

(1998) 03 J&K CK 0026

In the Jammu And Kashmir High Court

Case No : Arbitration Application No. 57 of 1983

N.D. Radha Krishen and Co.

APPELLANT

Vs

State of Jammu and Kashmir

RESPONDENT

Date of Decision : 11-03-1998

Acts Referred:

Jammu and Kashmir Arbitration and Conciliation Act, 2002 — Section 29, 30

Citation : AIR 1999 J&K 8

Hon'ble Judges : Arun Kumar Goel, J

Bench : Single Bench

Advocate : D.S. Thakur, for the Appellant; Hafiz-Ul-Rehman, Government Advocate, for the Respondent

Judgement

Arun Kumar Goel, J.—Heard learned counsel for the parties and have gone through the records of this case.

2. Brief facts giving rise to this case are that Qazi Ghulam Rasool, Retired Chief Engineer, was appointed as a sole arbitrator with mutual consent

of the parties, by this Court vide its order dated 27-2-1985 in Arbitration Petition No. 248 of 1983 for going into the disputes which had arisen

between the parties. On receipt of intimation communicated through Deputy Registrar of this Court under his endorsement No. 17931 dated 27-3-

1985, the arbitrator entered upon reference. Both the parties filed their claims/counter claims before the arbitrator and on conclusion of the

arbitration proceedings, award was made and published by the arbitrator on 21-9-1989. the award was filed in the Court.

3. Record of the case shows that award was received in the Registry of this Court on 22-9-1989 and objections were filed by the

respondent/objector on 26-10-1989, reply to such objections of the State was

filed by the non-objector/petitioner and on 31-7-1991 following issues were framed by the Court:-

- I. Whether the arbitrator has committed misconduct in making his award? If so, how? O.P. State.
2. Whether any part of the claim awarded by the arbitrator was without any evidence? If so, how and to what effect? O.P. State.
3. Whether the Award made by the arbitrator is liable to be made a rule of the Court? O.P. Claimant.

Right from 31-7-1991 time was granted to the State/Objector to file evidence by way of affidavits. It appears, that at one point of time shelter was taken on behalf of the State/Objector that since affidavit is to be first filed by the non-objector/petitioner, as such it is thereafter in terms of the order of the Court dt. 31-7-1991 that objector/respondent was to file objections keeping in view the tenor of the issues framed in this case, this plea was hardly open to the non-objector/respondent-State, yet this position was clarified vide order of the Court dated 12-9-1996, despite that till date no evidence by way of affidavit was filed, why and for what reasons is not known and is also not spelt out from the records of this case.

This shows the attitude and apathy of those who are entrusted with the running of day-to-day affairs of the welfare State.

4. In the aforesaid background, this Court had no option but for proceeding to hear the matter as if this is a case of no evidence in support of the objections filed by the objector/State against the award being made rule of the Court.

5. Mr. H. Rehman, learned Government Advocate argued that on the basis of the material on record even if evidence on behalf of the objector is not there, still he can support his objections by referring to the material which was there on the record of the arbitrator. Main thrust of the submissions of Mr. Rehman was that the arbitrator had fallen into an error by allowing pre-reference as well as pendent lite interest. In this behalf, it was further pointed out that in allowing interest from 12-2-1977 till the passing of the award in favour of the non-objector/petitioner is not sustainable. Incidentally, it may be clarified that interest at same rate with effect from 1-11-1973 till the date of passing of the award has been granted in favour of the objector/respondent on the amount that was found

payable by the non-objector to the objector.

6. Other pleas urged while questioning the impugned Award were that from the record it is manifestly clear that the arbitrator has misconducted

himself and has also not applied his mind while rejecting the counter-claim of the respondent-State, and the award is otherwise illegal and improper

as firstly it gives no reasons arid on the basis of so-called reasons contained in it, the same is not at all sustainable.

7. On the other hand learned counsel appearing for the non-objector/petitioner-claimant, has vehemently controverted all the pleas urged by Mr.

Rehman and while further advancing his case, it was pointed out that the arbitrator is well within his jurisdiction to have allowed the pre-reference

interest as well as pendenle lite interest till the passing of the award. Not only this, but with the aid of Section 29 of the Jammu and Kashmir

Arbitration Act, it was pointed out that interest from the date of making award rule of the Court be also granted in favour of his client.

8. Another ground urged on behalf of the non-objector/petitioner was that when a reference is made to the impugned award it is a case of non-

speaking award and alternatively reasons given are enough to uphold the same.

