

N.C.K. Sons Corporation Vs. Madhavnagar Cotton Mill Ltd.

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Court : Mumbai

Decided On : Aug-13-1986

Reported in : 1986(3)BomCR729

Judge : M.S. Jamdar, J.

Acts : [Arbitration Act, 1940](#) - Sections 3 and 28(2); [Evidence Act, 1872](#) - Sections 28(1) and 115

Appeal No. : Appeal From Order No. 674 of 1981

Appellant : N.C.K. Sons Corporation

Respondent : Madhavnagar Cotton Mill Ltd.

Advocate for Def. : B.R. Choudhary, Adv.

Advocate for Pet/Ap. : Shellim Samuel, Adv.

Disposition : Appeal allowed

Judgement :

M.S. Jamdar, J.

1. The appellants, N.C.K. Sons Corporation, have preferred this appeal being aggrieved by the order passed by the City Civil Court Judge, Bombay dismissing their application for setting aside the award passed by the arbitrator on behalf of the Cotton Textiles Export Promotion Council in Arbitration Case No. 446 of 1979, directing the appellants to pay to the respondents a sum of Rs. 25,734.70/- as costs.

2. The appellants had some dealings with the respondent-textile mill and a dispute arose between them in respect of the cash incentive admissible on exports of powerloom cloth supplied by the respondent-mill to the appellants under a contract dated February, 16, 1976. The respondent-mill, therefore, submitted the dispute to the arbitration of the Cotton Textile Export Promotion Council and appointed one Shri R.P. Poddar as arbitrator on their behalf. As the appellant failed to appoint an arbitrator on their behalf, though duly called upon to do so the matter was referred to the sole arbitration of Shri Poddar. The appellants were informed about it by the Deputy Director of the Export Promotion Council by a letter dated July 30, 1979. Parties were also informed on the same day that the first hearing of the arbitration case was fixed on Friday, August 17, 1979 at Council's Office, Bombay. In reply to this letter the appellants repeated their request for keeping the matter pending as the person who was managing the entire affairs of the company was out of India and was expected back by the end of August 1979. Though the request for staying the proceeding was not granted the next hearing of the arbitration case was adjourned to September, 18, 1979. On that day also the appellants asked for further adjournment on the same ground. The arbitrator granted this request also but while doing so made it clear that next arbitration hearing will be final and no further postponement will be granted. This direction was communicated to the appellants by the Dy. Director of the Export Promotion Council vide his

letter dated September 19, 1979. The next date of hearing was fixed on November 15, 1979 and in the communication addressed to the appellant in this behalf their attention was invited to Rule 18 of the Arbitration Rule of the Council which empowered the arbitrator to proceed ex parte in the absence of any party. It appears that this date was changed to January 21, 1980 but nothing was done on that day and the matter was adjourned to 30th and was heard ex parte on that day as the appellants did not remain present on that date also though they were specifically informed about it, as can be seen from the record of the arbitration proceeding. On that day the appellants asked for further adjournment on the ground that some other representative of their company was out of Bombay. On the basis of the ex parte hearing held on January 30, 1980 the sole arbitrator passed his award on February 9, 1980 directing the appellants to pay the amount claimed by the respondents. The said award was filed in Court by respondents on July 25, 1980 and the notice of filing of the award was served on the appellants on October 13, 1980. Thereafter the appellants filed an application on November 12, 1980 for setting aside the award.

3. Eventhough the award was sought to be challenged on several grounds mentioned in the application, at the hearing of the application it was sought to be challenged on the ground which was not mentioned in the application viz. that the award was void because it was made beyond the statutory period of 120 days. The learned trial Judge rejected this challenge firstly on the ground that this challenge was not made in the application and secondly on the ground that in view of the application for adjournment filed by the appellants seeking postponement of the arbitration case it should be deemed that the period for making the award was impliedly extended.

