
(2015) 05 BOM CK 0016
In the Bombay High Court
Case No : First Appeal No. 178 of 1998

Central Mine Planning and Design Institute Ltd. and Others	APPELLANT
Vs	
Anupam Rai	RESPONDENT

Date of Decision : 08-05-2015

Acts Referred:

Arbitration Act, 1940 — Section 30, 39
Civil Procedure Code, 1908 (CPC) — Section 34
Interest Act, 1978 — Section 3, 3(1)(b)

Citation : (2015) 5 ABR 147 : (2015) 6 MhLj 348

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : C.S. Samudra, for the Appellant; A.S. Jaiswal, Senior Advocate and Shantanu Khedkar Advocate, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

A.S. Chandurkar, J.—The appellants in the present appeal filed under Section 39 of the Arbitration Act 1940 (for short the said Act) have challenged the judgment dated 23-4-1998 in Special Civil Suit No. 67/1992 whereby the award made by the Arbitrator was made rule of the Court.

2. The relevant facts are that the appellants had invited tenders for constructing of office, dwelling units, boundary wall etc. Pursuant to said notice, the respondent had submitted its offer and on 24-4-1986, an agreement was entered into between the appellants and the respondent for undertaking said work. Prior thereto, work order came to be issued to the respondent on 31-3-1986. The work in question was to be completed within a period of 12 months from 10-4-1986 to 9-4-1987. The work was to be carried out as per the terms agreed between the parties. Certain conditions had been stipulated in the notices inviting the tenders. On that basis, the respondent undertook the work of construction. Said work could not be completed within the stipulated period and hence, time to complete the same was extended on two occasions vide

communication dated 14-5-1987 and 14-12-1987. The work came to be completed on 31-1-1988.

3. Disputes having arisen between the parties, the respondent in terms of the agreement sought appointment of an Arbitrator. By order dated 20-12-1995, the Civil Court directed the present appellants to file the arbitration agreement in Court and appointed a sole Arbitrator to adjudicate the claim of the present respondent. Pursuant thereto, arbitration proceedings took place and on 30-6-1997, the sole Arbitrator made his award and held that the respondent was entitled to a total amount of Rs. 16,05,982.95/-. The award was thereafter placed before the Civil Court and the appellants filed their objection vide Exhibit.41. The objections pertained to grant of amount towards escalation and award of interest at 18% per annum. The Civil Court thereafter considered the award and the objections thereto and by judgment dated 23-4-1998 upheld said award and made it rule of the Court. This judgment is under challenge in the present appeal.

4. Shri C.S. Samudra, learned Counsel appearing for the appellants submitted that the amounts as awarded by the Arbitrator in respect of escalation charges and interest @18% per annum were not permissible under the agreement between the parties and hence, by awarding said amounts, the Arbitrator had misconducted himself. He submitted that as per Clause 9 of the tender conditions, time had been made an essence of contract and, therefore, it was necessary for the respondent to have completed the work in question within stipulated time. He submitted that as per Clause 21 thereof, no escalation was permissible on account of fluctuation in market prices of labour and material during the currency of the contract. Similarly, as per Clause 16, it was agreed that the respondent would not be entitled to any compensation for any loss on account of delay in commencing or executing the work. He, therefore, submitted that in the absence of any agreement to provide for escalation, it was beyond the jurisdiction of the Arbitrator to award any amount of claim for said reason. In support of the said submission, the learned Counsel placed reliance on decision of the Division bench in Pawan Hans Helicopter Ltd., formerly known as Pawan Hans Pvt. Ltd. Vs. Associated Construction, (2007) 4 ALLMR 482 : (2007) 3 ARBLR 254 : (2007) 4 BomCR 26 : (2007) 4 BOMLR 26 : (2007) 109 BOMLR 1163 : (2007) 6 MhLj 255 , The Municipal Corporation of Greater Bombay Vs. Thermal Engineering Corporation, Bombay and others, (1997) 1 BomCR 353 : (1997) 1 MhLj 700 , Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another, AIR 2007 SC 509 : (2006) 14 SCALE 49 : (2007) 2 SCC 453 : (2006) 10 SCR 570 Supp , State of Orissa Vs. Sudhakar Das (Dead) by Lrs., AIR 2000 SC 1294 : (2000) 90 CLT 721 : (2000) 2 JT 465 : (2000) 125 PLR 763 : (2000) 2 SCALE 124 : (2000) 3 SCC 27 : (2000) 1 SCR 1136 : (2000) 1 UJ 613 : (2000) AIRSCW 981 : (2000) 2 Supreme 119 , New India Civil Erectors (P.) Ltd. Vs. Oil and Natural Gas Corporation, AIR 1997 SC 980 : (1997) 2 JT 633 : (1997) 2 SCALE 50 : (1997) 11 SCC 75 : (1997) 2 SCR 86 : (1997) AIRSCW 941 : (1997) 2 Supreme 265 , Ramachandra Reddy and Co. Vs. State of Andhra

