

(1988) 03 AP CK 0032

In the Andhra Pradesh High Court

Case No : C.R.P. No. 86 of 1986 and A.A.O. No. 29 of 1986

M. Paramasivam

APPELLANT

Vs

Food Corporation of India, Nellore

RESPONDENT

Date of Decision : 29-03-1988

Acts Referred:

Arbitration Act, 1940 — Section 29, 30
Civil Procedure Code, 1908 (CPC) — Section 34
Constitution of India, 1950 — Article 141
Contract Act, 1872 — Section 73
Interest Act, 1839 — Section 1
Interest Act, 1978 — Section 1, 2, 3, 6
Negotiable Instruments Act, 1881 (NI) — Section 30, 80
Sales of Goods Act, 1930 — Section 61(2)

Citation : AIR 1989 AP 124

Hon'ble Judges : Jagannadha Rao, J

Bench : Single Bench

Advocate : A. Bhaskara Chari, for the Appellant; D. Reddeppa Reddy, for the Respondent

Judgement

1. The appeal raises an important question relating to the effect of the three recent Supreme Court judgments in Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, ; State of Orissa and Others Vs. Construction India, ; and Food Corporation of India Vs. Surendra, Devendra and Mohendra Transport Co., , regarding grant of interest by an Arbitrator under the Indian Arbitration Act 1940, both prior to the commencement of the arbitration proceedings and during the pendency of the proceedings before him.

2. The appellant-firm is a contractor and offered to purchase 2709 bags of damaged food grains. We are concerned with the Contract No. 2. The appellant placed a tender on 12-4-1977 and the same was accepted by the Food Corporation of India (hereinafter called "the Corporation") at Nellore. A dispute arose between the parties regarding payment of storage charges and interest. As per the terms of the tender conditions, the dispute was referred to the arbitration

of Sri Ch. Prabhakara Rao. Additional Legal Advisor to Government of India, Ministry of Law, Justice and Company Affairs, Madras. The appellant and the respondent-Corporation filed their respective claim statements. The reference to the arbitrator Ls dated 15-10-1980 and the arbitrator entered on the reference on 1-11-1980 and passed an award on 19-6-1981. O.P. No. 71/81 has been filed by the Food Corporation for making the award a rule of Court for a sum of Rs. 18,285-75 with interest at 18% P.A. from the date of award till payment. O.P. No. 61/1983 has been filed by the appellant-contractor to set aside the award and dismiss the claim. The lower Court rejected the O.P. filed by the contractor and decreed the O.P. filed by the Food Corporation. C.R.P. is preferred against the decree in O.P. No. 71/81 while the C.M.A, is preferred against the order in O.P. No. 61/83.

3. As mentioned earlier, the appellant's tender dated 12-4-1977 was accepted by the Corporation after the tenders were opened on 5-5-1977. The tenders were kept open up to 5-6-1977 and the Corporation sent a telegram to the appellant on 3-6-1977 that the tenders would be kept open further till 20-6-1977. The Corporation wrote another letter dated 16-8-1977 to the appellant that the tenders will be kept open till 4-10-1977. On 28-6-1977 the Corporation wrote to the appellant requesting him to give his consent letter accepting the contract. Inasmuch as the appellant did not move in the matter, the Corporation issued a telegram on 5-7-1977 stating that the appellant's tender has been accepted and that he should deposit a sum of Rs. 69,222-84, on or before 12-7-1977 as also the earnest money deposit. A further reminder was sent asking the appellant to comply with these requests by 22-8-1977. It is important to note that on 4-9-1977 the appellant wrote a letter to the Corporation seeking time for making the deposits, It is obvious from this letter that the appellant accepted to proceed with the contract. Thereafter there was reminder by the Corporation on 23-9-1977 to which the appellant replied a further letter dated 3-10-1977 requesting 15 days time to make the necessary deposits. On 7-10-1977 the Corporation sent a telegram proposing to forfeit the earnest money deposit made by the appellant in connection with another contract which was in a sum of Rs. 6,945/-and to proceed to retender the contract. As there was no response from the appellant the Corporation forfeited the sum of Rs. 6,945/-as per their letter dated 20-10-1977. Thereafter -they offered the damaged goods for sale to a third party and a contract to that effect was concluded on 14-12-1977 and the said purchaser inspected the property and after making available certain storage facilities removed the goods from the custody of the Corporation on 21-2-1978. Under the terms of the tender it was clearly provided that storage charges could be collected by the Corporation at the rate of 3 paise per day per bag. On that basis, the Corporation laid a claim so far as this contract No. 2 was concerned as per Ex. A-14 in a sum of Rs. 18,285-75. The said notice, however, refers to certain amounts due under other contracts as well, apart from the above sum of Rs. 18,285-75 Ps. which comes to Rs. 34,559-25 Ps. It was pointed out that they were adjusting the amount of Rs. 6,945/- in their custody which was the earnest