4. Admittedly the appellants never remained present before the arbitrator. As a matter of fact as mentioned above it was because of their failure to nominate their own arbitrator that the Council was constrained to refer it to the Sole arbitration of the arbitrator nominated by the respondents. They were duly informed of all the dates of hearing of the arbitration case but on every date they applied for adjournment. As mentioned above some of the adjournments were granted and only after they failed to appear on September 18, 1979 they were informed that the next arbitration hearing would be final and no further postponement will be granted. The next date was November 15, 1979. It was, therefore, urged by Shri Choudhary, the learned Advocate for the respondents, that November 15, 1979 should be considered as the first date of hearing of the arbitration case. He further contended that if this date is taken into consideration as the date of first hearing then the award was passed within the statutory period of four months. He also urged that the arbitrator entered on the reference only on January 30, 1980 when the matter was heard, Shri Choudhary based the last submission on Clause 3 of the first schedule of the [Arbitration Act, 1940](#) which lays down that the arbitrators shall make their award within four months after entering on the reference or after having called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

5. The implied conditions of arbitration agreement mentioned in the first schedule, however, do not govern the present arbitration in view of the rules framed by the Cotton Textile Export Promotion Council, Bombay for arbitration on Cotton piece goods and yarn specifically sold for export. Section 3 of the Arbitration Act lays down that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference. As the Council has framed its own rules governing arbitration disputes or questions arising out of a contract for the sale and purchase of Indian cotton piece goods for export market a different intention must be deemed to have been expressed in the arbitration agreement and hence the provisions set out in the first schedule would not govern the arbitration under the rules framed by the Council. The award, therefore, was expected to be given within 120 days from the first date on which the arbitrator entered on the reference. The position would be governed by Rule 17 of the Rules framed by the Council. The said rule lays down that the arbitrators shall make an award in writing in the form prescribed by the Council, or notify their disagreement to the Secretary as early as possible and in any case within one hundred and twenty days from the date of the first hearing or within the period of any permitted extension of time. The permitted extension contemplated by

Rule 17 is governed by Rule 21 which lays down that the arbitrators or umpire may, from time to time with consent of all the parties, by endorsement on the reference paper, extend the time for making the award by a period not exceeding twenty eight days from the due date or extended due date of the award.

6. Primarily as contemplated by Rule 17, the award was expected to be given within 120 days from the date of the first hearing. As mentioned above after Shri Poddar was appointed the sole arbitrator the arbitration case was fixed on August 17, 1979. It is pertinent to note that by a notice dated July 30, 1979 the parties were informed that Friday, August 17, 1979, was fixed as the date of the first hearing of the reference. The attendance sheet also shows the same position. Shri Chaudhary tried to urge that August 17, 1979 cannot be taken as the first date of hearing because there is nothing to show that the arbitrator applied his mind to the case. There is no substance in this contention because the arbitrator did treat the date as the first date of hearing of the arbitration case. It will also be seen from the letter dated August 22, 1979 addressed to the parties by the Deputy Director of the Council that two officers of the respondent company were present while nobody attended on behalf of the appellants. Preamble of the letter itself shows that it had reference to the 'arbitration hearing' held on August 17, 1979 in connection with the arbitration case in question before the sole arbitrator. It is, therefore, difficult to accept the submission made on behalf of the respondents that August 17, 1979 was not the first date of hearing of the arbitration case. It is abundantly clear that the said date was the first date of hearing of the arbitration case and that date will have to be taken as starting point for counting the prescribed period of 120 days within which the arbitrator was expected to give the award.

