

(1953) 02 CAL CK 0029
In the Calcutta High Court
Case No : Award No. 254 of 1949

Union of India (UOI)

APPELLANT

Vs

Kishorilal Gupta and Bros.

RESPONDENT

Date of Decision : 11-02-1953

Acts Referred:

Arbitration Act, 1940 — Section 2
Contract Act, 1872 — Section 10, 39, 62, 63

Citation : AIR 1953 Cal 642

Hon'ble Judges : Bachawat, J

Bench : Single Bench

Advocate : I.P. Mukherji and R. Guho, for the Appellant; A.K. Sen, for the Respondent

Judgement

Bachawat, J.—This is an application asking for an order setting aside an award for a declaration that the arbitration agreements under which the award was made have ceased to exist and for an adjudication that the award is a nullity and is void and without any effect.

2. There were three contracts between the contractor firm Kishorilal Gupta and Bros. and Governor-General of India-in-Council through the Director-General of Industries and Supplies. Each of these contracts contains an arbitration clause. The "material part of the arbitration clause is as follows:

"In the event of any question or dispute arising under these conditions or any special conditions of contract or in connection with this contract (except as to any matters the decision of which is specially provided for by these conditions the same shall be referred to the award of an arbitrator to be nominated by the purchaser and an arbitrator to be nominated by the contractor....."

3. Under each of these contracts the Governor-General in Council now represented by the respondent supplied raw materials and the contractor made part supplies. All these three contracts were later cancelled.

4. By the contract dated 2-4-1943, the contractors agreed to supply to the Government 43,000 laddies cook. This contract was cancelled on 21-5-1945 and a claim by the Government for price of raw materials supplied remained outstanding. On the 6-9-1948 the parties entered into a settlement contract which is as follows:

" (1) The contractor expressly agrees to pay the Government the sum of Rs. 3,164-8-0 only on this contract.

(2) The contract on payment of the amount mentioned in Clause (i) shall stand finally determined."

5. By the contract dated 15-9-1944 the contractors agreed to supply to the Government 15,500 bath Ovals. This contract was cancelled on 21-5-1945 and there remained outstanding claims by the contractors for compensation and claims by the Government for price of raw materials supplied. On 6-9-1948 the parties entered into a settlement contract which is as follows: "

(1) The contractor expressly agrees to pay to the Government the sum of Rs. 36,276. If D. G. I. and S. has recovered any amount under the contract out of the sum due credit will be given to the contractor.

(2) The contract stands finally determined and no party will have any further claim against the other."

6. By the contract dated 22-9-1944 the contractors agreed to supply to the Government 100,000 Kettles Camp. This contract was cancelled on 9-3-1946 and claims by the Government for raw materials supplied under this contract and by the contractor for compensation for breach of contract remained outstanding. On 22-2-1949 the parties entered into a settlement contract which is as follows:

"The firm will pay a sum of Rs. 45,000/- in full and final settlement of the amount due to the Government in respect of raw materials received against the contract and their claims for compensation for cancellation for the same contract.

2. The firm will retain all surplus partly fabricated and fully fabricated stores lying with them.

3. The firm agree to pay the above mentioned sum of Rs. 45,000/- only together with the sums owing by them to the Government under the settlements reached in two other cases A/T Nos. MP/75762/R-61/78 dt. 15-9-44 and MP 50730 8/R-1/90 dated 2-4-43, in monthly instalments for Rs. 5,000/- only for the first three months, first instalment being payable on 10-3-1949 and further instalment of Rs. 9000/- per month till the entire dues payable to Government are paid.

4. In the event of default of any monthly instalments interest will be charged by Government on the amount as defaulted at the rate of 6 per cent. per annum from the first day of the month in which the instalment shall be due. If the instalments defaulted exceed two in number the Government will have the right

to demand the entire balance of the money payable by the firm together with interest thereon at the rate above mentioned on that balance and take such steps to recover from them from the security to be offered by the firm in terms of the settlement or otherwise.

