
(2000) 07 P&H CK 0092
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 457 of 1999

H.P.H.C. Ltd.

APPELLANT

Vs

Pioneer Engineer Construction Co.

RESPONDENT

Date of Decision : 20-07-2000

Acts Referred:

Citation : (2001) 1 ICC 238 : (2000) 4 RCR(Civil) 1

Hon'ble Judges : R.L.Anand, J

Advocate : Mr. Sarinder Dhull, Advocate., Advocates for appearing Parties

Judgement

R.L. Anand, J. (Oral)

1. This is a civil revision petition and has been directed against the order dated 13.11.1998 passed by the court of Additional District Judge, Ambala, who reversed the order dated 8th September, 1997 passed by the Civil Judge (Junior Division), Panchkula. Some facts can be noticed in the following manner :

2. The parties to the petition entered into an agreement when the work was allotted to M/s. Pioneer Engineer Construction Co. A dispute arose between the parties with regard to the execution of the work. The matter went to the court which appointed an arbitrator as per the arbitration clause. The arbitrator gave the award dated 30.11.1995 vide which a sum of Rs. 3,80,375/ was awarded to the contractor with simple interest. Against this award, the petitioners filed a petition under Section 33 of the Indian Arbitration Act in the court of Civil Judge (Junior Division), Panchkula who vide order dated 8th September, 1997 allowed the petition and the award was set aside for the reasons given in the said order. The contractor was not satisfied with the order of the trial Court. He filed an appeal before the court of Additional District Judge, Ambala, who reversed the order of the trial court and made the award the rule of the court. The interest was also awarded at the rate of 15% per annum on the awarded amount w.e.f. 5.9.1991 and on Rs. 13,000/ w.e.f. 27.7.1990 till the date of payment or the date award was made rule of the court whichever is earlier. This time, the revision is by the Haryana Police Housing Corporation Ltd.

3. I have heard the learned Counsel for the parties and with their assistance have gone through the record of the case. Before I deal with the rival contentions of the parties, it will be appropriate for me to incorporate paragraphs 8 to 23 of the judgment of the first appellate Court, which read as under :

"8. The first reason given by the learned trial Court to set aside the award is that the same is beyond time granted by the court. Learned Senior Sub Judge while referring the matter to the arbitrator had ordered that the arbitrator shall pronounce his award within a period of four months from the date of entering upon the reference. The arbitrator entered upon the reference on 25.9.1993 and pronounced the award on 30.11.1995. During this period arbitrator continued to extend the time with the consent of the parties. The time was extended seven times. Learned trial Court was of the view that the arbitrator had no jurisdiction to extend the time with the consent of the parties and that power vested with the court only. The findings of the learned trial Court on this point are erroneous and that is why this point has not been raised by the respondents before this Court. Since the award has been set aside on this ground also, I deem it fit to deal with that point.

9. Section 28(2) of the Indian Arbitration Act clearly postulates that the arbitrator can after entering upon the reference enlarge the time for making the award of course, with the consent of the parties and it is immaterial whether the arbitrator has been appointed by the court or by the parties. In this case the parties have given the arbitrator power to enlarge the time with their consent under clause 25(11) of the contract agreement which reads as under :

"The arbitrator shall be deemed to have entered on the reference on the day he issued notices to the parties fixing the first date of hearing. The arbitrator may from time to time, with the consent of the parties, enlarge the initial time for making and publishing the award."

