

(1989) 08 KL CK 0010
In the High Court Of Kerala
Case No : M.F.A. No. 605 of 1983

Government of Kerala and Another

APPELLANT

Vs

V.K. Kuriakose

RESPONDENT

Date of Decision : 11-08-1989

Acts Referred:

Arbitration Act, 1940 — Section 16, 30

Citation : (1989) 08 KL CK 0010

Hon'ble Judges : U.L. Bhat, J; Krishnamoorthy, J

Bench : Division Bench

Advocate : M.C. John, Government Pleader, for the Appellant; K.L. Narasimhan and Shaji P. Chali, for the Respondent

Final Decision : Allowed

Judgement

Krishnamoorthy, J.—This is an appeal by the Government of Kerala and the Superintending Engineer, P.W.D Buildings and Roads, South Circle, Trivandrum, rejecting an application to set aside an award passed by the Chief Engineer (Arbitration). The Respondent herein (the contractor) was entrusted with the work of construction of a bridge at Pulikuttissery crossing in Kallumada-Kallumkathara Road and agreement No. 29/SESC/70-71 was entered into. A Supplemental agreement was also executed by the parties which bears No. 29/3/SESC/74-75. For the purpose of this case it is not necessary to give the details of the agreement and other disputes; but it is enough to state that differences and disputes arose between the parties. There was an Arbitration clause in the agreement and the Chief Engineer (Arbitration) was the named Arbitrator. The disputes were referred to the Arbitrator and a non-speaking award was passed by him on 29th May 1982. The award was filed before the Sub Court. The Appellants filed objections to the award and prayed for setting aside of the same, and also paid the necessary Court-fee leviable for an application u/s 16 or 30 of the Arbitration Act. The main objection raised by the State against the award was that the Arbitrator posted the matter on 24th May 1982 for a preliminary hearing

and that immediately thereafter on 29th May 1982 he passed the award itself, without giving an opportunity to the State to state their case of place the evidence before him. It was also contended in the objection that the Arbitrator passed the award in haste as he was to retire on 31st May 1982 and that he has misconducted himself in passing the award. It is worthwhile to state at this stage that the Chief Engineer (Arbitration) is a Government servant and the normal rules of retirement apply to him also.

2. The Sub Court overruled the objection on the ground that the award being a non-speaking one, the jurisdiction of the civil Court to interfere with such an award is limited. It further came to the conclusion that the award is not vitiated by any legal error apparent on the face of the record and that there is no misconduct by the Arbitrator. Consequently, a decree was passed in terms of the award, overruling the objections of the State. The appeal is by the State against the order refusing to set aside the arbitration award.

3. The main contention of learned Government Pleader who appeared for the Appellants is that the Arbitrator misconducted himself in passing the award without observing the principles of natural justice. He contended that no opportunity was given to the State to place their case before the Arbitrator nor was there any consideration of the case by him, as can be seen from the records. He further contended that the award is based on no materials or evidence whatsoever and that there is an error apparent on the face of the record.

4. As stated earlier, the contractor made a claim before the Arbitrator alleging that amounts are due to him. The State had filed a defence statement before the Arbitrator contending that the claim itself is barred by limitation and by virtue of other provisions in the agreement and that the claim made by the contractor is unsustainable. In the award, the Arbitrator overruled the preliminary objections regarding limitation etc., and awarded a sum of Rs. 1,50,000 in satisfaction of all claims. The award also provided that the contractor shall be entitled to the release of his security and retention amounts, the former being subject to the rules regarding tax clearance.

5. In order to consider the contention of the learned Government Pleader it is necessary to look into the proceedings of the Arbitrator in the matter. Under the agreement between the parties, the Chief Engineer (Arbitration) is the named Arbitrator. On 5th December 1981 the contractor filed a petition before the Arbitrator to enter on the reference and to issue notice to the Superintending Engineer to file the agreement before him. By notice dated 11th December 1981 the Arbitrator requested the Superintending Engineer to forward to him within a fortnight the attested copy of the relevant clause empowering him to act as the Arbitrator and enter on the reference. Accordingly the Superintending Engineer sent the attested copy of the agreement by letter dated 24th February 1982. On receipt of the above letter, the Arbitrator entered on the reference on 2nd March 1982 by his proceedings of that date. On the same day, he sent a notice to the parties informing them that the claimant had already submitted his claim

statement and directing the claimant to forward a copy to the other parties. The notice also required the opposite party to file the defence statement on or before 10th April 1982 with copy to the claimant. Certain directions regarding production of documents were also given in that notice.

6. Though the above notice states that the claim statement had already been filed, it is seen from the Arbitrator's file (which was sent to the Court by him along with the award) that the claim statement is dated 8th March 1982 and hence it could not have been filed before 2nd March 1982. Whatever that may be, by letter dated 6th April 1982, the Superintending Engineer requested for time till 10th May 1982 for filing the defence statement. On 12th April 1982 the contractor filed a petition for an early hearing of the matter. On 13th April 1982 the Arbitrator issued the following notice to the parties:

1. Sri. V.K. Kuriakose, P.W.D. Contractor, Valiya House, Puthencruz P.O., Ernakulam (Represented by Advocate Sri. K.G. Gopalakrishnan).... Claimant
2. The Superintending Engineer, Building and Road South Circle, P.W.D., Trivandrum. On behalf of the Government of Kerala Represented by the Additional Government Pleader (Arbitration).... Respondent

In the matter of Indian Arbitration Act, 1940, and

In the matter of an Arbitration between the parties above named on disputes arising out of Agreement No. 29/SESC/70-71 for the work of "Constructing a bridge at Pulikuttissery crossing in Kallumada-Kallumkathara road".

