
(1984) 06 MAD CK 0040

In the Madras High Court

Case No : Civil Revision Petition No's. 4403 of 1981

Central Warehousing Corporation

APPELLANT

Vs

P. Gunasekaran and Others

RESPONDENT

Date of Decision : 15-06-1984

Acts Referred:

Arbitration Act, 1940 — Section 2, 28, 31
Limitation Act, 1963 — Article 137

Citation : (1986) ILR (Mad) 175

Hon'ble Judges : Ratnam, J

Bench : Single Bench

Advocate : G.K. Damodara Rao, for the Appellant; K. Ramamurthy, for the Respondent

Final Decision : Allowed

Judgement

Ratnam, J.—This civil revision petition has been preferred against the order passed by the Court below allowing an application in Original Petition No. 62 of 1980 (Principal Sub-Court, Madurai) filed by the first Respondent herein u/s 31 of the Arbitration Act praying that the reference Made by the Petitioner to the second Respondent for arbitration is not valid in law and the second Respondent, is, therefore, not entitled to proceed with the arbitration proceedings. The circumstances giving rise to the civil revision petition are as under: On 11th January, 1974, the first Respondent entered into a contract with the Petitioner at Madurai Town for doing the work of handling and transport of food grains, fertilizers etc., for a period of one year. On the expiry of the period, the Petitioner renewed the contract in favour of the first Respondent for one more year; but the first Respondent declined to continue to do the work for the extended period stating that he did not want any further extension. However the Petitioner maintained that it had the option to extend the period and that during the course of such extended period, the first Respondent must continue to do the work as per the rates fixed in the agreement. Ultimately, the first Respondent refused to do the work within the extended period with the result that the Petitioner was

obliged to employ some other contractors for completing the working respect of which the Petitioner claimed to have incurred an expenditure of nearly Rs. 88,837.66. In the agreement entered into on 17th January, 1974 between the first Respondent and the Petitioner, provision was made for decision of disputes by reference to arbitration and Clause (20) of the agreement was incorporated for this purpose. A dispute with reference to the work of handling and transport of food grains and fertilizers and for the recovery of a sum of Rs. 88,837-66 having arisen for the extended period between the first Respondent and the Petitioner, the Petitioner appointed one K.L.N. Rao as the arbitrator for the purpose of deciding the dispute. The appointment was questioned by the first Respondent herein by the institution of a suit in Original Suit No. 1428 of 1978, District Munsif Court, Madurai Town and the suit was ultimately dismissed. The arbitrator so appointed commenced the proceedings on 19th January, 1977. Since the period fixed for submitting the award expired, the Petitioner secured an extension of time periodically and finally in Original Petition No. 221 of 1978, time was extended up to 28th September, for the submission of the award. Meanwhile, there was a change in the arbitrator and the second Respondent sent a notice to the first Respondent to the effect that he had been appointed as an arbitrator and that the enquiry will be held in Madurai on a specified date. The first Respondent sent a reply stating that the time granted by the Court had already expired and in view of that, the arbitrator was not competent to make a further enquiry in the matter. It appears that the second Respondent had sent a telegram subsequently to the first Respondent stating that he was proceeding with the enquiry and if the first Respondent did not participate therein, an expert award would be passed. Thereupon, the first Respondent again instituted Original Suit No. 11 of 1980, District Munsif's Court, Madurai, for a permanent injunction restraining the second Respondent from making enquiry in the matter either on the date fixed or any other adjourned date. But that suit was finally dismissed on the ground that the District Munsif's Court had no jurisdiction to entertain the suit. It is thereafter the first Respondent filed original Petition No. 62 of purporting to be u/s 31 of the Arbitration Act stating that the second Respondent had been appointed to continue the arbitration proceedings commenced by his predecessor in Madurai, that he should have submitted his award within the extended time granted by the Sub-Court that he is not entitled to take four months time and further that the Petitioner cannot grant further time to the second Respondent and that therefore it has become just and necessary to pass an order that the second Respondent is not entitled to proceed with the arbitration proceedings.