In the absence of such a clause in the agreement also, the arbitrator has the power to extend the time with the consent of the parties. There are two judgments of the apex Court on that point. One is *Hari Krishan Wattal v. Vaikunth Nath Pandya (Dead) by LRs.* and another, AIR 1973 S.C. 2479 and other is *State of Punjab v. Hardyal*, AIR 1985 SC 920. In *Hari Krishan Wattal's* case (*supra*) there were some differences between the partners. A reference was made to the arbitrator in accordance with the agreement under the partnership deed. The arbitrator gave an award. An application was filed under Section 14 of the Arbitration Act for filing of the award and for making it rule of the court by one of the partners. Another partner challenged the award on several grounds. One of the grounds was that the award had been passed after prescribed period for making the award. The arbitrator had given the award after statutory period of four months, but the parties had extended the time six times with mutual consent. The learned trial Court upheld the contention of the objector. Hon'ble High Court has also agreed in appeal with the learned trial Court. The matter went before the apex Court. The Hon'ble High Court was of the view that there

are only two methods for enlarging the time. The first method is securing an order from the court and the second method is to stipulate in the arbitration agreement for extension of time by a subsequent agreement between the parties and the legislature did not contemplate any third method for extension of time. Since in that case the arbitration agreement itself did not stipulate any extension of time by a subsequent agreement and there was no order for a court extending the time, the extension of time with the consent of the parties after post reference was held invalid. Their Lordships of Hon''ble Supreme Court did not agree with the Hon''ble High Court. It was held that the arbitrator had a right to enlarge the time with the consent of the parties. The relevant paras of the judgment read as under :

"The question depends upon the true construction of Section 28. There is no doubt that the Arbitrator is expected to make his award within four months of his entering on the reference or on his being called upon the act or within such extended time as the court may allow. Reading Clause 3 of the Schedule alongwith Section 28 one finds that the power to enlarge the time is vested in the court and not in the Arbitrator. Clause 2 and Section 28(1) excludes by necessary implication the power of the Arbitrator to enlarge the time. This is emphasised by Section 28(2) which provides that even when such a provision giving the Arbitrator power to enlarge the time is contained in the agreement, that provision shall be void and of no effect. The headnote of section 28 brings out the force of this position in law by providing that the power is of the court only to enlarge time for making the award.

Subsection (2) of Section 28, however, indicates one exception to the above rule that the Arbitrator cannot enlarge the time and that is when the parties agree to such an enlargement. The occasion for the arbitrator to enlarge the time occurs only after he is called upon to proceed with the arbitration or he enters upon the reference. Hence, it is clear that if the parties agree to the enlargement of time after the arbitrator has entered on the reference, the Arbitrator has the power to enlarge it in accordance with the mutual agreement or consent of the parties. That such a consent must be a post reference consent, is also clear from Section 28(2) which renders null and void a provision in the original agreement to that effect. In a sense where a provision is made in the original agreement that the Arbitrator may enlarge the time, such a provision always implies mutual consent for enlargement but such mutual consent initially expressed in the original agreement does not save the provisions from being void. It is, therefore, clear that the arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the arbitration the parties to the arbitration agreement consent to such enlargement of time.

The question, however, is whether it was necessary to stipulate in the arbitration agreement itself for the enlargement of time by a subsequent agreement. In our opinion, subsection (2) of Section 28 does not say that such a stipulation should be in the arbitration agreement itself. It only tells us in which specific case of

mutual consent a provision for enlargement of the time for making the award, if inserted in the agreement, will save the provision from being null and void. It does not purport to lay down that such a specific case of mutual consent should, in order to become effective, be part of the original agreement between the parties."

In Hardy's case (supra) also the same view was taken by the Apex Court. In that case it was held by their Lordships that it is open to the parties to arbitration agreement to fix the time within which the arbitrator must give the award. If per chance no time has been specified by the parties, then the award must be given within four months of the arbitrator entering on the reference. It was further held that subsection (1) of Section 28 of the Arbitration Act confers full discretion on the Court to enlarge the time and Court alone has the power to extend the time and clause in the agreement giving arbitrator power to enlarge time is void. It was further held that it was not open to the arbitrators at their own pleasure without consent of the parties to the agreement to enlarge time for making the award. Meaning thereby, the arbitrator can enlarge the time with the consent of the parties.

10. In view of the judgments of the Hon'ble Supreme Court in both the cases referred above, it is clear that arbitrator has power to enlarge the time with the consent of the parties even in the absence of an agreement between the parties authorising him to extend the time with their mutual consent and since in this case the time was extended with the consent of the parties, the award is not invalid on the ground that the same has been made after the statutory period of four months.

