(1994) 07 BOM CK 0061

In the Bombay High Court

Case No : Arbitration Petition No. 367 of 1994 in Award No. 204 of 1993

Mazgaon Dock Ltd APPELLANT

Vs

Mcdermott International Inc RESPONDENT

Date of Decision : 15-07-1994

Acts Referred:

Arbitration Act, 1940 — Section 30
Civil Procedure Code, 1908 (CPC) — Section 34
Negotiable Instruments Act, 1881 (NI) — Section 80

Citation : (1995) 2 BomCR 412

Hon'ble Judges : A.P. Shah, J

Bench : Single Bench

Advocate : Sh. V.V. Tulzapurkar and S. Doctor, for the Appellant; Sh. S.H. Doctor and D.D. Madon, for the Respondent

Judgement

A.P. Shah, J.—The petitioners had floated global tender No. OP/SC/INST/101 dated July 18, 1983 for the transportation and installation of certain structures fabricated by it, transportation and laying of pipe-lines, etc. for the working season 1983-84. After reviewing the offers received, the petitioners awarded to the respondents on a lumpsum contract basis the contract No. AA/OP/64/83-84, OP/SC/INST/101 dated January 14, 1984, which is referred to by the parties as "Contract No. D-2318". Clause 53 of Annexure XIII of the contract provided for arbitration of disputes between the parties.

2. Certain disputes arose between the petitioners and the respondents by their letter dated August 7, 1989 appointed their arbitrator and called upon the petitioners to appoint their arbitrator to decide the disputes that had arisen. Thus the disputes came to be referred to the Joint Arbitration of Shri R. B. Bhatt and Shri B. Datta. The Joint Arbitrators differed and consequently, the reference was made to the Umpire, Shri Y. V. Chandrachud, the Ex. Chief Justice of the Supreme Court of India. The arbitration relating to the disputes under the contract bearing Reference No. D-2318 for the sake of convenience was referred to by parties, and by the learned Umpire in his Award as "Case No. 1" as there

were references to arbitration of the same Umpire in respect of disputes arising out of the two later agreements between the parties bearing Refs. No. D-2807 and D-2827.

3. The learned Umpire, after hearing the parties, made and published three Awards all dated September 12, 1993 in respect of all the three cases. As far as Contract No. D-2318 (Case No. 1) with which I am concerned in the present petition, the respondents had preferred claims aggregating to U.S. $ 20,921,817.50 under the following four principal heads of claim together with interest in respect of those claims and the learned Umpire was pleased to partly grant respondent''s claim as follow :

-- Particulars of Claim Amount of Claims as Claim Awarded (In U.S. $) (U.S. $) -- I. Priority work 222,000.00 46,410.00 II. Reimbursement of Income tax paid 584,790.00 Nil by M.I.I. under assessment orders III. Interest by way of damages on 851,747.50 Nil amounts withheld by Income Tax authority order on M.I.I. contracts IV. Interest on invoices which are paid 333,280.00 36,439.00 late --

20,921,817.40 82,849.00

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4. In this petition u/s 30 of the Arbitration Act, 1940 ("the said Act" of short), the petitioners are challenging the claim allowed at Serial No. IV of interest on invoices which were paid late. The petitioners are also challenging the claim of interest allowed by the learned Umpire for payment of interest at 12% per annum from June 30, 1987 on item at serial No. 1 viz. ''Priority work''.

5. In order to appreciate the challenge raised by the petitioners in the present petition, it will be necessary to refer to para 5.1 of the Statement of claim in which the respondents claimed a sum of U.S. $ 3,33,280.01 by way of interest on late payment of invoices. The interest is claimed at 15% per annum from the date the payment was due until the payment was made. Under the contract, the petitioners were required to pay invoices within 30 days of their receipt. Though, in the Statement of claim, the interest on late payment of invoices is shown as U.S. $ 3,33,280.01 in the "Details of M.I.I.''s Claims" filled by the respondents before the learned Umpire on November 11, 1992, such interest is shown as U.S. $ 1,62,534.78. The learned Umpire disallowed the major part of the claim for interest on the ground of limitation. As regards the claim for interest, which was within limitation, the learned Umpire held that the respondents will be entitled to interest on late payment of invoices. The relevant finding of the learned Umpire on this claim is as follows :

"In fairness and in equity, M.D.L. should be asked to pay the sum of U.S. D. 36,439 (as rounded off) by way of interest on late payment of invoices. The Supreme Court in Mahavir prasad Rungta''s case cited above, observed in paragraph 12 that "Interest is also awarded in some cases by courts of equity", but that, the case before it did not fall within those cases in which courts of equity grant interest."