5. In order to prove cover for the moneys payable to the Government the firm undertakes to hypothecate their moveable and immovable property in Bamangachi Engineering works together with all machinery sheds and leasehold interest in land measuring about 5.75 acres at mouja Bamangachi in Howrah. The firm further undertakes to execute the necessary stamped documents for the purpose as drafted by the Govt. Solicitor at Calcutta.

6. The contract stands finally concluded in terms of the settlement and no party will have further or other claim against the other."

7. Between 28-10-1948 and 17-1-1949 the contractors had in all paid a sum of Rs. 9,000/- to the Government under the first two settlement contracts. Since the 3rd settlement contract the contractor paid in all a sum of Rs. 11,000/- i.e. Rs. 3,000/- on 10-3-1949, Rs. 3,000/- on 26-4-1949, Rs. 1,000/- on 12-8-1949, Rs. 3,000/- on 3-9-1949 and Rs. 1,000/- on 31-10-1949. The contractor defaulted in payment of all the instalments payable under the third settlement contract. By letters dated 28-3-1949, 1-4-1949 and 4-5-1949, the Government requested the contractors to pay the instalments in arrears and the instalments to fall due. By letter dated 17-5-1949 the Government requested the contractors to execute the hypothecation bond and also reminded them that in default of payment of instalments the Government had the right to obtain payment of the entire balance remaining unpaid under the settlement contracts. The contractors did not execute the hypothecation bond.

8. On 10-8-1949 the Government referred its claim of Rs. 1,52,723 under all the three contracts to arbitration. By its letter of that date the Government appointed Bakshi Shib Charan Singh as its arbitrator and called upon the contractors to nominate their arbitrator. The contractor replied on 18-8-1949 stating that the matter had already been settled by arbitration. The contractors did not nominate their arbitrator and by its letter dated 29-8-1949, the Government appointed Bakshi Shib Charan Singh as sole arbitrator.

9. By letter dated 3-9-1949 the contractors alleged that a new arrangement had been arrived at between them and the Government and stated that in view of that settlement they had not appointed their arbitrator. This new arrangement was denied by the Government in the subsequent correspondence.

10. One of the partners of the contractor firm applied to this Court for a declaration that the arbitration clauses had ceased to exist. That application was dismissed by Banerjee J. on 15-6-1950 on the preliminary ground that all persons interested had not been joined as parties. While dismissing the application Banerjee J. also held that the arbitration clause contained in the contract dated 2-4-1943 for laddies cook had not ceased to exist. It was

conceded before Banerjee J. that the arbitration clause contained in the contract dated 15-9-1944 for bath ovals had ceased to exist. With regard to the arbitration clause contained in the contract dated 22-9-1944 for kettles camp, Banerjee J. declined to express a final opinion but he was doubtful whether the settled contract had discharged the original contract.

11. The Government filed its state of facts before the arbitrator on or about 12-9-1950. In that state of facts the Government claimed to appropriate the sum of Rs. 20,000/- paid since 6-9-1948 towards the contract dated 15-9-1944 for bath ovals. Upon such appropriation the Government claimed

" (a) the sum of Rs. 3,164-8-0 under the contract dated 2-4-1943 for laddies cook,

(b) the sum of Rs. 16,276/- under the contract dated 15-9-1944 for bath ovals,

(c) the sum of Rs. 1,13,282-4-5 on account of price of raw materials supplied under the contract dated 22-9-1944 for kettles camp after appropriating another sum of Rs. 20,000/- which had been paid sometime in June 1948.

The Government also stated that it did not claim relief in respect of the contract for bath ovals having regard to the concession before Banerjee J. that the arbitration clause in respect of that contract has ceased to exist. The contractors filed their counter-state of facts on or about 29-9-1950 challenging the jurisdiction of the arbitrator to arbitrate in the matter and alleging that the arbitration clauses in the several contracts had ceased to exist. The contractors also challenged the claim of the Government and the appropriation of payments made in the state of facts.

12. On 31-7-1951, the arbitrator made an award for the sum of Rs. 1,16,446-11-5 interest at 6 per cent. per annum from 10-8-1949 and Rs. 1,000/- for cost in favour of the Government and against the contractors. The arbitrator repelled the contention that the arbitration clauses had ceased to exist.