2. In the statement of objections filed by the Petitioner and the second Respondent, it was stated that the second Respondent is a fresh Arbitrator and as such, he would have four months time from the date of his entering upon his duties to complete the arbitration proceedings and under those circumstances, the objection of the first Respondent that the second Respondent is not entitled to take four months time or the Petitioner cannot grant four months time to

conduct the arbitration proceedings is unsustainable. Relaying upon the suits instituted by the first Respondent the pensioner as well as the second Respondent, contended that the first Respondent was stopped from questioning the validity of the agreement and the arbitration proceedings there under. The locus stands of the first Respondent to question the appointment of the second Respondent as an arbitrator and his further proceeding with the arbitration was also questioned. The Petitioner and the second Respondent charged the first Respondent with non cooperation with the arbitrator in the matter of the conduct, of the arbitration proceedings with a view to protract the proceedings and gain time so as to cause unnecessary loss and hardship to the Petitioner. Under those circumstances, the Petitioner prayed that the application filed by the first Respondent should be dismissed.

3. Before, the Court below, on behalf of the first Respondent exhibits A-1, A-3 were marked and no documents were marked on behalf of the Petitioner. No oral evidence was also let in on both sides. On a consideration of the rival contentions of the parties, the learned Principal Subordinate Judge found that the second Respondent who had taken the place of Sri. K.L.N. Rao who was originally appointed as arbitrator cannot be considered to be a new arbitrator but that as per Clause (9) of the agreement, the appointment of the second Respondent was only in continuation of the proceedings for arbitration earlier commenced by his predecessor. However, the learned Subordinate Judge was of the view that the Court last extended the time in Original Petition No. 221 of 1978 upto 28th September, 1979 and since there was a failure to get a further extension of time either with the consent of both parties or by an order of Court, the pensioner and the second Respondent were not entitled to proceed further in the arbitration, proceedings. In that view, the learned Subordinate Judge concluded that the reference by the Petitioner to the second Respondent for arbitration was not valid in law and that the second Respondent was not entitled to proceed with the arbitration. In the result original Petition No. 62 of 1980 was allowed. It is the correctness of this order that is challenged in this civil revision petition.

4. During the pendency of the civil revision petition, the Petitioner had filed Civil Miscellaneous Petition No. 17268 of 1983 u/s 28 of the Arbitration Act praying for extension of time to direct the second Respondent to proceed with the arbitration expeditiously and also to pass an award within such time as this Court may deem fit and proper. In the affidavit filed in support of that application, the Petitioner had narrated how the several steps taken by the Petitioner and the predecessor of the second Respondent and the second Respondent were held up owing to proceedings initiated by the first Respondent and that Section 28 of the Arbitration Act permitted the extension of time by the court in the interest of justice and therefore, the first Respondent cannot be permitted to take advantage of his obstructive tactics resulting in manifest miscarriage of justice. In the counter filed by the first Respondent, he stated that the Petitioner did not make any application for extension of time before the lower Court after orders were passed in Original Petition No. 221 of 1978, and that the application for

further extension of time, if any would be barred under Article 137 of the Limitation Act and the Petitioner cannot be permitted to take advantage of its own laches.

5. The principal contention of the learned Counsel for the Petitioner is that Section 28 of the Arbitration Act (hereinafter referred to as the Act) confers power on the Court to enlarge the time for making the award from time to time whether the time for making the award had expired or not and that overlooking this provision, the entire arbitration proceedings cannot be defeated. The learned Counsel further submitted that in view of the application in Civil Miscellaneous Petition No. 17268 of 1983 filed by the Petitioner praying for an extension of time reasoning in the order of the Court below cannot be sustained. On the other hand, the learned Counsel for the first Respondent strenuously contended that after the lower Court passed orders in Original Petition No. 221 of 1978 extending the time upto 28th September, 1979, there was no further extension and having regard to the expiry of the extended time, the Court below was quite justified in concluding that the arbitration, proceedings could not be further proceeded with by the second Respondent. In addition, the learned Counsel also submitted that the application filed by the Petitioner for extension of time was barred by limitation under Article 137 of the Limitation Act.