"In the instant case, M.D.L. had no justification for not paying the invoices in time. Besides, it is in the enviable position of being able to ward off the bulk of claim for interest on the ground of limitation. Equity demands that M.D.L. ought to pay U.S. D. 36,439 by way of interest on late payment of invoices which are within limitation."

6. As regards the claim of interest on item No. 1, namely, ''Priority work'' the learned Umpire was pleased to allow interest from June 30, 1987 till realisation on the following observations :

"In regard to the balance of U.S. D. 2,22,000 which was deducted from the dues of M.I.I. and which, M.D.L. wrongly refused or failed to reimburse to M.M.I., it is only fair and equitable that M.D.I. should pay that amount to M.I.I. with interest at 12% per annum from 30th the June, 1987 until payment. The interest shall be paid and appropriated separately on U.S. D. 46,410 in case No. 1 of 1989 and on U.S. D. 1,75,590 in case No. 2 of 1989."

7. Mr. Tulzapurkar, learned Counsel for the petitioners, submitted that in awarding interest on ground of equity, the learned Umpire has proceeded on an erroneous legal proposition apparent on the award and acted contrary to the judgments of the Supreme Court and particularly the principles laid down by the Supreme Court in (Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others,). Mr. Tulzapurkar submitted that the respondents have claimed interest by way of damages and since it is not permissible to award interest by way of damages, the learned Umpire ought to have rejected the respondent''s claim for interest. Mr. Tulzapurkar pointed out that the learned Umpire specifically held that the interest by way of damages cannot be granted. Mr. Tulzapurkar also pointed out that admittedly there was no contract to pay interest nor any usage or custom was shown permitting such claim for interest and that the respondents are also not entitled to claim interest under the Interest Act, 1978, as admittedly no notice was issued claiming interest. According to Mr. Tulzapurkar, the interest can be granted for the period prior to commencement of the arbitration proceedings only, if the case is covered under the Interest Act, 1978 or there is an agreement to pay interest or any usage or trade having the force of law or any other provisions of law under which such interest can be awarded. Mr. Tulzapurkar submitted that in the absence of any such agreement or provision of law, the respondents cannot claim interest. Mr. Tulzapurkar submitted that the learned Umpire has committed an error apparent on the face of the record in awarding the interest in respect of pre-reference period on equitable grounds. Mr. Tulzapurkar further submitted that the reliance placed by the learned Umpire on the judgment of the Supreme Court in Mahabir Prashad Rungta Vs. Durga Datt, is misconceived because the said judgment lays down that the interest cannot be awarded just because it is equitable to do so.

8. Mr. Doctor, learned Counsel for the respondents, in reply, contended that it has been well established that the court in India can grant interest on equitable grounds. Mr. Doctor contended that it has been laid down by the Privy Council in AIR 1938 67 (Privy Council) that the proviso to Section 1 of the Interest Act, 1839 applies to a case in which the court in equity exercises jurisdiction to allow the interest. Mr. Doctor further contended that in Mahabir Prasad Rungta''s case (supra), the Supreme Court has clearly held that the interest can be awarded on equitable grounds. Mr. Doctor also brought to my notice a Division Bench judgment of this court in Union of India and another v. D. P. Walia & Sons. AIR 1977 Bom. 10, in support of his contention that the Arbitrator has got power to award interest on equitable grounds. Mr. Doctor further contended that the issue of interest was also referred to the learned Umpire and, therefore, even assuming that the learned Umpire has decided the issue wrongly, this court cannot interfere with the award under the provisions of Section 30 of the said Act. Mr. Doctor contended that it is not the case of the petitioners that the Arbitrator has travelled beyond the scope of reference and since the award of interest is a matter strictly falling within the jurisdiction of the Umpire, it is not permissible for the petitioners to challenge the award of interest in the present petition.