13. This application is made by one Kishorilal Gupta. He admittedly was a partner of the contractor firm Kishorilal Gupta & Co. Originally, there were two other partners in that firm, viz., Banarashidas Gupta and Hanuman Prosad Boid. Banarashidas Gupta is now dead and Lilabati Devi is his only heir and legal representative. Both Hanumanprasad and Lilabati are respondents to this application. Mr. A.K. Sen, counsel for the Union of India at first contended that Lilabati Devi was not the only heir and a legal representative of Banarashidas Gupta, and on that ground this application was bad for non-joinder of parties. Eventually Mr. Sen abandoned this contention.

14. Mr. I.P. Mukherjee, learned counsel on behalf of the petitioner contends that all the three contracts and arbitration clauses contained therein have been abrogated by the subsequent settlement contracts and have now ceased to exist, and consequently the award is a nullity.

15. Mr. A.K. Sen, learned counsel on behalf of the Union of India contends that:

" (a) the original contracts could not be rescinded after breach.

(b) after breach the liabilities under the original contract can be discharged only by accord and satisfaction. In this case there was an accord but no satisfaction with regard to the contracts dated 22-9-1944 and 2-4-1943 and consequently those contracts were not abrogated."

(c) In any event the arbitration clauses have not been abrogated."

16. Mr. A.K. Sen concedes that in the present case the arbitrator has no jurisdiction to decide the question whether the arbitration clauses have ceased to exist and his finding is not binding upon this Court and it is for the Court to determine whether or not the arbitration clauses have ceased to exist.

17. It is at first necessary to advert to the provisions of Sections 62 and 63, Contract Act which are as follows:

"Section 62: If the parties to a contract agree to substitute a new contract for them or to rescind or to alter it the original contract need not be performed.

Section 63: Every promisee may dispense with or remit whole or any part of the performance of the promise made to him or may extend the time for such performance or may accept, instead of it, any satisfaction which he thinks fit."

18. In -- "Manohar Koyal v. Thakurdas" 15 Cal 319 this Court held that:

"We are of opinion that the Judge has erred in applying provisions of Section 62, Contract Act to this case at all. Section 62 is but a legislative expression of the common law and its provisions do not apply after there has been a breach of the original contract."

19. The view of this Court, therefore, is that u/s 62, Contract Act the contract can be rescinded only after breach; -- New Standard Bank Ltd., by B.K. Dutta, Managing Director Vs. Probodh Chandra Chakravarty, (B). I notice that Panckridge J. found some difficulty in applying this principle to all cases -- "Brijmohon v. Mahabir" 40 CWN 808.

20. The rescission u/s 62 may be express or implied. It is a question of construction of the new contract whether or not it rescinds the original contract. -- "Morris v. Baron & Co." 1918 AC 1 .

21. If the contract is rescinded wholly, the arbitration clause which forms part of that contract is also rescinded. If the original contract is not rescinded by the new contract the arbitration clause contained in the original contract is also not rescinded. -- Mohini Kanta Saha Chowdhry and others Vs. Preonath Niyogi and others, Mohesh Chandra Das and others, Sheikh Monaruddi and another and Mohesh Chandra Das and others .

22. Section 62 requires an agreement which necessarily implies consideration.

23. Section 63, Contract Act does not require an agreement with or without consideration. Under that section the promisee may before breach gratuitously release the promisor from the obligation to perform the promise. -- Jitendra Chandra Roy Chowdhury and Another Vs. S.N. Banerjee, Barrister-at-Law, . The promisee may after breach gratuitously release the promisor from his liability arising on such breach. The promisee may also accept instead of performance of the promise such satisfaction as he thinks fit. -- 15 Cal 319 .

24. It is also beyond controversy that the liability arising out of breach of contract may be discharged by accord and satisfaction -- New Standard Bank Ltd., by B.K. Dutta, Managing Director Vs. Probodh Chandra Chakravarty, ; that is to say, "by an agreement after breach whereby some consideration other than his legal remedy is to be accepted by the party not in fault, followed by performance of the substituted consideration" -- see "Chitty on Contracts, 20th Edition at p. 286".