9. Before examining the submissions of learned counsel for the parties, in the peculiar background of this case, it is necessary to examine the scope

of interference in these proceedings as well as the limit within which the Court can correct an award passed by the arbitrator.

10. So far settlement of disputes between the parties by resorting to arbitration is concerned, it has a tradition in this country and has a social

purpose to fulfill, measure being heavy workload in the Courts of law. While examining an award primarily the Court has to see that the arbitrator

acts within the norms of justice and reasonableness. Once it is so held and then it is found that the Award is clear, besides being just and fair, then

the Courts would hardly interfere with the same and further insist upon the parties to accept and adhere to the same, as the matter had been

adjudicated upon by a person chosen by them for setting the controversy at rest.

11. Another consideration, while examining the Award, with the Court should be that the arbitrator, who is adjudicating the controversy between

the parties in his capacity as such, should have no interest and/or bias in favour of or against any of the parties to dispute and further he should give

adequate notice and fair opportunity to the parties of being heard in the matter. Once it is established that these requirements are met with then

neither under the law of arbitration nor under the Administrative law it can be said that the award is bad simply because reasons are not given. It

may further be noticed here that the rigours of ordinary law of the land what is known as public law would not apply to the proceedings before an

arbitrator in relation to the proceedings undertaken by him, commonly known as the disputes arising under the private law.

(See : Food Corporation of India Vs. Joginderpal Mohinderpal, and AIR 1990 SC 1426 Raipur Development Authority v. Chakhamal

Contractors).

12. Similarly, the rigours of Evidence Act are not applicable while examining and considering the evidence by the arbitrator. This is a matter which

the Court would ordinarily consider and examine while considering the correctness of the Award. Reason for doing so is that both the parties have

of their free will chosen an arbitrator i.e. a particular forum, for adjudicating their disputes to which power for appraisal of evidence is left in the

discretion of such forum i.e. the arbitrator. Not only this, but further the arbitrator is the exclusive person to consider, appraise and appreciate the

nature as well as quality of evidence produced before him. Further, the Court will not take upon itself the task of examining the evidence that was

before the arbitrator as if it is judging the same de novo. It hardly needs to be emphasised that on re-examination/ re-appraisal of such evidence

before the arbitrator, the Court might come to a different conclusion from the one arrived at by him, even then it will not be a ground for setting

aside the award of an arbitrator unless of course the case falls within the four corners of Ss. 30/33 of the Arbitration Act. Besides this, reasons

would vary in its conclusion according to the understanding of the person deciding a matter, which will further depend upon the time as well as

situation whereunder he considers the whole matter.

13. In Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, two questions Were decided by a constitutional Bench

of the Apex Court, viz. that the arbitrator has the power to award pendente lite interest where the agreement is silent as to the grant thereof, and

the other point decided was that a non-speaking award was not liable to be set

aside merely for want of reasons, unless of course it was so stipulated in the agreement. While deciding the first question, earlier view of the Supreme Court reported in *Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others*, was overruled and it was held as under :-

43. The question still remains whether arbitrator has the power to award interest pendente lite, and if so, what principle. We must reiterate that

we are dealing with the situation where the agreement does not provide for grant of such interest nor does it prohibit such grant. In other words,

we are dealing with a case where the agreement is silent as to award of interest. On a conspectus of aforementioned decisions, the following

principles emerge :

(i) 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. The 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, C.P.C., and there is no reason or

principle to hold otherwise in the case of arbitrator.

(ii) 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.

(iii) 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 proviso to Section 41 and Section 3 of Arbitration Act illustrate this point).

All the same, the agreement must be in conformity with law, The arbitrator must also act and make his award in accordance with the general law of

the land and the agreement.

(iv) Over the years, the English and Indian Courts have acted on the assumption that where the agreement does not prohibit and a party to the

reference makes a claim for interest, the arbitrator must have the power to award interest pendente lite. The awards Seth Thawardas Pherumal Vs.

The Union of India (UOI), has not been followed in the later decisions of this Court. It has been explained and distinguished on the basis that in

that case there was no claim for interest but only a claim for unliquidated damages, it has been said repeatedly that observations in the said

judgment were not intended to lay down any such absolute or universal rule as they appear to, on first impression. Executive Engineer (Irrigation),

Balimela and Others Vs. Abhaduta Jena and Others, , almost all the Courts in the country had upheld the power of the arbitrator to award interest

pendente lite. Continuity and certainty is a highly desirable feature of law.