money deposit relating to another contract and three other items, in all amounting to Rs. 8,991-31 Ps. In the result the claim was for the balance of Rs. 23,567-84 Ps. being the difference of Rs. 34,559-25 Ps. and Rs. 8,981-31 Ps.

4. In this appeal we are concerned with the validity of the award in respect of the second tender in a sum of Rs. 18,285-75 Ps. and the award of interest thereupon prior to the commencement of arbitration as well as during the pendency of the arbitration. In the award dated 19-6-1981 passed by the arbitrator, six points were framed for consideration and the fifth point related to the award of interest. On that point the learned arbitrator referred to the decision of the Supreme Court in Union of India (UOI) Vs. West Punjab Factories Ltd., ; wherein it was held that in the absence of any usage or custom, express or implied or of any provision of law to justify the award of interest, interest by way of damages could not be awarded. Thereafter the learned arbitrator observed that in the instant case interest was not claimed as a penalty but that the Corporation has made a demand in terms of its notice, Ex. A-14, dated 1-8-1979 demanding not only the sum of Rs. 18,285-75 Ps. towards the storage charges for 2709 bags but that under the same notice the Corporation had claimed interest from the appellant. Ultimately he held that the award will be in a sum of Rs. 18,285-75 Ps. in favour of the Corporation "with liberty to claim interest at the rate of 6% per annum from 22-2-1978 to 19-6-1981, the date of the award." It may be noted that 22-2-1978 is the date next after the day (viz., 21-2-1978) when the new contractor lifted the goods from the godown. It is this award that has been confirmed by the lower Court.

5. In this appeal Sri A. Bhaskarachary, the learned counsel for the appellant, has contended that there is no delivery of goods to him by the Corporation and therefore the appellant is not liable to pay any damages for storage of the goods. In any event he contends that up to 4-9-1977 he is not liable for any damages inasmuch as the Corporation agreed to grant time for him to pay the amount. Alternatively, he contended that once the contract of the third party was accepted on 14-12-1977, the appellant cannot be made liable if there was delay on the part of the new contractor in lifting the goods which actually took place on 21-2-1978. Finally he contended that the award of interest both prior to the date of arbitration and during the pendency of the arbitration is without jurisdiction and is illegal. According to him, Ex. A-14 there is no claim for interest in so far as the second tender is concerned as wrongly assumed by the arbitrator. The above contentions are resisted by the learned counsel for the Food Corporation Sri D. Reddeppa Reddy.

6. Two points arise for consideration in this appeal:

(1) Whether the award of damages in a sum of Rs. 18,285-75 Ps, by the arbitrator towards storage charges from 12-7-1977 to 21-2-1978 or for any part thereof is liable to be set aside?

(2) Whether the award of the interest prior to the commencement of the

arbitration proceedings and during the pendency of the arbitration proceedings valid on the facts of the present case?