Pradesh and Others, AIR 2001 SC 1523 : (2001) 2 SCALE 291 : (2001) 4 SCC 241 : (2001) 2 SCR 186 : (2001) AIRSCW 1275 : (2001) 2 Supreme 220 , Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, AIR 1988 SC 1166 : (1988) 1 ARBLR 400 : (1988) 2 JT 95 : (1988) 1 SCALE 721 : (1988) 3 SCC 82 : (1988) 3 SCR 103 : (1988) 1 UJ 741 , Associated Engineering Co. Vs. Government of Andhra Pradesh and another, AIR 1992 SC 232 : (1991) 2 ARBLR 182 : (1991) 2 BC 375 : (1991) 3 CompLJ 86 : (1991) 3 JT 123 : (1991) 2 SCALE 50 : (1991) 4 SCC 93 : (1991) 2 SCR 924 : (1991) 2 UJ 347 , Ch. Ramalinga Reddy vs Superintending Engineer and another (1999) 9 SCC 610 and Hindustan Petroleum Corporation Limited Vs. Batliboi Environmental Engineers Ltd., formerly known as Hydraulic and General Engineers Ltd. and Shri K. Narayanan, Sole Arbitrator, (2008) 1 ALLMR 736 : (2008) 1 ARBLR 166 : (2008) 1 BomCR 89 : (2007) 109 BOMLR 2440 : (2008) 2 MhLj 542 .

5. He then submitted that there was no agreement between the parties for payment of interest. According to him, the Arbitrator had no jurisdiction to award interest that too at 18% per annum. He referred to provisions of Section 3(1)(b) of the Interest Act 1978 (for short the Act of 1978) to urge that no notice as contemplated therein had been issued by the respondent for seeking interest. He relied upon judgment of the Division Bench in Oil and Natural Gas Corporation Ltd., Bombay Vs. Essar Steel Ltd., Bombay, (2002) 1 ALLMR 737 : (2002) 2 BomCR 379 : (2002) 1 MhLj 699 and U.P. Co-operative Federation Ltd. Vs. M/s. Three Circles, (2000) 3 ALLMR 608 : (2000) 3 BomCR 360 : (2000) 3 BOMLR 430 : (2000) 3 MhLj 730 while questioning the award of interest at 18% per annum. He, therefore, prayed for setting aside the award.

6. Per contra, Shri A.S. Jaiswal, learned Senior Advocate with Shri S. Khedkar, learned Counsel appearing for the respondent supported the impugned award and the judgment of the Civil Court. It was firstly submitted that the scope of interference under Section 39 of the said Act by the appellate Court was quite limited and it was not open for this Court to examine each and every minute detail of the claim as made. He submitted that the award being one passed under provisions of the said Act which has since been repealed, it was not necessary that such award should be a speaking award. He submitted that the appellants having themselves extended the period for completion of the work in question on two occasions, it was not permissible for the appellants to subsequently deny the claim of the respondent. He submitted that in fact, no amounts towards escalation were claimed but the claim was made for the work completed at actual rates. In support of the said submissions, the learned Senior Counsel relied upon Associated Construction Vs. Pawanhans Helicopters Pvt. Ltd., AIR 2008 SC 2911 : (2008) 2 ARBLR 473 : (2008) 8 SCALE 451 : (2008) AIRSCW 4893 and submitted that judgment of the Division Bench in Pavan Hans Helicopter Ltd., (supra) had been set aside by the Supreme Court. He also relied upon decisions of the Supreme Court in Asian Techs Ltd. Vs. Union of India (UOI) and Others, (2009) 13 JT 265 : (2009) 12 SCALE 283 : (2009) 10 SCC 354 : (2009) 14 SCR 182 , K.N. Sathyapalan (Dead) by LRs. Vs. State of Kerala and

