



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2021 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Case Comment: Outfield Match - Board of Control for Cricket in India vs Deccan Chronicle Holdings Ltd.

Swarnendu Chatterjee^a Yashika Bhardwaj^b

^aManaging Associate, L&L, Delhi, India; Advocate-On-Record, Supreme Court, India ^bAmity University, Noida, India

Received 21 June 2021; Accepted 07 July 2021; Published 10 July 2021

INTRODUCTION

Bench - G.S. Patel, J.

Citation - Comm Arbitration Petition (L) No. 4466 OF 2020

Petitioner - Board of Control for Cricket in India

Respondent - Deccan Chronicle Holdings Ltd.

BACKGROUND

In the case of Board of Control for Cricket in India (BCCI) v. Deccan Chronicle Holdings Ltd (DCHL), the Bombay High Court overturned an arbitration decision ordering the BCCI to pay Rs. 4814,17,00,000/- (Rupees Four Thousand Eight Hundred and Fourteen Crores and Seventeen Lakhs only) to DCHL for the alleged unlawful termination of the Deccan Chargers, Hyderabad from the Indian Premier League (IPL) Franchise. Contractual breaches emerged

between the Parties due to non-payment to the players and others, creating charges on the assets and an insolvency event. The BCCI submitted a notice of termination in August 2012 when no ray of hope was visible to resolve the defaults and the contract was subsequently revoked. Former Supreme Court Justice (Retd.) C. K. Thakker was appointed as the sole arbitrator by the Bombay High Court to settle the dispute after DCHL filed a petition. A total of 16 issues were recognized by the Arbitrator. On 17th July 2020, the Arbitrator while observing the termination of the contract between the parties to be illegal passed an award in favor of DCHL and a compensation of Rs. 4,814 crores with an addition of 10% interest and legal fees were to be paid by the BCCI to the DCHL.

However, BCCI being dissatisfied with the decision filled a petition in the Bombay High Court under Section 34 of the Arbitration and Conciliation Act, 1996. The petition was subsequently allowed the Hon'ble Single Judge Bench of Justice Gautam Patel.

ARGUMENTS PUT FORWARD BY THE PETITIONER BEFORE THE HIGH COURT

- (i) Firstly, the award was berated on the ground that the findings and conclusions are devoid of any justification and reflected 'perversity' as part of 'patent illegality.'
- (ii) Secondly, the Award considers information that fails to be on the record. The Award had far-reaching implications that go beyond the contract and some attempts were made to modify contractual terms.
- (iii) The Petitioner argued that the Award appeared to do what Section 28(2) of the Act states that no arbitral tribunal is permissible to do unless the agreement specifically states otherwise, viz, determine *ex aequo et bono or amiable compositeur*.
- (iv) The Award incorporated elements of public law, particularly those of Article 14 of the India Constitution. The BCCI emphasized that this is utterly outside the purview of any private law arbitral tribunal as the policy of Indian law prohibits invoking these public law principles in resolving private law business disputes governed and limited by contract. It accomplishes this despite the fact that there is no plea. It moreover, fails to address BCCI's objection regarding an insufficient pleading.

- (v) Lastly, it was further contended that the Award imposed damages for no discernible reason. The Award provides for monetary damages in place of specific performance, notwithstanding the fact that this relief was not pursued at the hearing. The Respondent had no prayer for damages in lieu of specific performance, but only for (i) damages in addition to specific performance and (ii) damages if the specific performance relief was rejected. The Award incorrectly interprets these as requests and makes no conclusion at all that the Respondent is entitled to a particular performance. It awards compensatory damages – without explanation – and so rewards the Respondent for its failure to deliver. This was claimed to be contrary to Indian law's core philosophy governing damages.

RESPONDENTS' ARGUMENTS BEFORE THE HIGH COURT

- (i) The Respondents argued that the Arbitrator passed the award while exercising his discretionary powers which was rested on the facts of the case and the law. Therefore, the outcomes were not only conceivable but also entirely reasonable.
- (ii) That the Petitioner's intentions were always mala fide, intended to oust the Deccan Chargers team and DCHL's franchise on one pretext or the other. DCHL was driven to financial ruin.
- (iii) Besides, when performance was demanded, DCHL complied, at least substantially; and yet BCCI terminated the Franchise Agreement.
- (iv) It was also contended that the policy of arbitration legislation is to reduce curial intrusion. A Section 34 court is neither a court of appeal or first instance, and the Court's scope is extremely limited, and awards are not to be turned aside lightly. Furthermore, it was stated that the Award was fair, balanced, and took into account all of the information on record.

LEGAL REASONING

The Court identified that the basic issue pertained to whether the award is liable to be set aside under Section 34¹ of the Arbitration and Conciliation Act, 1996 ("Act") on the ground of perversity and patent illegality.