7. Point No. 1 :-- In my view the decision of the arbitrator awarding damages in a sum of Rs. 18,285-75 Ps. towards the storage charges for the period from 12-7-1977 to 21-2-1978 at the rate of three paise per bag per day, as per the conditions of the contract, does not suffer from any error apparent on the face of the record and is not, therefore, liable to be set aside. The appellant cannot contend that the goods were not delivered to him and therefore he was not liable for not removing them from the warehouses. The appellant did not pay the contracted sum of Rs. 69,222-84 Ps. as per the terms of the tender nor the earnest money deposit and without paying them he cannot expect the Corporation to deliver the goods to him. He cannot therefore lay the blame for the non-delivery of the goods on the corporation. Likewise he cannot say that for the period prior to 4-9-1977 or after 4-9-1977 he is not liable for the storage charges. Admittedly, whether before that date or after that date, he did not pay the above mentioned storage charges and he cannot take advantage of his own wrong. It is true that the contract of the third party was subsequently accepted on 14-12-1977 and that contractor could not lift the goods till 21-2-1978. But the appellant cannot contend that he is not liable for this period. In my view, the time taken by the new contractor to lift the goods from the warehouses is reasonable and, in fact, no such contention can be accepted in view of the facts found by the arbitrator. I am therefore of the view that the award of Rs. 18,285-75 is correct and there is no error apparent on the face of the record permitting this Court to interfere with the same.

8. Point No. 2 :-- The more important question arising in the case is with regard to the award of interest both prior to the commencement of the arbitration proceedings and subsequent thereto during the pendency of the case before the arbitrator and up to the date of decree. As already stated the reference was made to the arbitrator on 15-10-1980 and entered on reference on 1-11-1980 and the award was passed on 19-6-1981 and the decree was passed by the lower Court on 3rd Sept., 1985. As per the terms of the decree read with the award, interest as proposed in the award (ie., 6% P.A.) has been awarded up to the date of award and subsequent interest at 12% P.A. has been awarded from the date of decree till the date of realisation. But in the decree as drafted by the lower Court interest is awarded at 6% P.A. from 22-8-1978 (a mistake for 22-2-1978) up to 19-6-1981 the date of award and thereafter at 12% P.A. from the date of decree till the date of realisation. I have already referred to the three recent judgments of the Supreme Court rendered in 1987. The question is : whether the Supreme Court judgment has the effect of clarifying or modifying the principles laid down in earlier cases with regard to the grant of interest.

9. In my opinion there has been the substantial change in the legal position after the judgments in these three cases have been rendered by the Supreme Court. The law which was a little uncertain or rather conflicting has now been made

certain by the first of these judgments rendered by Chinnappa Reddy, J., speaking for a Bench of three Judges. That judgment was followed in the latter two cases. I shall presently show that in view of the judgment in those three cases no interest could have been awarded, on the facts of the present case for the period during the pendency of the arbitration before the arbitrator i.e., from 15-10-1980 till the date of decree i.e., 3-9-1985 and that on the facts of the present case no interest is payable even prior to the arbitration proceedings i.e., 15-10-1980 as there is no demand in Ex. A-14 notice dated 1-8-1979 demanding interest as wrongly assumed by the learned arbitrator.

10. In the first judgment rendered by the Supreme Court in Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, , there is an exhaustive discussion by Chinnappa Reddy, J. speaking for the Bench consisting of himself, M.H. Kania, and K. Jagannatha Shetty, JJ. In view of the said discussion of all the earlier cases, it becomes unnecessary to deal with the earlier case law. Suffice it to say that the learned Judge divided the discussion into two separate parts:

- (a) Interest for the period prior to the commencement of arbitration proceedings; and
- (b) Interest during the pendency of the arbitration proceedings up to the date of decree.

