
(1986) 08 KL CK 0016
In the High Court Of Kerala
Case No : M.F.A. No. 33 of 1981

Kerala State Electricity Board

APPELLANT

Vs

Rebuild Private Limited

RESPONDENT

Date of Decision : 14-08-1986

Acts Referred:

Arbitration Act, 1940 — Section 16, 16(3), 6(3)

Citation : (1986) 08 KL CK 0016

Hon'ble Judges : Sivaraman Nair, J; John Mathew, J

Bench : Division Bench

Advocate : K.P.G. Menon, for the Appellant; P.G. Parameswara Panicker and P.B.Mohankumar, for the Respondent

Final Decision : Allowed

Judgement

John Mathew, J.—The Appellant in a petition to set aside an arbitration award, is the Appellant. The Appellant is hereinafter referred to as K.S.E.B. The Respondent herein, who is hereinafter referred to as the claimant, entered into a contract with K.S.E.B. in respect of the work of "widening and improving the jeep road from Idukki to Neria-mangalam-Balance works-Between chainage 14600 and 29450 M-Neriamangalam Road end Hydro Electric Project". Certain disputes arose between the K.S.E.B and the claimant in respect of the execution of this contract. These disputes were referred to the arbitration of two joint arbitrators. They appointed an umpire. The arbitrators passed their award on 8th August 1975. Although that award was made a rule of Court by the Sub Court, Trivandrum, it was set aside by the Judgment of this Court in M.F.A. 118 of 1977. This Court remitted the dispute to the Arbitrators for passing a fresh award as directed therein. Since the arbitrators could not agree, the disputes were referred to the umpire. The umpire passed the award dated 19th July 1980 awarding a sum of Rs. 4,38,047. When this award was filed in Court the K.S.E.B. challenged the award on various grounds. The lower Court overruled those objections and passed a decree in terms of the award. This appeal is filed by the

K.S.E.B. against the order and decree of the Court below.

2. The main contention on behalf of the K.S.E.B. is that the umpire travelled beyond his jurisdiction and the award is contrary to the directions of this Court in M.F.A. No. 118 of 1977. Learned counsel for the claimant submitted that the direction in the remand order will bind only the arbitrators and when the proceedings are referred to the umpire, the entire case is at large and therefore the umpire can decide the disputes without reference to the remand order of this Court. We do not think that the contention of the claimant can be accepted. u/s 16 of the Arbitration Act, the Court is empowered to remit the award to the arbitrator, upon such terms as it thinks fit if the award had left undetermined any of the matters referred to arbitration or where it determines any matter not referred to arbitration or where the award is so indefinite as to be incapable of execution, or where an objection to the legality of the award is apparent upon the face of it. Sub-section (3) of Section 16 of the Arbitration Act provides that an award remitted under Sub-section (1) thereof shall become void on the failure of the arbitrator or umpire to reconsider it and submit its decision within the time fixed. When an award is remitted for reconsideration, with specific directions on certain points, it is the duty of the arbitrator to hear such further evidence as the parties may wish to produce. However, the arbitrators will have to comply with all the directions of the remand order while passing the fresh award. If the Court remits an award, but the arbitrators fail to reconsider it, the award becomes void under sections 6(3) see *Annada Prosad v. Jogesh Chandra* AIR 1914 Cal 497. So much so, subsequent to an order of remand the power of the arbitrator is circumscribed by any limitation or direction in the remand order-see *Atchayya v. Venkata* AIR 1915 Mad 1225 (F.B.) at 1231; *Premchand Hira Vs. Bai Galal*, at 599; *Nain Singh Vs. Koonwarjee and Others*, and *Achuthan Nairv. Raman* 1979 KLT 119. See also the following passage in *Russell on Arbitration*, 20th Edn., page 436.

Powers and duties of arbitrator when award remitted-

When an award is remitted to the arbitrator, all his original powers, so far as they are not affected by the order remitting the award, or the provisions of the Arbitration Act, are, it would seem, revived. But his powers and duties cannot exceed those which are necessary to give effect to the order of the Court. "Suppose an award good as to three points, and bad as to the fourth, and sent back as to that alone, as at present advised, I am of opinion that the arbitrator is *functus officio* as to the three and cannot alter his Judgment as to them. And he has only power, it would seem to reconsider the matters referred to him in some way which does not amount to a redetermination of matters already decided by his award.

The arbitrator must carry out and abide by the order remitting the matters to him.

Therefore the powers and duties of the arbitrator subsequent to the award

cannot exceed those which are necessary to give effect to the order of the Court and the arbitrator must carry out and abide by the order remitting the matter to him. The term "umpire" has not been defined in the Arbitration Act. In *Maganlal Gangaram Rathor and Another Vs. Ramaji Bondarji and Others*, the term "umpire" is held to mean a third person who is to decide a controversy or question submitted to arbitrators in case of their disagreement. An umpire when called upon to act is generally invested with the same powers as the arbitrators and bound by the same rules and has to perform the same duties-See Wharton's Law Lexicon, 14th Edition, page 1021. It is an implied condition of arbitration agreements that if the arbitrators cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators-See Clause 4 of the I Schedule to the Arbitration Act. The words "in lieu of the arbitrators" means that the umpire has to act instead of the arbitrators. Therefore the umpire will get only whatever power or authority the arbitrators had. If the jurisdiction of the arbitrators after remand is conferred and restricted by the remand order the umpire will also get only the same power and not anything more than that. Therefore the contention on behalf of the claimant that the umpire's powers are not restricted by the directions in the remand order cannot be accepted.