The Court recognized three main defaults by DCHL of their contractual obligation - failing to pay players and numerous others, creating charges on assets, and insolvency proceedings against the company. The Court dealt with all three issues in great detail and taking into account all the arguments from both the respective parties. For the purpose of the easement, the judgment is discussed under various sub-heads.

Show cause notice - The non-payment of players and other fees/dues fell under Clause 11.1² and made it obligatory for the BCCI to give DCHL 30 day window to cure such an event. However, Clause 11.2³ read with Clause 11.6⁴ it can be clearly established that an insolvency event called for immediate termination after notice and not a cure period. No provision in the contract suggests otherwise. It was impossible to bundle the two default classes and the two distinct types of notices into one amorphous 'show-cause notice'.

Premature Termination - the Court found that the Arbitrator's acceptance of the BCCI termination to be premature was unsustainable as DCHL itself has submitted documentary evidence. Firstly, it was furnished in terms of two letters from the DCHL's attorney and from DCHL. The letters reinforced that substantial steps have been taken to cure the defaults. The

¹ Arbitration and Conciliation Act 1996, s 34 (2A): "An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award: Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence."

² Clause 11.1- "Either party may terminate this Agreement with immediate effect by notice in writing if the other party has failed to remedy any remediable material breach of this Agreement within a period of 30 days of the receipt of a notice in writing requiring it to do so which notice shall expressly refer to this Clause 11.1 and to the fact that termination of this Agreement may be a consequence of any failure to remedy the breach specified in it. For the avoidance of doubt, a breach by the Franchisee of its payment obligations under this Agreement or under Clause 22 shall be deemed to be a material breach of this Agreement for the purposes of this Clause."

³ Clause 11.2- "Either party may terminate this Agreement with immediate effect by written notice if the other party commits or permits an irremediable breach of this Agreement or if it is the subject of an Insolvency Event."

⁴ Clause 11.6 - An "Insolvency Event" shall occur in respect of a party to this Agreement if: (a) any bona fide petition is presented or any demand under the Act is served on that party or an order is made or resolution passed for the winding-up of that party or a notice is issued convening a meeting for the purpose of passing any such resolution."

DCHL has also maintained it to be correct during proceedings and there was no question of the termination being premature as another day was not required to cure any defaults. The second evidence was in correspondence to the third letter by DCHL's attorneys, dated 14th September 2012 wherein it was mentioned that there are no defaults at all. Therefore, if so, was the case again the court stated that there was no ground for termination being 'premature'.

Substantial Compliance - The Court determined that the Award was based on the notion that precise contract compliance is not required, and that 'substantial compliance' is sufficient. This was examined in three parts: (1) players fees (2) bank charges (3) Doctrinal Relevance.

Players' fees: The Court ruled that after the Arbitrator determined that the players' payments had not been made, the Arbitrator could not conclude that 'substantial compliance' had been reached. The contractual obligation could not be met simply by delivering demand drafts. The Arbitrator overlooked the fact that the contract called for a fully 'ensured' payment. There was no basis for concluding that a 'substantial compliance' was achieved.

Bank Charges: The Arbitrator observed that the DCHL had no charges at the time the BCCI terminated its contract, and he accepted the DCHL's claims that (a) all charges existed antecedent to the Franchise Agreement and (b) were on the newspaper division. If DCHL claimed that all charges and claims by various banks had been withdrawn or cleared, the Court determined that the Respondent was responsible for proving this. The Court further determined that the Award included no reference of any papers or evidence that may have led to such a finding. The Court ruled that a party's mere acceptance of a submission does not constitute "reasons" in an Award.

Doctrinal Relevance: On the idea of 'substantial compliance,' the Court remarked that there is no authority under Indian private law that provides for such a perspective of significant compliance. Though it may be significant under public law, it would not be covered by a contract-based arbitration. The court rightly ruled that there is no notion of 'substantial compliance' in private law unless it is expressly stated in the contract.

No Insolvency Event - DCHL stated that no winding-up order had been filed against them since the IFCI issuance had been 'compromised.' As a result, when BCCI terminated the contract, the Arbitrator found that the 'insolvency' event was no longer 'existing.' The Court, on the other hand, found that the determination of fact was made without considering how and on what conditions the issue was 'settled.' The compromise agreement stated unequivocally that the winding-up petition had not been disposed of and was simply in abeyance and could be revived upon a default. As a result, the Arbitrator's conclusion that the Insolvency Event was "no longer in existence" was not sustainable nor conceivable, and was, therefore, both perverse and patently illegal.

Unfair Discrimination - The Arbitrator determined that the BCCI, is an organisation that performs "public functions" and was obliged to establish that all franchisees were treated equally and without prejudice. The Arbitrator determined that the BCCI had unjustly treated the DCHL, particularly in comparison to other franchisees and their owners. Despite other franchisees' misbehaviour, the BCCI took no action against them and instead ended the contract with the DCHL. The Court also reflected that the Award determined that the word 'may' should be interpreted as 'shall' to an extent that the entire obligation-entitlement structure was completely shattered. The Court held that if the wording of a contract is unambiguous, there is no room for starting on this type of interpretive adventure.