I shall now refer to these two aspects :

(a) The Supreme Court pointed out that so far as the period prior to the commencement of arbitration proceedings i.e., under category (a) above mentioned, the matter of award of interest will be governed by the substantive law or grounds of equity which may enable the Court to award interest. These are cases where there is an express provision in the contract itself for grant of interest or cases where interest is payable u/s 80 of the Negotiable Instruments Act or u/s 61(2) of the Sale of Goods Act or under recognised principles of equity permitting the grant of interest. Interest could become payable also, for periods prior to arbitration, under the Interest Act, 1839 or under the Interest Act, 1978 which has come into force from 19-8-81. These, generally, are the provisions of the substantive law enabling payment of interest prior to the commencement of arbitration. Unless the facts of the case fall within the above provisions of substantive law or equity, interest for the period prior to the commencement of arbitration proceedings cannot be awarded, as a matter of substantive law. But if these circumstances" exist, the arbitrator who, it is well settled, is bound to decide "according to law", has to apply the abovesaid provisions of law or equity and award interest for the period prior to the commencement of arbitration proceedings.

(b) (i) Likewise, the Supreme Court in Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, pointed out that so far as the period during the pendency of the arbitration proceedings (covered by Category (b)

above mentioned), no interest is payable for that period by the arbitrator inasmuch as the provisions of Section 34, C.P.C. are not attracted to an arbitrator, he being not a Court. However, in cases where the parties have initially gone to a civil suit and have, during the pendency of the suit, agreed to have the matter adjudicated by arbitration, the arbitrator may be treated as having been conferred with jurisdiction by the parties to decide the question of pendente lite interest also, in the same manner as the civil Court would have done u/s 34, C.P.C. The Supreme court pointed out that in a good number of cases decided earlier by the Supreme Court where interest was awarded during the pendency of the case before the arbitrator, the facts were clear that the reference was made during the pendency of a regular civil suit and the Supreme Court construed that fact as impliedly conferring a power on the arbitrator to award interest during the pendency of the case before the arbitrator, in the same way as the Court from which it has taken over the matter, would have awarded the interest u/s 34, C.P.C. It is important to notice that the Supreme Court distinguished the leading case in Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., as a case where a reference was made to arbitration after the matter was pending in a regular civil suit. In fact it was this case that had led to certain confusion in various cases decided by the High Courts as enabling the arbitrator to award interest pendente lite before him. Those cases, it is now revealed from the judgment of Chinnappa Reddy, J. did not notice that Union of India v. Bungo Steel Furniture Private Limited a case one where the reference was made in a pending suit. Similarly the Supreme Court classified the other decided cases into various categories and pointed out that interest is not to be awarded in cases where the reference has not been made in a pending suit. Interest could be awarded pendente lite before the arbitrator till the date of decree if the reference was made in a pending civil suit.

The above principles mentioned by me are nothing but a reproduction of the principles of law laid down by the Supreme Court in Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, . I shall, however, extract certain important portions of the said judgment of the Supreme Court which read as follows (at p. 1523) :

"The result is that while in cases arising after the commencement of the Interest Act of 1978, an arbitrator has the same power as the Court to award interest up to the date of institution of the proceedings, in cases which arose prior to the commencement of 1978 Act, the arbitrator has no such power under the Interest Act of 1839. It is, therefore necessary, as we said, to look elsewhere for the power of the arbitrator to award interest up to the date of institution of the proceedings. Since the arbitrator is required to conduct himself and make the award in accordance with law, we must look to the substantive law for the power of the arbitrator to award interest before the commencement of the proceedings. If the agreement between the parties entitles the arbitrator to award interest, no further question arises and the arbitrator may award interest. Again if there are any other provisions of the substantive law enabling the award of interest, the

arbitrator may award interest. By way of an illustration we may mention Section 30 of the Negotiable Instruments Act as provision of substantive law under which the Court may award interest even in a case where no rate of interest is specified in the promissory note or bill of exchange. We may also refer to Section 61(2) of the Sale of Goods Act which provides for the award of interest to the seller or the buyer as the case may be under certain circumstances in suits filed by them. We may further cite the instance of the non-performance of a contract of which equity would give specific performance and to award interest. We may also cite a case where one of the parties is forced to pay interest to a third party say on an over-draft, consequent on the failure of the other party to the contract not fulfilling the obligation of paying the amount due to them. In such a case also, equity may compel the payment of interest. Loss of interest in the place of right to remain in possession may be rightfully claimed as an equity by the owner of the property who has been dispossessed from it."