Another, (2006) 4 ARBLR 275 : (2006) 10 JT 615 : (2006) 12 SCALE 654 : (2007) 13 SCC 43 : (2006) 9 SCR 864 Supp , Food Corporation of India Vs. A.M. Ahmed and Co. and Another, AIR 2007 SC 829 : (2006) 4 ARBLR 155 : (2006) 10 JT 62 : (2006) 11 SCALE 425 : (2006) 8 SCR 148 Supp : (2006) 2 UJ 1469 , Indu Engineering and Textiles Ltd. Vs. Delhi Development Authority, AIR 2001 SC 2668 : (2001) 2 ARBLR 486 : (2001) 3 CompLJ 325 : (2001) 5 JT 404 : (2001) 4 SCALE 323 : (2001) 4 SCALE 317 : (2001) 5 SCC 691 : (2001) 3 SCR 916 : (2001) AIRSCW 2524 : (2001) 5 Supreme 111 and decision of the Calcutta High Court in Union of India Vs. Abhoy Sarkar and another, AIR 1992 Cal 242 .

7. As regards award of interest by the Arbitrator, it was submitted that the present appellants had not raised any objection before the Arbitrator regarding grant of interest @18% per annum. Reference in that regard was made to the grounds of objection that were raised by the appellants before the Arbitrator. It was pointed out that according to the appellants, the respondent had made his claim in the year 1991 and hence, there was no question of paying interest prior to 1991. On the question of grant of interest, the learned Senior Counsel relied upon the decision of the Supreme Court in B.V. Radha Krishna Vs. Sponge Iron India Ltd., AIR 1997 SC 1324 : (1997) 3 JT 327 : (1997) 2 SCALE 469 : (1997) 4 SCC 693 : (1997) 2 SCR 707 : (1997) 1 UJ 661 : (1997) AIRSCW 1422 : (1997) 3 Supreme 1 and judgment of learned Single Judge in First Appeal No. 601 of 2005 (Union of India Vs. M/s. Ambika Construction) decided on 23-12-2005. It was, therefore, submitted that there was no ground whatsoever to interfere with the award as made by the Arbitrator which was subsequently made rule of the Court.

8. The following points arise for consideration:

(1) Whether the claims as awarded by the Arbitrator towards completion of the work beyond the agreed period is justified?

(2) Whether grant of interest at 18% per annum is liable to be interfered with?

9. I have given due consideration to the submissions as urged and I have also gone through the material placed on record. The existence of the arbitration clause and conduct of arbitration proceedings thereafter is not in dispute. The challenge in the present appeal is basically with regard to amounts awarded towards the claim Nos. 1,3 and 6 of the claims made by the respondent. Similarly, the issue regarding grant of interest by the Arbitrator is also under challenge. The claims under dispute in the appeal are in relation to loss on account idling of labour/under utilization of labour charges, loss on account of under absorption of site, office expenses and loss on account of inflation in prices and rise in labour costs. The Arbitrator, after considering the objections raised by the appellants, arrived at a conclusion that barring marginal delays the same was not due to the respondent. It was observed that despite specific provision in the contract for imposing penalty, the same was not imposed and even the right to reserve such action by adding "the inclusive clause" was not availed. Hence, the

appellants objections in that regard were turned down. It was further found that barring one period of delay, the same was not attributable to the respondent. On that basis, the Arbitrator proceeded to award damages/compensation for said period of delay.

10. While considering the objections of the appellants in this regard, it is necessary to refer to the aspect of extension of time that was granted by the appellants for completion of the work. As per the agreement, the work was to be completed by 9- 4-1987. On 9-3-1987, the respondent made a request for extending time to complete the work in question. The appellants on 14-5-1987 accepted said request and extended the time provisionally till 30-9-1987. The right to impose penalty for non-completion of work was reserved by the appellants. Thereafter on 29-9-1987, the respondent again sought extension of time to complete the work of construction. On 14-12-1987, the time was extended up to 30-12-1987 for completing said work. In the second communication, no such right to impose penalty was reserved and the extension of time was unconditional. The work in question came to be completed on 31-1-1988. These are the admitted facts on record.