6. There is no dispute now before this Court that originally Sri. K.L.N. Rao was appointed as an arbitrator and his place was subsequently taken up by the second Respondent. There is no dispute also that the second Respondent came in only with a view to continue the arbitration proceedings commenced previously by the then arbitrator. The only ground upon which the Court below was inclined to hold that the arbitration proceedings could not be further taken up by the second Respondent is that the time for submission of the award earlier extended upto 28th September, 1979 in original Petition No. 221 of 1978 had not been further extended. In doing so, the Court below omitted to take into account the large amplitude of power conferred on Courts in the matter of enlargement of time for making an award u/s 28 of the Act. The power conferred on the Court is so wide to the court can extend the time before the expiry of the time originally fixed, or even thereafter whether or not the award has been made. The power to extend the time conferred on the Court u/s 28 of the Act for making it has expired. Proceeding to set out the effect of an order of enlargement of time, it is stated that the expended time is to be treated as if it had been originally given in the arbitration agreement and therefore the award and all things done in the arbitration during such extended time is rendered valid and effective. It is further pointed out that the power to enlarge the time conferred on the Court is entirely discretionary and will not be exercised unless the Court thinks fit to do so in a particular case; but in exercising its discretion, the Court will have regard to the terms of the submission and see whether the condition as to the time for making the award was an essential element of the submission or merely a regulation for the observance of the arbitrator. It is thus clear that there is no fetter on the power of the Court to exercise its discretion in the matter of enlargement of

time. It is no doubt true that in this case there was no enlargement of time after 28th September 1979 but the question is whether the Petitioner has to suffer. Earlier it has been seen that the Petitioner has taken steps in the arbitration even on 19th January, 1977 by appointing Sri. K.L.N. Rao as the arbitrator. On account of the pendency of the suit instituted by the first Respondent in Original Suit No. 1428 of 1978 against the Petitioner and Sri. K.L.N. Rao, the proceedings in arbitration did not take any progress till the dismissal of the suit. Again the second Respondent after having come in the place of Sri. K.L.N. Rao issued a notice to the first Respondent requiring the participation of the first Respondent in the arbitration proceedings and also informing him that if the first Respondent did not attend the enquiry, an experts award would be passed. That again led to the institution of original Suit No. 11 of 1980 by the first Respondent for a permanent injunction restraining the second Respondent from making enquiry in the matter on 4th January 1980 or any other adjournment date. Ultimately, the suit was also dismissed. It is thus seen that the Petitioner has not been in any manner responsible for holding up of the arbitration proceedings. The first Respondent, however, had resorted to proceedings before the civil Courts at least on two occasions and had effectively thwarted the progress of the arbitration proceedings by instituting original Suit No. 1428 of 1978 which was pending till 21st April 1979 and original Suit No. 11 of 1980 which was filed on 21st January 1980. It is not unlikely that on account of the pendency of these proceedings initiated by the first Respondent, the Petitioner did not apply to the Court for an extension of time. Indeed, if the first Respondent had succeeded either in original Suit No. 1428 of 1978 or Original Suit No. 11 of 1980, there would have been absolutely no necessity whatever for the arbitration proceedings at all, since the very agreement containing the arbitration clause was challenged in Original Suit No. 1428 of 1978 and the authority of the second Respondent to proceed with the arbitrator was questioned in original Suit No. 11 of 1980. Taking this into account, it cannot be said that the omission on the part of the Petitioner to have sought an enlargement of time after 28th September, 1979 was either deliberate or intentional. It also does not appear that the time for making the award was an essential element of the submission. It was, having regard to the terms of the agreement, merely intended for the observance of the arbitrator. As seen earlier, u/s 28 of the Act, the Court has got ample powers to enlarge time either before the award has been made or even after it has been made and that there is absolutely no fetter on the power of the Court to enlarge time taking into account the circumstances of each case. In this case, as seen earlier, the pendency of the proceedings before the civil Courts, undoubtedly, had a vital bearing upon the further course of the arbitration proceedings and till those proceedings before the civil Courts came to a close, there was no certainty that the arbitration proceedings would survive at all to enable the arbitral or to further proceed in the matter and under those circumstances, the failure on the part of the Petitioner to apply for and obtain an enlargement of time beyond 28th September, 1979 cannot be put against the Petitioner. In any event, the Petitioner has since filed an application before this Court in Civil Miscellaneous

