

(1962) 12 CAL CK 0015
In the Calcutta High Court
Case No : Award Case No. 252 of 1962

Union of India (UOI)

APPELLANT

Vs

Salween Timber and Construction Co. (India) Ltd. and
Another

RESPONDENT

Date of Decision : 21-12-1962

Acts Referred:

Arbitration Act, 1940 — Section 15, 30
Civil Procedure Code, 1908 (CPC) — Order 7 Rule 6
Constitution of India, 1950 — Article 299(2)
Interest Act, 1839 — Section 1
Limitation Act, 1908 — Article 115, 120

Citation : AIR 1963 Cal 307

Hon'ble Judges : P.C. Mallick, J

Bench : Single Bench

Judgement

P.C.Mallick, J.—This is an application to set aside an award. It relates to a dispute between the parties in respect to the supply of 292 tons of first class teak squares by the respondent to the petitioner under a contract. The contract is the usual contract evidenced by acceptance of a tender. The contract contained an arbitration clause. The disputes referred to arbitrators by the contractors are (a) the claim for sales-tax paid by the contractor; and (b) interest thereon. The arbitrator appointed was the senior Railway Inspector, Shri A. K. Gupta. He made his award on February 16, 1962. The award is In favour of the contractor for Rs. 16,640.64 nP. on account of sales tax paid with Interest thereon at the rate of 51/2 per cent from December 3D, 1957 to February 15, 1962, amounting to Rs. 3675.34 nP. The award directs the President of India to pay the above sums. This award is being challenged now by the Union of India.

2. Mr. Debt De, learned counsel appearing in support of this application contended that the award should be set aside because the arbitrator has made an award of a time barred claim. The relevant fact in support of this contention may be stated as under: The contractor made a demand of his claim by his letter

dated September 2, 1957. The reiteration of this demand was made by letter of contract dated December 19, 1957. The Disputes have been referred on February 15, 1961, three years after the last letter of demand. Mr. De, therefore, contended that this claim of the contractor is clearly time barred. This error, if at all, is an error, which does not appear on the face of the award nor in any connected document. This is conceded by Mr. De. Nevertheless, Mr. De contended that the arbitrator should have disallowed the claim having regard to pleadings from which it would appear that the claim was time barred. In making an award of a time barred claim the arbitrator has acted contrary to law and therefore has misconducted in the proceedings.

3. In the statement of facts filed by the contractor, a copy of which is annexed to the petition, the case has been made in paragraphs 13 and 14. There is a reference to these letters of demand -- one dated September 2, 1957 and the other dated September 25, 1957. In paragraph 14, it is pleaded that by the letter dated December 28, 1957, the Sleeper Control Officer of the Union of India admitted and acknowledged that the sum of Rs. 16,640.64 nP. was passed for payment. Mr. De contended that it is clear, therefore, that the contractor relied on the letter dated December 18, 1957, as constituting the acknowledgment of liability, if at all, it is an acknowledgment of liability. The reference having been made three years after that particular date, clearly the claim was time barred. In the counter statement of facts filed by the Government, the plea or limitation has been placed at the forefront, that is indeed the first paragraph of the counter statement of facts wherein it is stated : "The reference is time barred". Mr. De's contention is that on the pleadings there is no acknowledgment of liability so as to take it out of the statute of limitation. In that view of the matter, the arbitrator in awarding the claim has acted contrary to the law of limitation and as such the award cannot be upheld.

4. In a pleading in Court for the purpose of making a claim, a Pleader is required to make necessary averment to show that what appears to be a state claim is still alive by reason of acknowledgment and this fact of acknowledgment should be acknowledged in a proper plaint, I do not however consider that it is equally so in an arbitration proceedings, it is not imperative for a party in arbitration proceeding to plead acknowledgment, Nor is the claim liable to be dismissed "in limine" if in the statement of facts acknowledgment is not pleaded to save limitation. I am, therefore, not satisfied that merely because in the statement of facts there are not the necessary averments to take the claim out of the statute of limitation, the arbitrator should have disallowed the claim of the contractor. In the counter statement of facts, the point of limitation was expressly taken. There was, therefore, an issue before the arbitrator as to whether this particular claim of the contractor was barred by limitation or not. Mr. De contended that the appropriate article to apply was Article 115. Mr. Subimal C. Roy, learned counsel appearing on behalf of the contractor contended on the other hand that in substance and in fact, the claim of the contractor is for reimbursement of the sales tax paid by them. There being no express article for such cases of