25. I venture to think that the validity and effect of the accord and satisfaction must be judged by the general law of contract quite apart from the provisions of Sections 62 and 63, Contract Act.

26. The accord is an agreement for good consideration and is valid and enforceable under the general law of contract -- 40 CWN 808 ; -- "British Russian Gazette and Trade Outlook Ltd. v. Associated Newspapers Ltd." (1933) 2 1933 2 KB 616 and 644-5 (G), commenting on -- "(1918) AC 1 at p. 35 (D).

27. Mere accord without satisfaction does not discharge the liability arising on breach of contract. This rule had its origin in early days when the binding character of executory agreements was not recognised, see -- (1933) 2 KB 616.

28. Equitable considerations may arise if there is part performance of the accord and the parties cannot be restored to the position they occupied before such performance; -- (1918) AC 1.

29. It may be shown that the accord itself is also the satisfaction. It is open to the injured party to accept the promise of the party in default in satisfaction of the existing cause of action. The question in modern law is purely one of construction of the accord: -- (1918) AC 1 and --.(1933) 2 KB 616 . The cases are illustrative of this question of construction. The promise itself was held to be the satisfaction in -- "Elton Cop Dying Co. v. Broadbent & Son Ltd.(1919) 89 LJB 186; -- 40 CWN 808 and -- 18 CWN 617 (Privy Council) . Not the promise but its actual performance was held to be the satisfaction in -- 15 Cal 319; -- Babulal Marwari and Others Vs. Tulsi Singh and Others, (J). In -- 18 CWN 617 (Privy Council) Lord Moulton observed thus:

"The receipt given by the appellants and accepted by the respondent and acted by both parties proves conclusively that all the parties agreed to a settlement of all their existing disputes by the arrangement formulated in the "receipt". It is a clear example of what used to be well known in Common Law Pleading as

"accord and satisfaction by a substituted agreement". No matter what were the respective rights of the parties "inter se". They are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place the prior rights of the parties are extinguished. They have, in fact, been extinguished for the new rights; and the new agreement becomes a new departure and the rights of all the parties are fully represented by it."

30. The accord and satisfaction discharges the causes of action for breaches of contract already committed. Where the accord and satisfaction is by substituted agreement it is a question of construction of that agreement whether it also extinguishes all pre-existing rights and obligations and totally discharges the original contract.

31. Breach of the substituted agreement does not revive what has been discharged. Further complaint must be founded on the substituted agreement and not on the original contract. If the substituted agreement is put an end to u/s 39, Contract Act on account of such breaches the original contract is not thereby revived.

32. The arbitration clause is distinct from the other clauses in the contract.

"It is collateral to the substantive stipulations of the contract. It is merely procedural and ancillary, it is a mode of settling disputes..... It.....depends on there being a dispute or difference in respect of the substantive stipulation."

per Lord Wright in -- "Heyman v. Darwins Ltd." 1942 AC 356. Total breach of the substantive stipulations even when it is accepted by the other party does not abrogate the arbitration clause and even the party in default may invoke that clause. -- 1942 AC 356 . But the parties are not bound to have recourse to arbitration. They may settle the disputes directly and agree not to invoke the arbitration clause for that purpose. The arbitration clause ceases to exist with reference to the disputes which are thus settled. They may also enter into a substituted agreement in complete supersession of the original contract and thereby abrogate the contract and the arbitration clause contained in it.

33. Let us now turn to the document dated 22-2-1949. The parties had arrived at a settlement of their disputes and that settlement is embodied in this document. The words "in full and final settlement of" in Clause 1 are strong evidence that the parties intended to wipe out the pre-existing claims once and for all in exchange of the contractor's liability for payment of Rs. 45,000/-. By Clause 3 the performance of the promise to pay that sum is deferred. The settlement is immediate and is not dependent upon performance of the deferred promise. By Clause 4, on default of performance of the promise the Government has the right to recover the balance of the promised amount remaining unpaid. The default does not revive the old rights and obligations. By Clause 5, the substituted promise is to be secured by hypothecation. Clause 6 clinches, the issue. The contract stands finally concluded in terms of the settlement. The

conclusion or termination is immediate. It is in terms of the settlement or the bargain which is embodied in the document. No party thenceforth will have further and other claims against the other. There is complete and immediate abrogation of the contract. The parties have settled all their disputes directly. There is accord and satisfaction by substituted agreement. The substituted agreement discharges the existing causes of action. It also totally discharges and extinguishes the original contract. The arbitration clause which is contained in the original contract perishes with it.