9. The Arbitrator undoubtedly is a domestic forum. It is a forum other than a court of law constituted by the parties or by provisions of law for determination of disputes and differences, after hearing both the sides, in judicial manner. The Arbitrator has to conform broadly to judicial trappings. It has been held by the several judgments of the court that an Arbitrator is bound by the legal principles and has to adhere to the provisions of law applicable to the adjudication of matters before him. Having regard to the functions and position of the Arbitrator it is implicit that an Arbitrator must have the powers of the judicial nature so as to facilitate determination of disputes and differences between the parties relating to an award which when made a rule of the court acquires legal sanctity, and becomes final, binding and conclusive. Application of this principle to the question of competence of the Arbitrator to award the interest is a matter of some controversy, which can be divided broadly into two parts, namely, the power to award the interest pendente lite and future interest and the second part is power to award the pre-reference interest. As far as the Arbitrator''s power to award interest pendente lite and future interest, the position is more or less settled by a judgment of five Judges'' Bench in (Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy,). After taking into consideration the previous judgments of the Supreme Court and Privy Council and some of the High Courts, the Supreme Court was pleased to lay down the five propositions in paragraph 43 of the judgment. Though Mr. Doctor conceded that in G. C. Roy''s case (supra), the Supreme Court was mainly concerned with the Arbitrator''s power to award interest, pendente lite and future interest, he tried to draw support from the proposition No. (1) as laid down by the Supreme Court in paragraph 43 of the said judgment in support of his contention that the

Arbitrator has power to award interest for pre-reference period on equitable grounds. The said proposition No. (1) laid down by the Supreme Court reads as follows :

"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 basis 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, C.P.C. and there is no reason or principle to hold otherwise in the case of arbitrator."

Mr. Tulzapurkar, however, brought to my notice that in a subsequent judgment by two Judges of the Supreme Court in (State of Orissa Vs. B.N. Agarwala,), it has clearly laid down that the judgment in G. C. Roy''s case was confined to the power of the Arbitrator to award interest pendente lite. It did not pertain to nor it did pronounce upon the power of the arbitrator to award interest for the period prior to his entering upon the reference. Mr. Tulzapurkar also point out that this very aspect has been clarified by Jeevan Reddy, J., in his concurring judgment in (Jugal Kishore Prabhatilal Sharma and others Vs. Vijayendra Prabhatilal Sharma and another,). Mr. Tulzapurkar submitted that the decision of the Supreme Court in Abhaduta Jena''s case (supra) was still a good law as far as the award of interest for perseverance period is concerned. Mr. Tulzapurkar brought to my notice the judgment of the Supreme Court in Jugal Kishore''s case (supra) and particularly the following observations made by Jeevan Reddy, J., in a concurring judgment :

"The decision in G. C. Roy was concerned only with the power of arbitrator to award interest pendente lite. It was not concerned with his power to award interest for the pre-reference period." "In the circumstances, it would not be correct to read the first of the five principles set out in para 43 as overruling Jena insofar as is dealt with the arbitrator''s power to award interest for the pre-reference period. Principle No. (1) should be read along with principle No. (v) wherein it is clearly stated that the interest for the period anterior to the reference (pre-reference period) is a matter of substantive law unlike interest pendente lite. The conclusion in para 44 again deals only with the power of the arbitrator to award interest pendente lite. It is, therefore not right to read the said decision as overruling Jena in so far as it dealt with the power of the arbitrator to award interest for the pre-reference period."

In view of these clear observations of the Supreme Court, there is no difficulty accepting Mr. Tulzapurkar contention that the G. C. Roy''s case was concerned only with the power of Arbitrator to award interest pendente lite and that the decision of the Supreme Court in Abhaduta Jena''s case is still a good law as far as the award of interest for pre-reference period is concerned. The crucial question, which is required to be considered is whether grant of interest on equitable grounds is impermissible view of the law laid down by the Supreme

Court in Abhaduta Jena''s case. But before I deal with the Judgment in Abhaduta Jena''s case, it will be necessary to make a reference to the judgment of the Privy Counsel in Bengal Nagpur Railway Co.''s case (supra) and also the judgment of he Supreme Court in Mahabir Prasad Rungta''s case on which the learned Umpire has placed considerable reliance for awarding interest on equitable grounds.