Additionally, the Court while taking the view of Supreme Court in *Assistant Excise Commissioner v. Issac Peter*,⁵ and *ONGC Ltd v Streamline Shipping Co Pvt Ltd*.⁶ concluded that the discussion in the Award of Article 14⁷ and public law was not a conceivable point of view nor within the ambit of a contract-bound commercial arbitration dispute. An arbitrator must work within the parameters of the contract. The Court stated that public law principles such as fairness and reasonableness cannot be introduced into an arbitral tribunal.

The Arbitrator as 'amiable compositeur': decision ex aequo et bono- Arbitral Tribunal is required to decide ex aequo et bono or as amiable compositeur only if the parties expressly

⁵ *Assistant Excise Commissioner v Issac Peter* (1994) 4 SCC 104

⁶ *ONGC Ltd v Streamline Shipping Co Pvt Ltd* 2002 SCC OnLine Bom 303

⁷ Constitution of India, art 14

authorize it to do so. Unless specifically authorised in an arbitration agreement, commercial arbitrators are not permitted to decide a dispute by using what they deem to be "fair and reasonable." Section 28(3) further requires the arbitral tribunal to consider the contract conditions when formulating and deciding the award and the section is applicable across all stages of the proceedings of the arbitral tribunal. In the present case, the court observed that the findings were perverse.

Award - It was impossible to argue that even if DCHL did not pursue its claim for a particular performance, it was nevertheless entitled to damages in addition to or in place of a specific performance. Damages 'in lieu of' specific performance may have been awarded only if a claim for specific performance had been filed. Furthermore, damages may only be awarded if a particular performance was shown to be a possibility. The Court further noted that the Respondent's petitions were never changed to seek damages in lieu of specific performance.

Attempt to Furnish Reason for the Award - The Court while accepting the submission of BCCI that Section 34 Court will not assess the sufficiency of the reasons and calling the reasons of DCHL impermissible held that the award speaks for itself. Thus, it was held impermissible for a party to supply reasons. Although, Section 34 court cannot and will not examine the reasonableness of reasons in the Award⁸. But a Section 34 court can, will, and must examine whether reasons exist the court observed as the court observed it to be a requirement of Arbitration law and the Arbitration Act.

Defaults: At the most basic level, there were three defaults: not paying players and others, imposing charges on assets, and the insolvency event (the IFCI winding-up petition). The first two were expected to be curable, but the contract stated that if they were not, the contract would be terminated. The insolvency may result in immediate termination. It was evident from the facts and the eyes of the court that none of the three can be shown to be cured or to no longer exist. All three of them went on. In some situations, the Award proceeded without justification, rejecting evidence in others, deviating from the contract in others, and taking positions that were not conceivable.

⁸ *Muddasani Venkata Narsaiah v Muddasani Sarojana* (2016) 12 SCC 288

Interest - There was no clause in the contract that forbade pendent lite interest. As a result, the Court determined that the requirements of Section 31(7) (a) of the Act will apply.

Final Order - Petition was thereby succeeded as there was no better convincing response. Except for the award in favour of DCHL for Rs 36 crores less Rs.1.83 crores and interest on that amount, the Award dated July 17, 2020, was set aside. Naturally, the arbitral judgement of Rs 50 lakhs in costs must be cast aside as well. As it was a matter in the Commercial Division and governed by the Commercial Courts Act, 2015 which has amended Section 35⁹ of the Code of Civil Procedure, 1908. This was a Commercial Division issue regulated by the Commercial Courts Act of 2015. This Act modified, among other things, Section 35 of the Code of Civil Procedure, 1908, which dealt with costs. Section 35(2) states that costs must follow the event. Using its discretion, and finding no reason to decline the cost the court held that DCHL- the losing party shall pay Rs. 10 Lakhs to the BCCI.

CONCLUSION

The ruling is crucial in clarifying that the duty of an Arbitrator is limited within the precise boundaries of the contractual obligations, with no elbow room for deviation. The Court has carefully examined the extent of the challenge under Section 34(2A) of the Act. The decision confirms that the ground of 'perversity' functions as an element within the scope of 'patent illegality.' It reaffirms the accepted legal position that arbitral decisions can be overturned on the grounds of 'perversity,' for reasons like disregarding critical evidence and reaching implausible conclusions.

The Judgement has further supplemented that there is no authority to a private law tribunal to hold a public entity responsible under Article 14 principles unless the contract specifies otherwise.

⁹ Code of Civil Procedure 1908, s 35(1): Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of, and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers;

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing;

The decision also serves as a primer for calculating damages in arbitration. It upholds the notion that an Arbitrator is not needed to offer minute computations because a lump sum award is permitted; nonetheless, the arbitrator must explain reasons for accepting or rejecting each head of the claim. The assessment remains an essential condition for the payment of compensation.