34. Very soon after the settlement the contractors committed breaches of the several terms of the settlement. Even after such breaches the Government insisted on performance of the substituted agreement and received payment under it. Persistent breaches of the substituted agreement cannot and does not revive the original contract.

35. In my opinion the arbitration clause contained in the contract for Kettles Camp dated 22-9-1944 has ceased to exist since 22-2-1949. The arbitrator, therefore, had no jurisdiction to entertain any claim with regard to that contract and the award, so far as it relates to it is a nullity. It is, therefore, not necessary to decide if there is any error of law on the face of the award so far as it relates to that contract.

36. It is also clear that the contract dated 2-4-1943, for Laddies Cook and the arbitration clause contained in it have not been abrogated by the settlement contract dated 6-9-1948. By the express words of the settlement contract the original contract is to be determined only on payment in terms of the settlement. Such payment was not made and the original contract and its arbitration clause continued to exist. The arbitrator, therefore, had jurisdiction to make an award with reference to that contract. I am also satisfied that there is no error on the face of the award so far as it relates to that contract.

37. Unfortunately the arbitrator has made an award the operative portion of which is as follows:

"The result is that, on a review of the entire evidence that has been produced before me, I have come to the conclusion that there ought to be an award for Rs. 1.16,446/11/5 in favour of the, claimant -- the Union of India -- and against the respondent M/s Kishorilal Gupta and Bros. The amount awarded shall carry interest at 6 per cent, per annum from 10-8-1949 upto the date of payment. I award accordingly.

The stamp duty on this award has been paid by the Government. I direct that respondent firm should pay Rs. 1,000/- as cost of arbitration proceedings in addition to the amount awarded."

38. The petition assumes that there is a separate award for Rs. 3,164/4/- in respect of the contract dated 2-4-1943 and another award of Rs. 1,13,382/3/5 in respect of the contract dated 22-9-1944. The court however must deal with the

award as it stands. The award on the face of it is a lump sum award. On the face of it there is no separate award in respect of the contract dated 2-4-1943. The Court cannot ascertain with certainty the award which the arbitrator would have made if his verdict in respect of the contract dated 22-9-1944 were in favour of the petitioner. The petitioner claimed to appropriate the payment of Rs. 11,000/- made since 22-2-1949, towards all the three settlement contracts. The respondent claimed to appropriate that payment towards the contract dated 15-9-1944, for Bath Ovals but its witness C.C. Mookherji (Qq. 13 and 15) admitted before the arbitrator that the payment was appropriated towards the contract dated 2-4-1943 for Laddies Cook and the contract dated 22-9-1944 for Kettles Camp. A separate finding with regard to appropriation may not be necessary for a lump sum award but such finding is clearly necessary if the arbitrator were to make separate awards in respect of the last two contracts. Even if the figure of Rs. 1,16,446711/- is split up into 2 figures the Court must add further words in the award to indicate in respect of which contract the good part of the award is made. If the Court were to pass judgment on the award for Rs. 3,16478/- without specifying in the award that it is for the contract dated 2-4-1943 the Union of India may be met by a plea of res judicata when it subsequently enforces its rights in respect of other matters. The award of Rs. 1000/- for costs is clearly effected by the decision of the arbitrator with regard to the contract dated 22-9-1944. The Court is not certain in whose favour and for what sum the award for costs would have been if the arbitrator had decided in favour of the petitioner with regard to the contract dated 22-9-1944. The Court cannot re-write this award. Part of the award is void and the whole award is therefore bad.

39. I pass the following order:

I declare that the arbitration clause contained in the contract dated 22-9-1944, for Kettles Camp has ceased to exist since the settlement contract dated 22-2-1949.

I declare and adjudge the award to be void and invalid and set it aside.

The respondent must pay to the petitioner the costs of this application.