11. with regard to second and third reasons given by the learned trial Court to set aside the award, the Court has taken notice of two points namely :

(a) The arbitrator had no jurisdiction not deal with the claim for liquidated damages as laid down under clause 2 of the agreement.

(b) The arbitrator acted beyond the reference by awarding claim No. 4 for Anti Termite Treatment.

12. Clause 2 empowers the Executive Engineer Incharge of the project to levy compensation on the contractor for uncommenced or unfinished work. The Managing Director of the Corporation is given power to reduce the amount of compensation on representation from the contractor and the decision of the Managing Director has been made final. In this case the Executive Engineer had imposed penalty as the applicants had failed to execute the work in time. Applicants filed an appeal before the Managing Director which remained pending with him for more than two years and ultimately he referred that dispute to the arbitrator with the consent of the parties. Now the claim of the respondents is that the Managing Director had no power to refer the matter to the arbitrator and that dispute was not arbitrable. Respondents have relied upon clause 25A(4)(a) of the contract agreement which takes out from the purview of arbitration any

dispute relating to levy of compensation as liquidated damages which has already been referred to EngineerinChief and is heard or has been finally decided by the EngineerinChief or the Managing Director. Respondents also placed reliance upon Vishwanath Sood v. Union of India and another, AIR 1989 SC 952. In that case also there was a similar cause as in this case. The arbitrator had awarded Rs. 20,000/ as amount of compensation to the Govt. setting aside the award for that particular amount, it was held by their Lordships that the compensation determined either by EngineerinChief or on further reference by the Superintending Engineer was not capable of being called in question before the arbitrator.

13. So far as the legal preposition involved on this point is concerned, there is no dispute that only the Managing Director could decide the appeal under clause 2 of the contract agreement relevant to liquidated damages. But in this case the applicants had in fact preferred an appeal before the Managing Director on 13.8.1991 which remained pending with him for than 2 years. Ultimately during the pendency of the arbitration proceedings, he transferred the same to the arbitrator with the consent of the parties. The proceedings dated 25.5.1994 recorded by the arbitrator reads as under :

"The Managing Director HPHC vide his note dated 11.5.1994 has referred the hearing under clause 2 of this agreement to the arbitrator for adjudication with the consent of both the parties. The parties were asked if they have any objection. The parties have no objection to subject the matter to the arbitrator. The point will be discussed in the next hearing. The parties have been requested to file the replied/counter replied in time so that the matter is considered finally in the next hearing. The documents received from the Managing Director containing into 8 pages are placed on record as part of this case. Thus, it is with the consent of the parties the dispute regarding liquidated damages has been decided by the arbitrator. In Vishwanath Sood's case (supra) referred to by the respondents, the dispute regarding amount of compensation was not referred to the arbitrator, but the arbitrator took cognizance of that fact from the claims/ counter claims of the parties. Therefore, in my view the award is not liable to be set aside on the ground the arbitrator had no jurisdiction to deal with the claim for liquidated damages. The jurisdiction of the arbitrator to entertain claim for liquidated damages has been barred by the parties with their mutual consent by entering into an agreement to that effect. The law is that the arbitrator has no power to travel beyond the scope of the agreement and rightly to because arbitrator is the creature of agreement and he derives the (sic) from agreement and he has no jurisdiction to travel beyond that. But the parties have always a right to widen the scope of the arbitration and to refer any other dispute to arbitrator with their mutual consent. Since in this case the parties agreed to refer the dispute regarding liquidated damages to the arbitrator, their reference of the Managing Director to the arbitrator to adjudicate upon that dispute also was not illegal in any way. Had it been a unilateral reference to the arbitrator or the arbitrator would have decided it otherwise, then of course the award would have

been liable to be set aside on that ground.

