, it said "Interest for a period prior to the date of the suit may be awarded if there is an agreement for payment of interest at a fixed rate or is payable by the usage of the trade having force of law or under the provisions of any substantive law entitling the plaintiff to recover interest". Referring to the Interest Act it held that it being not a sum certain interest could not be allowed under that Act, and that the case also did not fall

under the provisions because the case did not attract the equitable jurisdiction. It also held that it could not be allowed u/s 73 as damages for wrongful detention of moneys.

9. Mr. Bobde distinguished the case saying that interest was not allowed in that case under the Interest Act because the sum was not certain. Implying that as in this case the sum was certain the Act itself would be attracted. However, in the present case, the money was not payable at a certain time and no demand was made as required in cases where the debt is payable otherwise than at a certain time. The Interest Act, therefore, would not be attracted. Again there is no agreement for payment of interest, the contract being silent. No substantive provision of law is pointed out under which it can be allowed. It would appear that the plaintiff would not be entitled to claim interest on the advance price according to the above decision. This case was subsequently followed in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, and the *Union of India (UOI) Vs. A.L. Rallia Ram*, .

10. In support of his contention that the arbitrator can in such a case award interest, Mr. Bobde relies on the decision in *Province of West Bengal Vs. Basant Properties Ltd.*, , the decisions in *Caledonian Railway Co. v. William Carmichael* (1870) LR 2 HL Sc and Div. 56 and *Fletcher v. Lancashire and Yorkshire Railway Co.* (1902) 1 Ch. 901, at p. 910 The last case *Fletcher v. Lancashire and Yorkshire Railway Co.* (1902) 1 Ch. 901, at p. 910 was a case where a Railway Company owned a canal and the plaintiffs were the owners of mines under the canal and the adjacent land. The plaintiff was not entitled to work the mines when he came to within a certain distance of the canal. Except under certain circumstances he had to give two months' notice to the Company of his intention to proceed with the work and he could not proceed unless two months had expired. If the Company thought that the further working was likely to damage the canal and was willing to purchase and make compensation for the seam, it could give a counter notice to that effect, and then the seam was not to be wrought or gotten, but was to be purchased and paid for by the Company. The Court applied the decision in *Birch v. Joy* (1832) 3 HLC 656 which was between a vendor and a purchaser and which decided that interest was payable on the ground that from the time the notice was served, the mine owners had been deprived of their property, and the Company had enjoyed both the property and the purchase money and, therefore, the Company was bound to pay interest. In *Caledonian Railway Co. v. Carmichael* (1870) LR 2 HL Sc and Div. 56 the remarks of Lord Westbury are to the following effect:

Interest can be demanded by virtue of the principal sum of money having been withheld and not paid on the day when it ought to have been paid.

Whether that observation today in the context of the Interest Act applies or not is a different matter, but it is difficult to apply the observations in the present case, because in the present case, there is no question of principal money being detained and no question of its having been withheld and not paid on the date

when it ought to have been paid. So far as the first decision of the Calcutta High Court is concerned, the Court applied the principle enunciated in *Fletcher v. Lancashire and Yorkshire Railway Co.* (1902) 1 Ch. 901 at 910 as the case arose out of acquisition proceedings and related to the amount of proper compensation for the requisitioned property. The case bore very close analogy to the case of acquisition dealt with by the House of Lords in *Birch v. Joy* (1832) 3 HLC 556 and the Chancery Court in *Fletcher v. Lancashire and Yorkshire Railway Co.* (1902) 1 Ch. 901 at 910

11. Mr. Bobde contends that at least regarding the advance price of 987 tons of ore where the breach of the contract was committed by the defendant u/s 61 of the Sale of Goods Act he is entitled to interest. According to him, the case falls fairly and squarely within section 61 of the Sale of Goods Act which by sub-section (2) (b) enables the Court to award interest to the buyer in a suit by him for refund of the price in a case of the breach of contract on the part of the seller from the date on which the payment was made.

12. Mr. Phadke in reply relies upon the second branch of his argument that an arbitrator is not a Court and he cannot therefore allow interest. He relies for his contention upon the decisions in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, and the *Union of India (UOI) Vs. A.L. Rallia Ram*, already referred to. In *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, the Supreme Court assumed (478) that an arbitrator is a Court within the meaning of Interest Act and rejected the claim for interest on other grounds. But it did say when interest was claimed for the period during the pendency of the proceedings on the analogy of section 34, C. P. Code that "an arbitrator is not a Court within the meaning of the Code."

13. In the *Union of India (UOI) Vs. A.L. Rallia Ram*, the Court did not decide that an arbitrator is not a Court at any rate for the purpose of section 61 of the Sale of Goods Act. On the contrary the claim for interest was negatived on the ground that the suit was not for refund of the price, which must imply that arbitrator was entitled to apply the principles of section 61 of the Sale of Goods Act, which was not a procedural provision but substantive one giving certain relief's to a purchaser who had suffered loss.

14. We may in this connection refer to English Law. In *Podar Trading Co. Ltd., Bombay v. Prancoi Taglar Barceelone* (1949) 2 All E. R. 62 the Divisional Court decided that arbitrator had no jurisdiction to award interest. A similar question arose u/s 28 of the CPC in *Edwards v. Great Western Rly.* (1851) 11 C. B. 588. The section is similar to one under consideration except that the word "Jury" appears instead of the word "the Court". The plaintiff had given notice of demand. The Court held that the arbitrator under a submission of "all matters in difference" might award the plaintiff interest, notwithstanding that the notice of action did not contain demand for interest. The decision clearly shows that though section 28 speaks of the jury and discretion is given to the jury to award interest, an arbitrator could award interest if the matter referred to him is one

where jury could give interest.

