

(2004) 03 CAL CK 0068

In the Calcutta High Court

Case No : G.A. No. 3903 of 2003 and E.C. No. 22 of 2003

Saraswat Trading Agency

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-03-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : AIR 2004 Cal 267 : (2004) 3 ARBLR 492 : (2004) 3 CALLT 637 :
(2004) 2 CALLT 604 : (2005) 2 CHN 420

Hon'ble Judges : Jayanta Kumar Biswas, J

Bench : Single Bench

Advocate : Dhruba Ghosh and Bimal Singha, for the Appellant; L.K. Chatterjee and D.K. Singh, for the Respondent

Final Decision : Allowed

Judgement

Jayanta Kumar Biswas, J.—The Court: This is an application u/s 47 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the CPC"). The judgment-debtor (Union of India, through the General Manager, South Eastern Railway, Garden Reach) has filed this application.

2. Briefly stated, the facts relevant for disposal of this application are these. In terms of a contract executed between the judgment-debtor and the award-holder on February 25th, 1886 the award-holder was engaged for handling goods, parcels and luggage booked at Itwari, Kamptee, Kanhan Bhandara Road, Tumsar Road and Tirora Stations. Clause 24(b) of the contract provided as follows:

"24(b). The Contractor/Contractors is/are required to give a no claim certificate before the security deposit is refunded to him/ them. The right to claiming any amount or disputing any decision shall be deemed to have been waived as soon as the Security Deposit is received back by the Contractor/Contractors on submission of the no claim certificate. If, however, the Contractor/ Contractors has/have any dispute or difference he/they should submit a list of such disputed

items and the amount claimed against each for final settlement. The provision of Clause 32 of this Agreement will be limited to the disputes/differences mentioned in this list submitted by the Contractor. The Railway Administration will be at liberty to withhold refund of the security deposit till finalisation of the disputes and the contractor shall have no claim for compensation or otherwise for the delay for refund of the security amount."

3. The contract, in its Clause 32(a), contained the following arbitration agreement:-

"32(a)--If any dispute, difference or question shall arise between the Railways Administration and the Contractor as to the respective rights, duties and obligations of the parties hereto or as to the construction or interpretation of any of the terms and conditions of this Agreement or as to its application (except in matter the decision whereof is herein expressly provided for and also excepting the matters regarding which the Contractor has submitted to claim certificate), then the same shall be referred to the Sole Arbitrator of the General Manager of the South Eastern Railway or if he be unable or unwilling to act then to the Sole Arbitrator of any person appointed by him on his behalf and the decision of the General Manager or of the person so appointed shall be final and binding on the parties hereto under the provisions of the Arbitration Act."

4. The award-holder claimed certain amounts. It approached the authority for referring the disputes to arbitration. The General Manager by his letter dated April 19th, 1993 referred the disputes to the sole Arbitrator appointed by him. The Arbitrator made his award on August 25th, 1993. As against the claim of the award-holder (Rs. 29,66,099/-), the Arbitrator awarded Rs. 27,72,346/-. The award was made under the Arbitration Act, 1940. It was filed before this Court. The judgment-debtor filed an application for setting aside the award. The award was set aside by the learned single Judge. In appeal preferred by the award-holder, by judgment and order dated September 4th, 2001 the Division Bench of this Court made the award rule of Court. Before the award was made rule of Court, and after the award was made and published by the Arbitrator, the judgment-debtor paid Rs. 18,44,639/-. Hence the decree was passed for Rs. 9,27,707/-. This sum (Rs. 9,27,707/-) was also paid by the Judgment-debtor. While paying this sum the judgment-debtor paid interest in terms of the award for the period from September 4th, 2001 till the date of payment. On the sum of Rs. 9,27,707/- no interest was paid to the award-holder for the period from August 25th, 1993 (the date of the award) to September 4th, 2001 (the date of the decree). Claiming a sum of Rs. 8,93,925.69p on account of interest for this period on the sum of Rs. 9,27,707/-, the present execution proceeding was initiated. During progress of the execution proceeding the present application u/s 47 of the CPC has been filed.

5. Mr. Chatterjee, learned counsel for the judgment-debtor, contends that the decree is a nullity. His contention is that admittedly (a) the award-holder received the final payment after accepting the final bill prepared by the judgment-

debtor, and (b) then, after submitting the no claim certificate as required by Clause 24(b) of the contract the award-holder took refund of the security amount; and hence in terms of Clause 32(a) of the contract, which contained the arbitration clause, the alleged disputes raised by the award-holder regarding escalation charges, were simply not referable and arbitrable. He submits that the reference being without jurisdiction, the award and the decree that followed the award are void in the eye of law.