14. The applicants had claimed Rs. 26,968/ for anti termite treatment under claim No. 4 and the arbitrator awarded Rs. 34,475/. It is argued on behalf of the respondents that the anti termite treatment work was given to the applicants on a separate work order and that order was no the part of the contract agreement between the parties, hence arbitrator had no jurisdiction to adjudicate upon that claim. The respondents in support of their contention relied upon *Jivarajbhai Ujamshi Sheth and others v. Chintamanrao Balaji and others*, AIR 1965 SC 214. In that case it was held by their Lordships that if the parties set limits to action by the arbitrator, then the arbitrator has to follow the limits set for him. Respondents also referred *Union of India and others v. Santiram Ghosh and others*, AIR 1989 SC 402. In that case under the terms of reference the board of arbitrators was required to give its findings on the question whether the post of Scientific Assistant of the Botanical Survey of India should be allocated the revised scale of Rs. 500900 in terms of Third Pay Commission's recommendations. The board of arbitrators by its award held that all the Scientific Assistants who are continuing as Scientific Assistants since 1.1.1993 and who possess the prescribed qualification shall be placed in the scale of Rs. 500900 with immediate effect i.e. from the date of award. The award was set aside by the Apex Court holding that the arbitrator acted beyond terms of reference. In another authority *Associated Engineering Co. v. Govt. of Andhra Pradesh* and another, AIR 1992 SC 232 referred to by the respondents the same view was taken by the Hon'ble Supreme Court. It was ruled by their Lordships that where it is apparent not by construction of the contract but by merely looking at the contract that the umpire travelled totally outside the permissible territory and thus exceeded his jurisdiction in making the award, it is an error going to the root of his jurisdiction.

15. It is again true that an umpire or arbitrator cannot widen his jurisdiction by deciding the question not referred to him by the parties or by deciding the question or otherwise than in accordance with the contract. In other words he cannot say that he does not care what the contract says. He is bound by it. He cannot travel outside its bounds and if he exceeds his jurisdiction by doing so his award is liable to be set aside. But in this case the arbitrator has neither exceeded his jurisdiction nor acted beyond reference. Although antitermite treatment was not part of the agreement specifically but that was a nonscheduled item and the appellants were under obligation to carry out the work of antitermite treatment and it was the admitted case of the parties before the arbitrator that 60% of the operations involved in the antitermite treatment was thus part of the agreement between the parties and the fact that was nonscheduled item does not preclude it from the purview of the contract. Thus, it cannot be said that the arbitrator acted beyond reference in awarding compensation for antitermite treatment under claim No. 4.

16. The fourth reason which prevailed with the learned trial Court to set aside

the award was the arbitrator awarded more than the amount claimed under claim No. 4. As referred above the applicants had claimed Rs. 26968/ whereas the arbitrator awarded Rs. 34,475/. Claim of the respondents is that the arbitrator had no jurisdiction to award the more amount than claimed. Respondents in support of their contention relied upon M/s. Andhra Civil Construction Co., Hyderabad v. State of Orissa and another, AIR 1981 Orissa 32. In that case the claimant claimed Rs. 60,000/ under item No. 18 of the claim, but the arbitrator awarded Rs. 64,316.70 after referring the judgment of the Apex Court in AIR 1977 SC 2014 (in which) it was held by his Lordship that in respect of a particular item of claim the arbitrator could not award a sum higher than that claimed under the said item and, therefore, the arbitrator in granting Rs. 64,000/ against the claim of Rs. 60,000/ acted without jurisdiction in respect of the particular item of claim and that was an error apparent on the face of the record. His Lordship further held that merely because of that defect the award in its entirety could not be set aside and the award would be perfectly legal if the award under that item is confined to the amount claimed under the head i.e. Rs. 60,000/. So, the excess amount of Rs. 4316.70 awarded on that item by the arbitrator was set aside and the award on that item was modified accordingly.