11. At this stage, it would be necessary to consider the scope for interfering with the award of the Arbitrator. In *Indu Engineering and Textiles Limited (supra)*, it was observed by the Supreme Court that as the Arbitrator is a Judge appointed by the parties, the award passed by him is not to be lightly interfered with. If the view taken by the Arbitrator was a plausible one and was not suffering from any manifest error on the face of the award or was not wholly improbable, then it was not open for the Court to interfere with the award within limitations as laid down in Section 30 of the said Act. In *Associated Construction (supra)*, it was held that a Court does not sit as one in appeal over the award of the Arbitrator and if the view taken by the Arbitrator is permissible, no interference is called for on the premise that a different view was also possible. It is, therefore, clear that the scope in such matters is limited and the view taken by the Arbitrator cannot be substituted by the Court merely on the ground that another view is possible. As observed in *B.V. Radhakrushna (supra)* where reasons have been given by the Arbitrator in making the award, the Court cannot examine the reasonableness of the reasons. Hence, where the reasons germane had relevance for the Arbitrator to hold in the manner he did have been indicated, it cannot be said that the reasons were unreasonable. On same lines are the observations of the Supreme Court in *M/s. Tarapore and Company (supra)*.

12. It is in aforesaid backdrop that the challenge as raised by the appellants to the award of amounts towards the escalation is required to be considered. In the decisions relied upon by the learned Counsel for the appellants, it has been held that in absence of any escalation clause in the arbitration agreement, the Arbitrator cannot assume any jurisdiction to award any amount towards the escalation. In *Ramnath International Construction (supra)*, it was stipulated in the contract that no claim in respect of compensation on account of extension for

executing the work would be granted. It was observed therein that when extension of time was granted to complete the work it had been clarified that no claim for compensation would lie. In the present case, the time has been extended by the appellant without rider. In *New India Civil Erectors (P) Ltd. (supra)* in the acceptance letter, it had been clearly stated that the price agreed for the contract would not be subject to any escalation on any ground till the work is completed. In *Ch. Ramalinga Reddy (supra)* while granting extension of time to complete the work it had been clarified that no claim for compensation would lie. In that background, it was held that the contractor therein was not entitled for such compensation. In *Hindustan Petroleum Corporation Ltd. (supra)*, it was found that there was no material on record to hold that the party giving the contract was responsible for the delay. It is on that basis that the Division Bench held that the Contractor was not entitled to be compensated for the work done beyond the period of the contract. In the present case, the Arbitrator has recorded a finding that major part of the delay was attributable to the appellant.

13. On the other hand in *K.N. Sathyapalan (supra)*, the agreement between the parties did not contain a Clause for grant of escalation. In the supplemental agreement, a specific provision was made that all further works during the extended period would be completed as per the rates agreed earlier. The question that was considered was as to whether in the absence of any price escalation clause in the original agreement and a specific prohibition to the contrary in the supplemental agreement, the Contractor could have claimed escalation costs and whether the Arbitrator exceeded his jurisdiction in granting such claim. It was held that ordinarily the parties would be bound by the terms agreed upon in the contract. But if one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, then the Arbitrator is vested with authority to compensate the second party for the extra costs incurred by him as a result of failure of the first party to live up to its obligations. It was, therefore, held that by allowing some of the claims on account of escalation of costs that were referable to the execution of the work during the extended period, the Arbitrator had acted within his jurisdiction. The aforesaid position applies on all fours to the present case. In *Food Corporation of India (supra)* relied upon by the learned Counsel for the respondent, it has been held that if the Arbitrator finds that the delay in execution of the contract was due to conduct of the Department then the Arbitrator had jurisdiction to go into said question and grant amounts for claim made on said basis. Similarly, it was also held in aforesaid decision that if in equity and in law the contractor was entitled to receive extra payment then such award was not liable to be interfered.

14. Hence, considering aforesaid legal position and the fact that on two occasions time was extended by the appellants for completing the work in question coupled with the fact that what was claimed by the respondent were the amounts of actual charges for doing the work, it cannot be said that the Arbitrator exceeded his jurisdiction in granting the claim in so far as the claim Nos. 1,3 and 6 as

made by the respondent is concerned. There is no reason for this Court to interfere in that regard with the impugned award. Point No. 1 stands answered accordingly.