(ii) The second category of cases in which interest could be paid during the pendency of the proceedings before the arbitrator are cases where the provisions of the new Interest Act 1978 are attracted. It may here be noted that the Interest Act 1978 (Act 14 of 1978) has been notified to come into force with effect from 19-8-1981. Section 2(a) of that Act defines a "Court" as including a Tribunal and an arbitrator. Section 3 of the Interest Act, 1978 enables the arbitrator who is a "Court" to award pendente lite interest during the pendency of the arbitration proceedings, before the arbitrator, provided the Interest Act, 1978 applied to the case. The Act contains six sections unlike the earlier Interest Act 1839 which contained only one section. It is important to note that u/s 6 of the Act, the provisions of that Act shall not apply to any suit or other legal proceedings pending at the commencement of the Act and provisions of the corresponding law applicable immediately before such commencement shall continue to apply to such suit or other legal proceedings, notwithstanding, the repeal of such law. It is also important to notice that u/s 5 it is stated that nothing in the Act shall affect the provisions of Section 34 of the C.P.C. Obviously the Parliament intended by Section 5 that the provisions relating to award of interest as a matter of substantive law under the provisions of the Interest Act, 1978 for the period prior to the commencement of the suit or legal proceedings should not be confused as in any way interfering with or affecting the power of a regular civil Court u/s 34 to grant interest as a matter of procedural law u/s 34 of C.P.C.

11. In relation to award of interest by the arbitrator during the pendency of the case before the arbitrator the Supreme Court in *Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others*, referred to the observations of Bose, J. in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, and two other cases and pointed out as follows :

".....the claimants would not be entitled to the same (i.e., interest during the pendency of the proceedings before the arbitrator) for the simple reason that the

arbitrator is not a Court within the meaning of Section 34 of C.P.C., nor were the references to arbitration made in the course of suits. In the remaining cases which arose before the commencement of the Interest Act 1978 the respondents are not entitled to claim interest either before the commencement of the proceedings or during the pendency of the arbitration.....They are not entitled to claim pendente lite interest as the arbitrator is not a Court nor were the references to arbitration made in suits. One of the submissions made on behalf of the respondents was that in every case all disputes were referred to arbitration and the jurisdiction of arbitrator to award interest under certain circumstances was undeniable.....It is difficult to agree with this submission. The arbitrator is bound to make his award in accordance with law. If the arbitrator could not possibly have awarded interest on any permissible ground because such ground did not exist, it would be open to the Court to set aside the award relating to the award of interest on the ground of an error apparent on the record."

12. In the second judgment rendered by the Supreme Court in *State of Orissa and Others Vs. Construction India*, , the Bench consisted of Sabyasachi Mukharji and S. Ranganathan, JJ. The learned Judges observed at the end of the judgment as follows (at p. 1531) :

"We must note that the award inasmuch as the interest which had been awarded is to set aside to the extent that the award of interest from the commencement of the proceedings before the Arbitrator to the date of award. Subject to this modification the SLP is dismissed. The award will stand modified by deletion of interest for that period viz., from the commencement of reference before the arbitrator to the date of award."