Sirs,

I hereby call upon you to appear before the Arbitrator on 4th May, 1982 at 11 a.m. for a preliminary meeting at this office "Jayasree", Vellayambalam, Trivandrum-10 to deal with the following matters:

1. Particulars of claims and counter claims.
2. Discovery and inspection of documents demanded by the claimant.
3. Inspection of properties and things by parties or Arbitrator as may be necessary.
4. Any other particulars.

The Claimant and the Respondent shall produce necessary exhibits and such other details, if any, required for the disposal of the case, before the preliminary meeting. If necessary, the Claimant may peruse connected records before that date, and in such cases, the Respondents shall give necessary facilities to the Claimant or his Advocate to peruse the records relating to the case, upon prior notice being given to them.

The Respondent is granted time upto 2nd May 1982 for filing the defence statement.

The above notice would show that the matter was posted by the Arbitrator only for a preliminary meeting at his office to deal with the matters mentioned in it. Nothing was; done by the claimant in pursuance to the notice and on 4th May 1982 the Arbitrator granted time to the Superintending Engineer till 15th May 1982 for filing the defence statement and posted the matter to 17th May 1982 for preliminary hearing. On 15th May 1982 the State and the Superintending Engineer filed defence statement contending that the claim by the contractor is barred by limitation and on the terms of the agreement; they contested the claim also on merits. Certain documents were also produced along with the defence statement. On 17th May 1982, the preliminary hearing was adjourned to 22nd May 1982. On 22nd May 1982 the matter was again adjourned to 24th May 1982 for preliminary hearing. Though nothing is seen in the file as to what happened on 24th May 1982, it has to be presumed that the Arbitrator would have acted only on the matters which were stated in his notice dated 13th April 1982 quoted above. But we find from the files that the Arbitrator passed the award on 29th May 1982. From these facts it is clear that the matter was posted only for a preliminary meeting or hearing on the matters mentioned in the notice dated 13th April 1982 and that the State had no opportunity to adduce their evidence or place the relevant materials before the Arbitrator. The Arbitrator had time till 1st July 1982 to pass the award.

7. The history of the law of arbitration and the grounds for setting aside an award came up for consideration by their lordships of the Supreme Court in a recent decision reported in Food Corporation of India Vs. M/s. Veshno Rice Millers, .

Therefore, arbitration as a mode for settlement of disputes between the parties, has a tradition in India. It has a social purpose to fulfil today. It has a great urgency today when there has been an explosion of litigations in the Courts of law established by the sovereign power. New rights created, or awareness of these rights, the erosion of faith in the intrinsic sense of fairness of men, intolerant and uncompromising attitudes are all the factors which block our Courts. The Courts are full of litigations, which are pending for long time. Therefore, it should be the endeavour of those who are interested in the administration of justice to help settlement by arbitration, if possible. It has also a social efficacy being the decision by the consent of the parties. It has greater scope of acceptance today when there is a certain erosion of faith in view of the failure to appreciating the functions of the Courts of law. It has also the advantage of not quickness of decision but of simplicity of procedure. But in proceedings of arbitration there must be adherence to justice, equity, law and fair play in actions. However, the proceedings of arbitration must adhere to the principles of natural justice and must be in consonance with such practice and procedure which will lead to a proper resolution of the dispute and create confidence of the people for whose benefit these processes are resorted to. It is, therefore, the function of Courts of law to oversee that the arbitrators act within the norms of justice. Once they do so and the award is clear, just and fair, the

Courts should, as far as possible, give effect to the award of the parties and make the parties compel to adhere to and obey the decision of their chosen adjudicator.

(underlining is curs)

In Russell on Arbitration (20th Edn.) it is stated at page 276:

The arbitrator should hear all the evidence material to the question which the parties choose to lay before him as on a trial before a jury. It has been said that he may exercise some discretion as to the quantity of evidence he will hear, but declining to receive evidence on any matter is, in ordinary circumstances, a delicate step to take, for the refusal to receive proof where proof is necessary is fatal to the award.

The award may be impeached if the Arbitrator makes his award without having heard all the evidence or having allowed parties a reasonable opportunity of proving their whole case.

8. Judged in the light of the above principles, we are clearly of the opinion that the Arbitrator has misconducted himself in passing the award. As seen from the facts narrated above, it is clear that the matter was posted by the Arbitrator only for a preliminary meeting of the parties to take a decision on the matters mentioned in the notice dated 13th April 1982. The State had already filed their defence statement and the documents. No opportunity was given to the State to adduce evidence nor was any hearing given to them. In the circumstances of the case, the Arbitrator has violated the principles of natural justice and fair play which is clearly misconduct on his part and the award is liable to be set aside.

9. Even otherwise, we feel that the award cannot be sustained. The contractor had only filed a claim statement. No evidence of any sort, either documentary or oral, was adduced by him to substantiate his claim. This is not a case where the Arbitrator has come to a conclusion on the basis of the evidence adduced before him. But this is a case where there was absolutely no evidence for the Arbitrator to pass the award for an amount of Rs. 1,50,000. If there were some evidence and the Arbitrator came to a conclusion on the basis of the available evidence, then the matter may be different. An Arbitrator is not expected to be arbitrary. He has to come to a conclusion on the materials available before him and if he comes to a conclusion and passes an award without any material or any evidence, certainly it is an error of law and the Court is entitled to interfere with such an award. The award in question being based on no evidence, we are of the opinion that it is liable to be set aside on that ground also. The lower Court has not considered any of these aspects in spite of the fact that specific objection had been raised in their objections on these matters.

We therefore set aside the order of the lower Court and the award and remit the matter to the Arbitrator for fresh consideration by him. The Arbitrator shall pass the award within four months of the date of receipt of the records from the Sub

Court, Trivandrum. The appeal is allowed as indicated above. There will be no order as to costs.

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