17. Learned Counsel for the applicants has submitted that award against this item was rendered on the basis of settlement reached between the parties. The Executive Engineer had produced the rate list effective from 1.8.1991 and on the basis of that rate list the amount was calculated. The total area involved was 870.41 square metres which corresponds to about 95,00 square feet whereas the applicants had claimed the compensation for 8774 square feet area only and that was a clerical mistake. Learned Counsel further submitted that they have no objection if the award under this item is reduced to the amount claimed i.e. Rs. 26,968.

18. In view of the law laid down in M/s. Andhra Civil Construction Co.'s case (supra) referred to by the respondents and the admission on the part of the applicants, the award under claim No. 4 is modified and is reduced to Rs. 26,968/ as claimed by the applicants. Admittedly, on that ground whole of the award cannot be set aside.

19. The last and fifth ground accepted by the learned trial Court was that the arbitrator had no jurisdiction to award interest. Again the findings of the learned trial Court are erroneous and against the settled law on the point. It is by now fairly well settled that the arbitrator has full power to award prerenfence, pendente lite as well as future interest upto the date of payment of the decree whichever is earlier. In view of the conflicting judgments on the point, the matter was heard by the Constitution Bench of the Hon'ble Supreme Court in Secretary, Irrigation Department, Govt. of Orissa and others v. G.C. Roy, AIR 1992 SC 732. After referring the whole case law on the point, it was held by their Lordships that a person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be

called interest, compensation or damages. This basic consideration is as valid for the period the dispute is pending before the arbitrator as it is for the period prior to the arbitrator entering upon the reference. This is the principle of Section 34 CPC and there is no reason or principle to hold otherwise in the case of arbitrator. An arbitrator is an alternative forum for resolution of disputes arising between the parties. If so, he must have the power to decide all the disputes or differences arising between the parties. If the arbitrator has no power to award interest pendente lite, the party claiming it would have to approach the Court for that purpose even though he may have obtained satisfaction in respect of other claims from the arbitrator. This would lead to multiplicity of proceedings. An arbitrator is the creature of an agreement. It is open to the parties to confer upon him such powers and prescribe such procedure for him to follow as they think fit so long as they are not opposed to law. The same view was repeated in subsequent judgments like *Hindustan Construction Co. Ltd. v. State of Jammu and Kashmir*, AIR 1992 SC 2192 and *Jugal Kishore Prabhilal Sharma and others v. Vijayendra Prabhatilal Sharma*, AIR 1992 SC 864. Therefore, the controversy has been at rest by the Constitution Bench of the Highest Court of the land now the argument that the arbitrator has no power to grant pendente lite or future interest is not tenable.

20. Thus, none of the reasons recorded by the learned trial Court to set aside the award is sustainable in the eyes of law.

21. To add further, learned counsel for the respondents submitted that in the contract agreement the arbitrator was under obligation to give a reasoned award in respect of each claim and counter claim separately where the aggregate amount awarded exceeded Rs. 25,000/. Learned counsel referred clauses 25A(3) and (4) of the contract agreement which lays down that in all cases where the aggregate amount awarded exceeds Rs. 25,000/ the arbitrator must invariably give reasons for his award in respect of each claim and counter claim respectively. Subclause (4) further lays down that the arbitrator shall award separately giving his award against each claim and dispute raised by either party including any counterclaim individually and that any lumpsum award shall not be legally enforceable.

22. There is no doubt that under the terms of arbitration agreement between the parties, the arbitrator was required to give reasons in his award in respect of each claim separately and that is precisely what has been done by the arbitrators. The arbitrator has given separate award for each claim covering all items of claim and counter claim. The concept of a reasoned award has been dealt with by the Hon"ble Delhi High Court in *M/s. Anant Raj Agencies v. Delhi Development Authority* and another, 1988(1) Arbitrator Law Reporter 44. In that case Hon"ble Delhi High Court summed up the position as under :

"The underlying idea behind the requirement of giving reasons by the arbitrator is that the award is a speaking one and the arbitrator avoid arbitrariness and the idea behind is not of obliging the arbitrator to write a detailed judgment like the

Judges in the ordinary course."