Petition No. 17268 of 1983 for the purpose of extending the time. The only objection raised by the first Respondent to such extension, prayed for by the Petitioner is that the application is barred under Article 137 of the Limitation Act. Having regard to the scope and content of the power conferred on the court u/s 28 of the Act, the objection regarding limitation has absolutely no merit. u/s 28 of the Act, the Court is empowered whenever it thinks fit to enlarge the time for making the award from time to time irrespective of the fact whether the time for making the award had expired and whether the award has been made or not. This Section confers unlimited powers upon the Court to enlarge time and is not subjected to or circumscribed by any period of limitation. In other words, whenever it appears to the Court to be just and necessary and expedient in the interest of justice, it could always enlarge the time provided the Court is satisfied that it's discretion ought to be exercised in favour of enlarging time. Even on the assumption that Article 137 of the Limitation Act would apply, it is not under dispute that the application for enlargement of time had been filed before this Court within three years of the disposal of original Suit No. 11 of 1980 which put in peril the arbitration process which was attempted to be continued by the second Respondent herein. In the circumstances of this case referred to earlier the extension of time prayed for by the Petitioner ought to be granted. It may be that the Petitioner did not make the application for enlargement of time before the Court below; but that, however, cannot prevent this Court, which is a Court within the meaning of Section 2(c) of the Act, from considering the circumstances of this case and granting an enlargement of time. Earlier, the circumstances under which the Petitioner could not apply for and obtain an enlargement of time beyond 28th September, 1979 have been noticed. Taking that into account and also the interest of justice the time for submission of the award is enlarged upto 31st December, 1984 from 28th September 1979. Civil Miscellaneous Petition No. 17268 of 1983 is therefore ordered accordingly. Thus, the main ground upon which the Court below was included to invalidate the proceedings does not appear to be available in law and therefore, the Court, below was in error in holding that the reference made by the Petitioner to the second Respondent for arbitration is not valid and that the second Respondent is not entitled to proceed with the arbitration proceedings.

7. It was submitted by both sides during the course of arguments that the second Respondent who had stepped in as arbitrator is no longer available and that in the event of the further proceedings in arbitration being allowed to go on, it would be necessary to name another arbitrator in the place of the second Respondent. Counsel on both sides were granted time to consider the question of naming another arbitrator in the place of the second Respondent and they reported that they and their parties are agreeable for the appointment of Thiru V. Balasubrahmanyam, a retired Judge of this Court, as arbitrator in the place of the second Respondent. When asked about the remuneration for the arbitrator, Counsel on both sides readily and fairly stated that a sum of Rs. 10,000 may be fixed as the remuneration for the arbitrator, the Petitioner and the first

Respondent contributing Rs. 5,000 each and that the other incidental expenses of the arbitrator would be met by the Petitioner and the first Respondent in moieties. Accepting the suggestions made by the Petitioner and the first Respondent and their Counsel, Thiru V. Balasubrahmanyam, Retired Judge of the High Court, Madras, is appointed as Arbitrator in the place of the second Respondent on a remuneration of Rs. 10,000, the Petitioner and the first Respondent each paying a sum of Rs. 5,000 to the arbitrator. Besides, the incidental expenses of the arbitrator have also to be paid by the Petitioner and the first Respondent in moieties. In the first instance, the Petitioner and the first Respondent will each pay a sum of Rs. 2,500 to the arbitrator towards his remuneration on or before 30th June, 1983. On such payment, the arbitrator will enter upon his duties and proceed with the arbitration and on the completion thereof, will be paid the balance of his remuneration. Taking into account the pendency of the arbitration proceedings since 1977 and with a view to see to it that the very object of referring the dispute to arbitration is not totally frustrated, it is hoped that the arbitrator will immediately enter upon his duties and proceed with the arbitration and complete the same as expeditiously as possible. The Petitioner as well as the first Respondent are directed to make available all material records and extend their fullest co-operation and assistance to the arbitrator to enable him to enter upon his duties immediately and complete the arbitration work before 31st December, 1984. In the event of the arbitration proceedings not coming to a close by 31st December, 1984 it would be open to the Petitioner and the first Respondent as the case may be, to apply to this Court for further enlargement of time, if need be.

8. In the result the order of the Court below is set aside and the civil revision petition is allowed and ordered accordingly. There will be no order as to costs.