6. Mr. Chatterjee relies on the decision in *M/s. Prabartak Commercial Corporation Ltd. Vs. The Chief Administrator Dandakaranya Project* and another, for the proposition that an award made on an invalid reference is without jurisdiction. To show that the terms and conditions in the arbitration clause [Clause 32 (a) of the contract] are valid and lawful, he has relied on an unreported decision dated January 10th, 2001 given by Alope Chakrabarti, J. in A.P. 288 of 2000 (*M/s. A.K. Pal v. General Manager, Metro Railway, Calcutta*). The decision in *Union of India Vs. M/s. Popular Builders, Calcutta*, has been relied on by him in support of the proposition that after receiving the final bill the decree-holder was not entitled to seek reference of alleged disputes and differences under Clause 32(a) of the contract. For the proposition that an award made under the Arbitration Act, 1940 on an invalid reference is a nullity, he has relied on the decision in *The Union of India (UOI) Vs. Shri Om Prakash, . Relying on the decision of Official Trustee, West Bengal and Others Vs. Sachindra Nath Chatterjee and Another*, he submits that if the Court passes an order which it could not have passed, then it is a void order. For the proposition that a decree which is a nullity can be challenged at any stage, he relies on the decision in *Kiran Singh and Others Vs. Chaman Paswan and Others, .* He submits that the decision of the Division Bench of the Delhi High Court in *Union of India Vs. Jagat Ram Trehan and Sons*, was given in an almost identical case. He contends that the decree being a nullity, the Judgment-debtor is not estopped from raising the question of its executability at the present stage, though it did not raise it at any previous stage.

7. Mr. Ghosh, learned counsel for decree-holder, contends that the judgment-debtor should not be permitted to raise the question of validity of the decree at this belated stage. It is his contention that the Arbitrator was appointed by the competent authority, and not only the judgment-debtor participated in the arbitral proceeding, but it also complied with the award by making substantial payment; and hence it should not now be permitted to raise the question of jurisdiction of the Arbitrator to make the award. He relies on the decision in *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, .* His further contention is that the decree-holder was not prevented from seeking arbitration of the disputes and differences under the contract, simply because he had taken refund of the security after giving an no claim certificate.

8. On the basis of the authorities cited at the bar, I find substantial force in Mr. Chatterjee's submission. It was held in *Prabartak Commercial Corporation's* case that an award made by the Arbitrator on the basis of an invalid reference would

be null and void. That means, if the reference is bad, then the award also becomes bad, irrespective of whether the parties participate in the arbitral proceeding or not. The validity of Clauses 24(b) and 32(a) of the contract have not been questioned before me. It is true that in M/s. A.K. Pal's case (unreported decision) Alope Chakrabarti, J was pleased to sustain the validity of an identical clause in a contract. But then, in the present case, in the absence of any challenge to the validity of the two clauses, I find no necessity to examine their validity. The decree-holder has accepted the terms and conditions in the contract to be correct. In Popular Builders's case, the Supreme Court allowed the Union of India (that suffered the award made by the Arbitrator) to raise the question of validity of the reference for the first time in the Supreme Court. It was held that since existence of an arbitrable dispute was the condition precedent for exercise of power for appointment of an Arbitrator under the relevant clause, and the reference was made in violation of the terms and conditions of the relevant arbitration clause, the award was to be set aside. In Om Prakash's case it was clearly held by the Supreme Court that an award on an invalid reference would be a nullity. There can be no dispute regarding the proposition that in an application u/s 47 of the Code of Civil Procedure, the question that a decree is not executable being a nullity can be raised, and the executing Court can decide the question. I find that in Jagat Ram Trehan's case in an almost similar situation the Section 47 application filed by the Union of India which had suffered the award was allowed by the Division Bench of the Delhi High Court.

9. The question of acquiescence, in my considered view, will not be relevant in a case where the challenge is that the decree sought to be executed is a nullity. A decree which is a nullity in the eye of law is no decree, and hence even by consent of the parties such a decree cannot be executed by the Court. True that the Judgment-debtor did not raise the question before, but for this reason it cannot be denied the remedy available to it u/s 47 of the Code of Civil Procedure. If this Court finds that the decree is a nullity, as contended by the judgment-debtor, this Court cannot proceed to execute it, and it is the duty of this Court to hold that the decree is not executable. Hence, in my view, the principles of waiver, acquiescence and estoppel cannot be applied to take away the legal right of the judgment-debtor available u/s 47 of the Code of Civil Procedure.

10. The chief question is whether the decree passed in this case is a nullity in the eye of law. The specific case of the judgment-debtor is that the disputes and differences raised by the decree-holder were simply not referable under Clause 32(a) of the contract, because after submitting no claim certificate in terms of Clause 24(b) of the contract he had already taken refund of the security deposit. Such specific case made out by the judgment-debtor in this application has remained totally uncontroverted. The decree-holder has chosen not to file any affidavit to controvert the statements made in the present application. Hence the statements made in the present application regarding submission of the no claim certificate and withdrawal of the security deposit by the decree-holder have to be

treated as admitted by the decree-holder,

11. It is, therefore, the admitted position that the reference was made for adjudication of disputes which were not arbitrable at all in terms of the contract. The bar imposed by the contract had come into operation, before the decree-holder raised the disputes and sought the reference. This being the position, the award made by the Arbitrator was clearly a nullity. The authorities cited by Mr. Chatterjee fully support this position. Consequentially the decree is also a nullity. Hence I am of the view that the decree is not executable.

12. For the foregoing reasons I hereby allow this application filed u/s 47 of the Code of Civil Procedure. The execution proceeding (E.C. No. 22 of 2003) initiated by the decree-holder is hereby dismissed.

13. In the facts and circumstances of the case, I am not inclined to make any order for costs in favour of the judgment-debtor, either in this application or in the execution proceeding. Hence there will be no order for costs in both of them.

Urgent certified xerox copy of this judgment and order shall be made available to the parties, if applied for.