In another judgment in *Indian Oil Corporation Ltd. v. Indian Carbon Ltd.*, 1988(1) Arbitrator Law Reporter 394. The legal position has been defined by the Apex Court thus :

"When the arbitration clause required the arbitrator to give reasons and if the arbitrator does give his reasons in the award, the sufficiency of the reasons depends upon the facts of the particular case. He is not bound to give detailed reasons. The Court does not sit in appeal over the award and review the reasons. The Court cannot (can ?) set aside the award only if it is apparent from the award that there is no evidence to support the conclusion or if the award is based upon any legal proposition which is erroneous."

23. It is well settled that the Court has a very limited scope of interference with a reasoned award. It has been the consistent view of the Apex Court that the arbitrator is the final arbiter of the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts. To begin with is the case of *Hindustan Tea Co. v. K. Shashi Kant and Co. and another*, 1987(1) Arb.LR 29, *Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar*, 1987(2) Arb.LR 314, *Food Corporation of India v. Joginderpal Mohinderpal and another*, 1989(2) Arb.LR 159. The Apex Court while dealing with all the aspects of the matter formulated the legal position in *State of Rajasthan v. Puri Const. Co. Ltd. and another*, 1995(1) Arb.LR 13 in following terms :

"The arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts.The arbitrator is the sole judge of the quality as well as the quantity of evidence and it will not be for the Court to take upon itself the task of being a judge on the evidence before the arbitrator.The Court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous.".....

"An award may be set aside by the Court on the ground of error on the face of the award. But an award is not invalid merely because by a process of inference and argument, it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion."....

"Judicial decisions over the decade have indicated that an error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award. It does not appear to us that the findings made by the arbitrators are without any basis whatsoever and are not referable to documents relied on and such findings are so patently unjust or perverse that no reasonable man could have arrived at such findings....."

4. The first contention raised by the learned counsel for the petitioner is that the

arbitrator did not give the award within four months from the date of entering upon the reference. The argument is not acceptable to the Court. It is true that under the Arbitration Act, the Arbitrator was supposed to give the award within four months but in this case the parties gave the consent before the arbitrator to continue the proceedings beyond four months. In these circumstances when the parties have participated in the proceedings and they have given consent to the continuation of the arbitration proceedings beyond four months, it is not open to the petitioner to say that the award was given after four months. It was then submitted that the award is a non speaking one. I have gone through the award. In my opinion, the arbitrator has applied his quasi judicial mind in giving the award. By no stretch of imagination it can be said that the award is cryptic or nonspeaking one. The detailed award shows that on each and every item, the arbitrator has applied his mind and has determined the issue as to how much amount is due to the contractor. It is a basic principle of law that while dealing with determination of the amount due, the arbitrator is the master of law and facts. Unless there is a mistake on the face of the award or the Rent Controller has misconducted himself, the award cannot be set aside by the civil Court as the civil Court is not sitting as a Court of appeal.

5. It was then submitted by the counsel for the petitioner that the arbitrator has given the award against the terms of the agreement and, therefore, the award is liable to be set aside. Counsel for the petitioner has adopted the reasons given by the trial Court in submitting his arguments but this Court is again not convinced with arguments. No amount has been awarded to the contractor which is against the terms of the agreement. In this case, the Managing Director of the petitioner Corporation had appointed the arbitrator and he had jurisdiction to appoint the arbitrator who had given the award.

6. Faced with the above position, it was then submitted by the learned counsel for the petitioner that the rate of interest awarded by the arbitrator and the Court is on the higher side. This argument of the petitioner requires to be considered sympathetically. Accordingly, it is hereby directed that the contractor shall get interest at the rate of 12% per annum on the awarded amount w.e.f. 5.9.1991 and on Rs. 13,000/ w.e.f. 27.7.1990 till the date of payment or the date award was made rule of the court, whichever is earlier. Future interest shall also be calculated by the Department at the rate of 12% instead of 15%. With these observations, the revision petition is dismissed.