15. The Podar Trading Company's case (1949) 2 All E. R. 62 was considered and overruled in *Chandris v. Isbrandtsen Moller Co. Inc* (1960) 2 All E R 618 by the Court of Appeal. The Court referred to another matter in dealing with the question. It was that the powers of the arbitrator to deal with the defences available in actions even without express provision to that effect and cited the following observations of Lord Maugham in the House of Lords in *Naamlouze Vennootscha Handels-en Transport Mantschapij "Vulcaan" v. A /S. J. Indwig Mawinckels Rederi* (1938) 2 All E. R. 152.

The matter does not rest there, because we have to consider how far the suggested elimination of defences available at law or in equity must logically be held to extend in other arbitrations. If the party defending, may not rely on" the Statute of Limitations, can he rely on the Statute of Frauds, or the Act partially replacing it? Could he rely in a commercial arbitration on the Gaming Act? A number of, like questions might be asked. It is true, and this is the main point, on which the appellants rely, that the Limitation Act, 1623, section 3, was in terms limited to actions. It may be noted that no such statute passed before the Real Property Limitation" Act, 1833, expressly bound courts of equity. There is, however, no doubt that long before the Judicature Act, 1873, where a Court of equity had to adjudicate on the validity of a debt in a suit to administer an estate, or in any like suit, it held itself bound to apply the statutes of limitation in precisely the same way as there were an action at law to recover the debt. It is indisputable that, in modern arbitration, the principles of equity must be applied just as they would now be applied in a court of law, since upon a Special Case for the opinion of the court u/s 7 of the Arbitration Act or the Judicature Act,- 1926, section 94 (replacing p. 19 of the Arbitration Act), the court is, and has long been, bound to apply equitable rules and relief. It is difficult to see how the equitable view of the applicability of the Limitation Act, 1623, to a case of debt can be excluded in a legal arbitration... The authorities on the question as to whether the statutes of limitation are available in an arbitration have been carefully considered by my noble and learned friend LORD WRIGHT, presiding in the Court of Appeal, and it is not necessary to repeat them. The hesitation or the doubts expressed by SCRUTTON, L. J., in *Board of Trade v, Gayzer, Irvine & Co.* appear to be mainly directed against the laying down of an absolute and general rule applicable in all kinds of arbitration. At least, that is how I understand them, and, if I may say so with all respect, to that extent I agree with them. The remarks of VISCOUNT CAVES, L. C, in the same case, when the matter came before this House, certainly tend to show that, in his view, in Commercial arbitrations an arbitrator is bound to give effect to all legal defences, including a defence under any statute of limitation. On a careful consideration of all the cases, I am content to say that I agree with what was said by Lord SALVESKN. delivering the judgment of the Board in *Ramdutt Ramkissendass v. S. D. Sassoon Co.* In that case the Indian Limitation Act, 1908 (the relevant period being three years), was taken for practical purposes to be the same as the Limitation Act,

1623, and Lord SALVESEN observed: Although the Limitation Act does not in terms apply to arbitrations, they (Their Lordships of the Judicial Committee) think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a Court of law can be equally proposed for the arbitrator's decision unless the parties have agreed which is not suggested here to exclude that defence. Were it otherwise, a claim for breach of a contract containing a reference clause could be brought at any time, it might be twenty or thirty years after the cause of action had arisen.

The Court held that the arbitrator had the same power as a Court had u/s 3 of the Law Reform (Miscellaneous Provisions) Act, 1934.

16. To hold that an arbitrator who has to decide all differences between parties has not got the powers which a Court has in relation to such disputes, may create great many difficulties even in applying the substantive statutory law when reference is to "Court". The first and foremost amongst such Act is the Limitation Act and Courts have held that arbitrator is bound to apply the Law of Limitation. Supreme Court in Seth Thawardas Pherumal Vs. The Union of India (UOI), did not really decide the point in relation to Interest Act but said that the arbitrator is not a Court u/s 34, Civil Procedure Code. The question was not argued fully and the cases above referred to were not brought to the notice of their Lordships. The question of applicability of section 34 does not arise here at all, the only question being whether the arbitrators had no power to award interest on the advance price by reason of section 61 of the Sale of Goods Act and we think he has. It may be mentioned that in Union of India (UOI) Vs. A.L. Rallia Ram, the Court did not hold that the arbitrator could not award interest u/s 61 of that Act but held that the section did not apply as it was not a suit for refund of the price. It seems to us, therefore, that in respect of 987 tons of ore which the defendant failed to deliver, the arbitrator was right in awarding interest. Under these Circumstances, there can be no question of the plaintiff making out equitable grounds for the award of interest, though he could not award interest on the price of 4,000 tons of ore.

17. So far as the appeal by the plaintiff is concerned Mr. Boble realising that it involves the merits of the findings of the arbitrator, does not press the appeal.

18. In the result, we direct that the decree will follow in terms of the award except as to the direction regarding payment of interest of Rs. 27,037.17 nP. Mr. Bobde requests us to make an order in terms of the order that was made in the stay application by this Court for payment of interest. We do not think it is necessary for us to do so since an interim order is as much an order of this Court as a final order and is capable of being enforced. Having regard to the circumstances of this case, there will be no order as to costs in either of the appeals.