7. Shri Choudhary then tried to affirm the proposition laid down by the learned trial Judge that as the appellants who sought adjournments were responsible for the delay, they should be deemed to have consented to the extension of time for giving the award. Rule 21 which makes provision for extension of the time for making the award clearly lays down that the arbitrator cannot extend the time for making the award without the consent of the parties. Only the Court can do so without the consent of the parties in view of section 28(1) of the Arbitration Act. Further as laid down in sub-section (2) of section 28 an agreement which empowers the arbitrator to extend the time without the consent of the parties is void and is of no effect. No doubt the consent can be express or can be implied from the conduct of the parties, but merely seeking adjournments cannot be such a conduct. No inference of consent of parties can be drawn merely on the basis that the adjournments sought by the appellants were granted by the arbitrator. There is also nothing on record to show that the adjournments were granted with the concurrence of the respondents. The respondent have nowhere stated that they had any time consented to the adjournments or to the extension of time for making the award. It is significant to note that though on the first occasion i.e. on August 17, 1979 the application for adjournment filed by the appellants was placed before the arbitrator in the presence of the respondents, subsequent adjournments were granted without reference to the respondents. Moreover, consenting to adjournment does not necessarily mean consenting to the extension of time for making the award as contemplated by Rule 21. It is, therefore, difficult to accept the finding of the learned trial Judge that the time was impliedly extended by the consent of the parties.

8. Shri Choudhary then urged that in view of the conduct of the appellants in seeking postponements they would be estopped from challenging the validity of the award on the ground that it was given beyond stipulated time of 120 days. In support of this contention he placed reliance on the decision of the Full Bench of Patna High Court in *Bokaro & Ramgur Ltd. v. Prasun Kumar*, : AIR1968Pat150 . In that case it was held that the party having taken a willing part in the deliberations before the Arbitrator after the expiry of four months without any objection, protest or the like, was estopped from challenging the validity of the award on the ground of its having been made after the expiry of the period or it waved its right to put a stop to the proceeding going ahead on the expiry of that period. The ratio of this case, however, is not applicable to the facts of the present case because admittedly the appellants did not willingly participate in the deliberations before the arbitrator after the expiry of four months without any objection. As a matter of fact they only asked for adjournments and never appeared before the arbitrator even once. There was therefore, no question of their acquiescing in the delay or waiving their right to challenge the award. It is also significant to note that in

that case the learned Judges held that even taking part in the proceeding before the arbitrator after the expiry of four months did not have the exact effect of extending the time by consent of parties. As mentioned above under rule 21 an endorsement about the extension of time by consent of parties is expected to be made on the reference paper itself. Admittedly there is no such endorsement in writing on the reference paper in the present case. Hence neither can it be said that the time was extended by implied consent of the parties nor the appellants are estopped from challenging the validity of the award on the ground that it was made after the expiry of the prescribed period of 120 days.

9. There is however, great force in the ultimate submission made by Shri Choudhary that the Court in exercise of the direction conferred by section 28(1) can in a case like this extend the time for making the award. He supported this submission by the decision of the Orissa High Court in Narsingh Das v. Firm Bisandayal, : AIR1954Ori29 and the decision of Madhya Pradesh High Court in State v. Babulal, : AIR1974MP179 . In the latter case it was held that the policy of law is that the award of the arbitrator is ordinarily final and conclusive and that the Court should approach the award with a desire to support it, if that is reasonably possible, rather than destroy it by calling it illegal, and that it would be consonant with justice to extend the time in the exercise of the Courts' discretionary power.

10. In the Orissa case Narsingh Das v. Firm Bisandayal the delay in giving the award was due to the conduct of the defendant and that after the award was filed in Court no objection to the validity on the ground of its having been made beyond time was raised by the defendant. These circumstances were held to be sufficient for the Court to exercise its discretion under section 28(1) of the Arbitration Act. Both these circumstances are present in this case. The delay was on account of the conduct of the appellants in seeking adjournment after adjournment and admittedly in the petition filed by them for challenging the award they did not take the ground that the award was invalid as it was made beyond time. Hence in passing the decree on the basis of the award the learned trial Judge can be deemed to have exercised his discretion to grant extension of time for making the award.

11. The appeal, therefore, fails and deserves to be dismissed. The appeal is dismissed with costs.

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