The facts in Bengal Nagpur Railway Co.''s case were that certain rates of payment under an agreement for the construction of a railway line were abandoned by mutual consent of the parties and the contractor was required to be paid at rates which were fair and reasonable for the work done. The question arose whether the contractor was entitled to be paid interest on the amount which the Railway Company was liable to pay. The Privy Counsel found that the railway was liable to pay to the plaintiff an amount of Rs. 6,69,801.06 on July 26, 1925. The suit for recovery of the amount was filed on November 29, 1927. The Privy Council held that award of interest from the date of the institution of the suit was governed by Section 34 of the CPC and went on to observe that the crucial question was whether the court had authority to allow interest for the period prior to the institution of the suit. The Privy Council observed that the solution of the question depended not upon the Code of Civil Procedure, but upon substantive law. Interest for the period prior to the date of the suit may be awarded if there was an agreement for the payment of interest at a fixed rate or it was payable by the usage of trade having the force of law or under the provision of any substantive law entitling the plaintiff to recover interest. Section 80 of the Negotiable Instrument Act was cited as a provision of the substantive law under which court may award interest when no rate of interest of specified in the promissory note or bill of exchange. In the case before them, however, they observed that there was neither usage nor contract, express or implied, to justify the award of interest. Interest shall not be payable by virtue of any provisions of the law governing the case. Under the Interest Act of 1839, the court may allow interest to the plaintiff, if the amount claimed is a sum certain, which is payable at a certain time by virtue of a written instrument. But it was conceded that the amount claimed in the case was not a sum certain. Referring to the provisions of Section 1 of the Interest Act, which stated that interest shall be payable in all cases in which interest shall then payable by law, the Privy Council observed that proviso applies to cases in which the court of equity exercises jurisdiction to allow interest. But then they said the case before them did not attract the jurisdiction of the court. The precise observations made by Privy Council on the Court''s power of granting interest on equitable grounds may be reproduced as follows :

"The Interest Act, however, contains a proviso that ''interest shall be payable in all cases in which it is now payable by law''. This proviso applies to cases in which the court of equity exercises jurisdiction to allow interest. As observed by Lord Tomlin in 1929 A.C. 631 :

In order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance.

The present case does not however attract the jurisdiction of the court and cannot come within the purview of the proviso."

The next judgment which is of some importance is the judgment in Mahabir Prasad Rungta''s case (supra). In that case, two cross suits were filed. One suit was filed by one Rungta for claiming damages for breach of the contract of work of transport Rungta claimed a sum of Rs. 60,000/- as damages including Rs. 20,000/- as general damages for loss of business, credit and reputation. The other suit was filed by one Durga Dutta claiming a decree for Rs. 4,95,441,20/- by way of damages. The Supreme Court held that Rungta was guilty to breach of the contract. While dealing with Durga Datta''s claim for interest on amount of damages, the Supreme Court observed as follows :

"There remains the question of interest. Interest for a period prior to the commencement of suit''s claimable either under a statutory provision or under the Interest Act, for a sum certain where notice is given. Interest is also awarded in some case cases by courts of equity. AIR 1938 67 (Privy Council) . In the present case no agreement about interest was made, nor was it implied. The notice which was given did not specify the sum which was demanded, and, therefore, the Interest Act does not, apply. The present case does not fall within those cases in which courts of equity grant interest. Learned Counsel for Durga Datta claimed interest as damages; but it is well-settled that interest as damages cannot be awarded. Interest upto date of suit, therefore, was not claimable, and a deduction shall be made of such interest from the amount decreed. As regards pendente lite until the date of realisation, such interest was within the discretion of the court.