reimbursement, the appropriate article to apply is Article 120. He has drawn my attention to a passage in Rustomji on Limitation Act at pp. 37-38 as also a decision of the Privy Council in the case of Raja Peary Mohan Mukherjee v. Narendranath Mukherjee, reported in 37 Ind App 27. He has drawn my attention to a paragraph at pp. 37-38. In that case it was held by the Judicial Committee that there is no express article in the Limitation Act for a suit for the recovery by a trustee of the amount paid by him on account of the trust as and by way at reimbursement and as such Article 120 would apply. Mr. Roy contended that on the same principle in the instant case, the appropriate article would not be Article 115, but Article 120. It seems to me that Mr. De is right in his contention that the appropriate article to apply in a case of this description is Article 115 and not Article 120 and that the decision in 37 Ind App 27, does not apply to the facts of this case. But that does not dispose of the matter. A claim more than three years old may yet be alive by reason of acknowledgment in writing made by the debtor. In the instant case various documents including a bunch of correspondence were placed before the arbitrator as evidence. One of such letters being a letter dated February 17, 1958 adduced by the Sleeper Control Officer has been referred to and relied on by the contractor as amounting to an acknowledgment of liability so as to extend the period of limitation. It is an inter-departmental letter, a copy of which was sent to the contractor. It is not for me to decide whether it amounts to acknowledgment in law. The arbitrator might have held on the basis of this document or any other document that the claim was not time barred. The decision of the arbitrator right or wrong is not liable to be set aside, unless the error of law is apparent on the face of the award. As stated before, the error of law, if any, is not apparent on the face of the award. In my judgment, it is not for the Court to ransack the whole record for the purpose of finding out whether in fact there is or is not an acknowledgment in the documents filed before the arbitrator. The letters were placed before him and he might well have construed the document or any one of them to amount to an acknowledgment so as to take the claim out of the Statute of Limitation. It cannot therefore be contended that the arbitrator must have made the award of a time barred claim contrary to the provisions of the Indian Limitation Act. The award is not liable to be set aside on this ground.

5. The next contention of Mr. De is that the arbitrator was wrong in allowing interest as claimed by the contractor. The amount of interest awarded is Rs. 3675.34 nP. from December 30, 1957 to February 15, 1962. Mr. De contends that this award of interest can only be made on the basis of the Interest Act but the under mentioned conditions must be satisfied as laid down by the Supreme Court in the case of Seth Thawardas Pherumal Vs. The Union of India (UOI), . The conditions are set out at p. 478 as under:

1. There must be a debt or a sum certain;
2. It must be payable at a certain time or other wise;
3. These debts or sums must be payable by virtue of some written contract at a

certain time;

4. There must have been a demand in writing stating that interest will be demanded from the date of the demand.

6. It is contended by Mr. De that two of those conditions were not present in the instant case. The liability in the instant case was a contingent liability and not a certain liability. At the date of the contract it was not certain whether the contractor would be liable to pay sales tax. Hence the instant case is not covered by the Interest Act. Mr. De submitted that according to the authority the certainty of time required by the Act must be existing at the time of the contract. Where the sum is not payable at a certain time and its payment is contingent upon events which may never happen, or if they ever do happen, may be indefinitely postponed, and the date is not certain, the Interest Act would not apply. It is next contended by Mr. De that the demand for payment must be made in writing and the demand "shall give notice to the debtor that interest will be claimed from the date of such demand." In the instant case, the date on which the amount was payable was not from the date of the notice but a few days subsequent thereto.

7. Mr. Subimal Roy contended that the instant claim for interest is not a contingent claim at all. At the date of the contract parties knew that Sales Tax would have to be paid and when it was paid it would become a certain liability. A reference however to the contract does not make it clear that the Sales Tax would in any event have to be paid. If I could satisfy myself from the contract that the parties contemplated that in any event sales tax would have to be paid, I would have upheld the contention of Mr. Roy. But reading the contract I am apt to think that the parties themselves were in doubt as to whether sales tax would be payable at all and, if the contractor was made to pay the sales tax, it is only in that event that he would be able to recover the amount from the Government. The event might or might not have happened. I am therefore apt to think that this contention of Mr. De is well-founded. The claim of interest therefore awarded in favour of the contractor, in my judgment, runs counter, to the provision of Section 1 of the Interest Act and this portion of the award made by the arbitrator must be held to be bad and apparent on the face of the award.

8. The third contention of Mr. De is that the award has been made against the President of India. He drew my attention to Article 299 of the Constitution, Sub-clause (2) of which Article expressly provides that the President shall not be personally liable in respect of any contract. If I could have read the award as being an award whereby the President is being made personally liable, I would not have had the slightest hesitation in setting it aside. I am however satisfied that what the arbitrator really meant was to make the Union of India liable. In that view of the matter it is not necessary for me to set aside the award, Section 15 of the Arbitration Act empowers the Court to correct an award when inter alia there is an obvious error in the award.

9. In the instant case the dispute was between the Union Government on one side and the contractor on the other. The counter statement of facts tiled before the arbitrator was filed by the Union of India and everybody proceeded on the basis that the liability, if any, was that of the Union of India. No doubt the contract was in the name of the President of India as is required by the Constitution but that the liability, if any, was that of the Union of India there was not the least of doubt in the mind of the parties. Nor have I any doubt whatsoever that what the arbitrator meant was to make the Union of India liable. In my opinion there is an obvious error in the award in directing the President to pay the amount under the award. Therefore, in exercise of the power given to the Court u/s 15 I correct the award by directing that the Union of India and not the President is made liable under the award.

10. As indicated before, I have held in favour of Mr. De that the award of interest made by the learned arbitrator cannot be upheld. The award can be corrected by disallowing interest without affecting the other portion. Award is therefore ordered to be corrected as indicated above. Be it noted that the Union of India in both cases waives notice u/s 14(2) of the Arbitration Act.

11. There will be an order accordingly. The parties will bear and pay their own costs.

12. There will be- a judgment in terms of the corrected award with usual costs. The decretal amount will carry, interest at the rate of 3 per cent per annum. The decretal amount is payable within 2 months.