13. In the third case in *Food Corporation of India Vs. Surendra, Devendra and Mohendra Transport Co.*, at P. 739), the Bench again consisted of Sabyasachi Mukharji and S. Ranganathan, JJ. it was observed :

"In a recent decision, Chinnappa Reddy, J. speaking for a Bench of three learned Judges in *Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others*, at para 18 of the judgment considered the question of award of interest by an arbitrator. The learned Judge noted the decisions in *Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore*, ; *Ashok Construction Company Vs. Union of India (UOI)*, and the *State of Madhya Pradesh Vs. Saith and Skelton (P) Ltd.*, and expressed the view that these were cases in which the references to arbitration were made by the Court or in Court proceedings of the disputes in the suit. It was held that the arbitrator must be assumed in these cases to have the same power to award interest as the Court. Therefore, the grant of pendente lite interest on the analogy of Section 34 of the CPC was permissible. In regard to interest prior to the suit, it was held in most of these cases that since the Interest Act, 1839 was not applicable, interest could be awarded if there was an agreement to pay interest or a usage of trade having the force of law. This Court held in the last mentioned case that they are not

entitled to claim interest for the period prior to the commencement of the arbitration proceedings for the reason that the Interest Act did not apply to their case and there was no agreement to pay interest or any usage of trade. It was further held that the claimants were not entitled to claim pendente lite interest as the arbitrator was not a Court nor were the references to arbitration made in suits."

14. After stating as in the above passage, their Lordships deleted the award of interest pendente lite.

15. In view of the provisions of Article 141 of the Constitution of India, the decisions of this Court including the one rendered by me in Food Corporation of India v. S. Krishnaiah, (1987) 2 Andh LT (SN) 55 to the extent of the applicability of Section 34, C.P.C. for the period during which the matter is pending before the arbitrator, must be treated as not correct.

16. I shall now deal with the facts of the present case.

(a) So far as the interest prior to commencement of arbitration proceedings is concerned the substantive law or the principles of equity above referred to have to be considered. The only ground on which interest was awarded by the arbitrator for the period prior to the pendency of the proceedings is on the basis that in Ex. A-14 notice dated 1-8-1979 there is a demand for interest. If there was a claim for interest in the said notice, the interest would certainly have become payable u/s 1 of the Interest Act of 1839, if there was a demand in respect of a sum certain. As pointed out in State of Rajasthan Vs. Raghubir Singh and Others, it may be a sum now payable or which may become payable in future by reason of a present obligation. It may also be in respect of a debt or a sum which was ascertained or was ascertainable on a calculation to be made in accordance with the terms of the agreement. In a claim in such a notice, claiming an amount of loss by way of interest", interest could be awarded. But in the present case Ex. A-14 merely claims so far as the tender No. 2 is concerned, a sum of Rs. 18,285-75 only and no interest in regard to that particular tender is claimed in Ex. A-14. A reading of the notice discloses that in respect of certain other tenders interest was claimed but not in relation to this tender No. 2 with regard to the claim for storage charges of 2709 bags of food-grains. The learned counsel for the Corporation fairly conceded that there was no claim for interest on the sum of Rs. 18,285-75 in Ex. A-14 and that the factual assumption of the learned arbitrator in this regard was not correct. It is therefore clear that no interest could have been awarded as a matter of substantive law for any period prior to the commencement of the arbitration proceedings i.e., prior to 15-10-1980.

(b) So far as the claim for interest during the pendency of the proceedings before the arbitrator is concerned, inasmuch as the arbitrator is not a court no interest is payable for the period during which the proceedings were pending before the arbitrator. Inasmuch as the award was made on 19-6-1981 before

commencement of the Interest Act 1978 on 19-8-1981 no interest can be awarded u/s 3 of that Act for the period during which the proceedings were pending before the arbitrator. Further this is not a case where the reference to the arbitration was made in a pending civil suit. For that reason also, the arbitrator had no power to award interest, pendente lite. In the result the arbitrator could not have granted interest during the pendency of the proceedings before him. u/s 29 of the Arbitration Act, interest, can however, be granted by the Court from the date of decree.

17. I, therefore, set aside the award and the judgment and decree passed by the lower Court as well as the order in the O. P. filed by the appellant and hold that the respondent-Corporation is entitled only to a sum of Rs. 18,285-75 with interest at 12% P. A. as awarded by the lower Court from the date of decree viz., 3-9-1985 till the date of payment. The appeal and revision are partly allowed to the extent mentioned above. In the circumstances of the case there shall be no order as to costs.