10. To my mind, the legal position appears to be clear. The dispute as to payment of interest is a dispute which is capable of reference to arbitration under the provisions of the said Act. Such a dispute, if referred to the Arbitrator, brings it within his competence to make an award in respect of payment of interest by one party to the other. The perimeters governing the excise of his jurisdiction however, will be the same as obtain to a Court of law, in the matter of awarding interest. Now the Supreme Court has authentically laid down the law relating to the award of interest in Mahabir Prasad Rungta''s case (supra) and upon the authority of the Supreme Court it can be, therefore, observed that past interest can be granted by a court when there is an agreement between the parties or there exists an usage of trade or a statutory provisions providing for grant of interest. Such interest also can be granted upon equitable grounds. There are several statutes, which make provisions for the payment of interest, such as, Sale of Goods, Act, Negotiable Instruments Act and the Interest Act. The question as to whether a person is entitled to the direction for interest would

depend on the facts of each case or the provisions of law or of equity or of the contract in question upon which such a claim of interest is founded. The judgment of the Supreme Court in Mahabir Prasad Rungta''s case (supra) was considered by the Division Bench of this court in D. P. Wadia & Sons case (supra). The following observation of the Division Bench are extremely material for the present case :

"The arbitrator has competence to award interest provided the claim for such interest is based either on the agreement between the parties or substantive provision of law applicable thereto or upon on equitable principle impinging thereon. This is upon the principle that it is an implied incident of a reference that an arbitrator can give such relief with regard to interest as a court could give if it decided the dispute. In all cases, it would be a question of fact as to whether a particular award for interest made by the arbitrator is justified under the provisions of law, invoked by the parties and the material on record before the arbitrator."

11. Mr. Tulzapurkar, however, submitted that the award of interest on equitable grounds is contrary to the decision of the Supreme Court in Abhaduta Jena''s case. Mr. Tulzapurkar brought to my notice the following observations made by the Supreme Court in Abhaduta Jena''s case :

"In the remaining case 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 interest for the period prior to the commencement of the arbitration proceedings for the reason that the Interest Act, 1839 does not apply to their cases and there is no agreement to pay interest or any other provisions of law under which the claimants were entitled to recover interest".

Mr. Tulzapurkar submitted that in view of the Abhaduta Jena''s case the interest can be awarded for the pre-reference period only in following situations and not otherwise :

(1) that interest in payable under the Interest Act :

(2) that there is an agreement to pay interest or interest is payable under any usage or trade having the force of law;

(3) that interest is payable under any other provisions of law under which the claimant is entitled to recover the interest.

Mr. Tulzapurkar submitted that in view of the clear pronouncement of law in Abhaduta Jena''s case, it is not open for the learned Umpire to award interest on equitable consideration. To my mind, the submissions of Mr. Tulzapurkar are not well-founded. On careful study of the judgment in Abhaduta Jena''s case (supra). I do not find that the Supreme Court has restricted the award of interest only to the three situations mentioned by Mr. Tulzapurkar. It is also not possible to accept Mr. Tulzapurkar''s contention that the award of interest on equitable grounds is excluded by the said case. In Abhaduta Jena''s case (supra) the Supreme Court in Bengal specifically referred to the judgment of the Privy Council in Bengal Nagpur Railways Co.''s case (supra) and while dealing with the said judgment, the Supreme Court has considered the situations where the Courts in India can grant interest for pre-ferrous period on equitable grounds, which is clear from the observations made by the Supreme Court in para 7 of judgment in Abhaduta Jena''s case (supra). In my opinion, Mr. Tulzapurkar is not right in contending that the grant of interest on equitable consideration is excluded by reason of pronouncement of law in Abhaduta Jena''s case. On the other hand, in Abhaduta Jena''s case the Supreme Court has categorically observed that if there was a slightest possibility of the entitlement of the claimant to interest on one or other of the legally permissible ground it may not be open to the court to go behind the award and decide whether the award of interest was justifiable. In my opinion the learned Umpire has not committed any error or mistake in awarding interest on late payment of invoices and on priority work. The learned Umpire has also taken into consideration the fact that the petitioners have successfully award off the bulk of the claim of interest on the ground of limitation. The learned Umpire cannot be faulted for accepting the respondents'' claim for interest. In the result, Arbitration Petition is dismissed with no order as to costs.

12. On the oral request of Mr. Tulzapurkar, the operation of this order is stayed for a period of eight weeks.

13. Petition dismissed.