15. As regards grant of interest is concerned, the Arbitrator has held that the notice as required under provisions of the Act of 1978 had been issued. The Arbitrator thereafter proceeded to award interest @18% per annum. According to the Counsel for the appellants, there was no notice issued under provisions of Section 3(1)(b) of the Act of 1978 and hence, it was not open for the Arbitrator to award interest from the date it was awarded by the Arbitrator. On behalf of the respondent, it was submitted that in the objection raised by the present appellants it had been averred that the respondent was not entitled to any interest prior to 1991 as the notice itself had been given in the year 1991.

It is to be noted that the respondent had issued a notice to the appellants on 6-1-1991. In said notice, interest at the rate of 18% per annum was claimed from 22-2-1989 which was the last date on which payment was made. In the present case, the Arbitrator has proceeded to award interest for the period of 9 years and 3 months i.e. from 1-4-1986 till the date of the award which was 30-6-1997.

16. It is not in dispute that for claiming interest prior to initiation of proceedings it is necessary for the party claiming such interest to issue a written notice to the other party that the party making the claim would be entitled to interest till the date of institution of the proceedings. In *Sayeed Ahmed and Co. Vs. State of U.P. and Others*, (2009) 9 JT 429 : (2009) 9 SCALE 261 : (2009) 12 SCC 26 : (2009) 11 SCR 841 : (2009) 8 UJ 3559 , the Supreme Court dealt with the principles regarding powers of an Arbitrator to grant interest. Therein, it observed thus:

"9. The Arbitration Act, 1940 did not contain any specific provision relating to the power of the arbitrator to award interest. That led to considerable confusion about the power of arbitrators in regard of award of interest from the date of cause of action to date of award, that is, pre-reference period (from the date of cause of action up to the date of reference) and pendente lite (from the date of reference to the date of award).

10. Ultimately, this Court made it clear that the arbitrator had the jurisdiction and authority to award interest for the three periods, namely, preference period, pendente lite and future period (from the date of award) if there was no express bar in the contract regarding award of interest - vide *Irrigation Deptt., Govt. of Orissa v. G.C. Roy, Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj* as also the decision in *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.*

12. The principles relating to interest were summarised by this Court in *State of Rajasthan v. Ferro Concrete Construction (P) Ltd.* Thus:

(a) Where a provision for interest is made on any debt or damages, in any

agreement, interest shall be paid in accordance with such agreement.

(b) Where payment of interest on any debt or damages is barred by express provision in the contract, no interest shall be awarded.

(c) Where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of Section 3 of the Interest Act will apply and consequently interest will be payable:

(i) where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings;

(ii) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed.

(d) Payment of interest pendente lite and future interest shall not be governed by the provisions of the Interest Act, 1978, but by the provisions of Section 34 of the Code of Civil Procedure, 1908 or the provisions of law governing arbitration as the case may be.

17. In *Oil and Natural Gas Corporation Ltd. (supra)*, the Division Bench of this Court held that interest for the period anterior to the institution of the proceedings can be granted only if a written notice as prescribed under Section 3(1)(b) of the Act of 1978 is given. Where no such notice is given neither a Court of law nor the Arbitrator would have the power to award interest for the period prior to the date on which the proceedings were instituted. In the present case, the respondent having issued notice dated 6-1-1991 to the appellants for claiming interest from 22-2-1989, in terms of the aforesaid law, the respondent would be entitled for interest only from 22-2-1989 and not prior thereto. The Arbitrator proceeded to award interest from 1-4- 1986 till passing of the award. In view of provisions of Section 3(1)(b) of the Act of 1978, interest could have been granted only from 22-2-1989 and not prior thereto. Grant of interest from 1-4-1986 to 21-2-1989 by the Arbitrator was not permissible in view of absence of any demand under Section 3(1)(b) of the Act of 1978. The point is answered accordingly.

18. In view of aforesaid adjudication, it is concluded as under:

(1) The respondent is held entitled for interest for the period from 22-2-1989 till 30-6-1997. The interest awarded for the period from 1-4-1986 to 21-2-1989 is set aside.

(2) Save and except aforesaid direction, rest of the award stands confirmed.

(3) The decree passed in Special Civil Suit No. 67/1992 stands modified accordingly.

(4) The first appeal is partly allowed in aforesaid terms with no order as to costs.