3. M.F.A. 118 of 1977 was also filed by K.S.E.B. against the award of the arbitrators dated 8th August 1975. By that award the arbitrators granted a total amount of Rs. 1,90,385 to the claimant in full and final settlement of all claims and counter-claims. The claimant had no objection to this award. The award under Issue No. 3, by which the arbitrators directed ex gratia payment to the contractor was challenged by the K.S.E.B. on the ground that while considering Issue No. 4 the arbitrators found that the claim under that issue was not justified by the provisions of the contract. Therefore by the remand order this Court directed as follows:

3. If the amount was not due how the Arbitrators directed an ex gratia amount to be paid and what that amount was is not seen from the award. Since the amount mentioned as payable by the Respondent when considering issue No. 3 is said to inclusive of this amount also what would be the balance amount cannot also be determined with reference to the award. Some other amounts were also under consideration under censing heads. That amounts are due to the contractor is found, but what those amounts are have not been indicated. What is said is that what is found on issue 3 is all-inclusive. Reference may be made in this context to answers to issues 6, 7, 8, 9 and 10. These issues call for specific answer. What amount was due under each one of these heads should have been found in answering these issues. Merely refer-ing to the answer to issue 3 and mentioning that it is all inclusive is not answering the terms of reference. Therefore on the face of it the Award is illegal. It calls for being set aside and the matter has to be remitted back to the Arbitrators. We accordingly remit the matter back to the arbitrators who shall submit their decision to the Court below within a period of 4 months. The only issues now in dispute are issues 3, 4, 6, 7, 8, 9 and 10 and they alone call fresh consideration. This is agreed to by both sides....

However, a reading of the award by the umpire will clearly show that he has not complied with the directions in the remand order. He rejected claim under issues 7, 8 and 10. Under issue 4 the Arbitrator awarded Rs. 2,79,277 and under issue 6 he awarded Rs. 1,17,270. Under issue 9 the Arbitrator directed return of the balance retention amount of Rs. 41,500. So the ultimate result is that the claimant who was awarded an amount of Rs. 1,90,385 by the arbitrator's award dated 15th June 1976, has obtained an award of Rs. 4,38,047 by the umpire's award dated 19th July 1980. The curious part of it is that the claimant had no objection to the Arbitrator's award and that only the K.S.E.B. challenged the Arbitrator's award. We may extract the Arbitrator's award dated 15th June 1976 in respect of issues 3, 4, 6, 7, 8, 9 and 10 in order to understand the scope of the remand order of this Court:

Issue No. 3. -The Respondent will pay an amount of Rs. 1,90,286 (Rupees One Lakh Ninety Thousand Two Hundred and Eighty-Six Only) to the claimant and the Accounts between the claimant and Respondent are thus settled.

Issue No. 4.-The claimants claim under this issue is not justified by the provisions of the Contract. But an ex gratia payment is allowed and the same is merged in the Award on issue No. 3.

Issue No. 6.-The claimant did some extra items of work and is entitled to get payment. Payment due to the claimant is included in the Award under issue No. 3 and no more amount is due from the Respondent to the claimant.

Issue No. 7.-The claimant is entitled to raise the claim of contingency and unforeseen items, which he has actually met with in the course of the performance of the work. The amount found to be due to the Claimant has been awarded under the finding on issue No. 3 and has been merged in the amount covered by issue No, 3 Awarded to the claimant. No more amount is due to the claimant under this issue.

Issue No. 8.-This issue is covered under issue No. 7 and the finding on issue No. 3 and no more amount is due to the claimant from the Respondent.

Issue No. 9.-The return of the retention amount to the claimant is taken into account in the finding on issue No. 3 and no more amount is due to the claimant under this issue.

Issue No. 10.-No more amount is due to the claimant under this issue. The claim under this issue is merged in the finding on issue No. 3.

A reading of the remand order will clearly show that the order directed the Arbitrators (1) to clarify as to how Arbitrators awarded an ex gratia amount under issue No. 4 when it was found by the Arbitrators themselves that the claim under this issue is not justified by the provisions of the contract what is the amount granted as ex gratia payment, which is merged in the award on issue No. 3. (2) Instead of a composite award under issue 3, issues 6, 7, 8, 9 and 10 called for specific answer. What amount was due under each one of these heads should

have been found in answering these issues. It may be noticed that the remand order set aside the award on these issues only for the abovementioned clarifications after fresh consideration. As stated above, the total amount awarded under issue No. 3, namely Rs. 1,90,286 was challenged by the K.S.E.B. only and therefore after the remand it was not open to the Arbitrators or the umpire to enhance the same under cover of the remand order directing reconsideration. The Arbitrators could have, if necessary after consideration, only reduced the amount awarded. We are clarifying this aspect because we are again remanding the case to the umpire by this order.

In the result, the order and decree of the lower Court and the award of the umpire are set aside. The award is remitted to the umpire for consideration and disposal in accordance with the directions in the Judgment of this Court in M.F.A. No. 118 of 1977 as further clarified in this Judgment. A copy of the Judgment in M.F.A. No. 118 of 1977 will also be forwarded to the umpire along with a copy of this Judgment and other connected records. Appeal allowed as above. There will be no order as to costs.