(v) Interest pendente lite is not a matter of substantive law, like interest for the period anterior to reference (pre-reference period). For doing

complete justice between the parties, such power has always been inferred.

44. Having regard to the above considerations, we think that the following is the correct principle which should be followed in this behalf.

45. Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the

claim for principal amount or independently) : is referred to the arbitrator, he shall have the power to award interest pendente lite. This is for (he

reason that in such a case it must be presumed that interest was an implied term of the agreement between the parties and, therefore, when the

parties refer all their disputes - or refer the dispute as to interest as such - to the arbitrator, he shall have the power to award interest. This does not

mean that in every case the arbitrator should necessarily award interest pendente lite. It is a matter within his discretion to be exercised in the light

of all the facts and circumstances of (he case, keeping the ends of justice in view.

46. For the reasons aforesaid we must hold that the decision in Jena, Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and

Others, , insofar as it runs counter to the above proposi- tion,;did not lay down corre6t law.

14. In Sudarsan Trading Co. Vs. Government of Kerala and Another, , it was held that simply because reasons for making award having not been

given by the arbitrator, it was not liable to be set aside. Relevant paragraph of the judg ment is as under :--

29. The next question on this aspect which requires consideration is that only in a speaking award the Court can look into the reasoning of the award. It is not open to the Court to probe the mental process of the arbitrator and speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion. See the observations of this Court in Hindustan Steelworks Construction Ltd. Vs. C. Rajasekhara Rao, . In the instant case the arbitrator has merely set out the claims and given the history of the claims and then awarded certain amount. He has not spoken his mind indicating why he has done what he has done; he has narrated only how he came to make the award. In absence of any reasons for making the award, it is not open to the Court to interfere with the award. Furthermore, in any event, reasonableness of the reasons given by the arbitrator cannot be challenged. Appraisal of evidence by the arbitrator is never a matter which the Court questions and considers. If the parties have selected their own forum, the deciding forum must be conceded the power of appraisal of the evidence. 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. See the observations of this Court in Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, .

15. In Rishi Dev Batra Vs. Union of India (UOI), , while considering the matter relating to grant of interest for the period prior to reference, it was observed that when reference is made after coming into force of the Interest Act, arbitrator had the jurisdiction to have granted the same. Relevant paras of this judgment are to the following effect:

10. The moot question which remained for consideration is, whether the arbitrator had the power to grant interest for the period prior to his entering upon the reference, in other words, for the pre-reference period. This question cannot detain me as the question is now no longer res Integra. In view of the decision of the Supreme Court in Sudhir Brothers v. Delhi Development Authority, AIR 1995 SCW 4622 wherein it has been held that the arbitrator has the power and jurisdiction to award interest for the period between making of reference, to the arbitrator and his entering upon the reference after coming into force of the Interest Act, 1978.

Hence the decision of the Supreme Court in State of Orissa Vs. B.N.

Agarwala, , can be of no assistance to the respondent as in that case the Award was made prior to the coming into force of the Interest Act, 1978.

11. Interest, as we know, can be granted for three different periods, viz. (i) pre-reference, (ii) pendente lite, and (iii) post-award. So far as (he

period during which the arbitration proceedings were pending, i.e. pendente lite interest, is concerned, the arbitrator has the power to award the

same as held by the Apex Court in Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, . There can also be no

dispute about the post-award period. So far as the pre-reference period is concerned, when reference is made after the date of coming into force

of the Interest Act, 1978, the arbitrator has the power to grant interest for this period in view of what has been stated by the Apex Court in Sudhir

Brothers' case AIR 1995 SCW 4622 (supra).

12. In view of what has been stated above, it has to be held that as the reference in the instant case was made after 19-8-1981 (the date on which

the Interest Act was enforced), the arbitrator had the jurisdiction and was justified in granting interest for the pre-reference period. In view of my

finding that notice, as required by Section 3(b) of the Interest Act was served, it has to be held that the learned Subordinate Judge was not right in

deleting the grant of interest for the pre-reference period from the Award. Accordingly, that part of the impugned judgment and decree passed by

the learned Subordinate Judge deleting the grant of interest for pre-reference period from the Award, is set aside.

16. In another recent judgment reported in Sudhir Brothers Vs. Delhi Development Authority and Another, ; it was held as under:-

9. Thus, the law is now well settled that the arbitrator has the power and jurisdiction to grant pre-reference interest in references made after the

coming into force of the Interest Act, 1978. The Division Bench of the High Court was thus clearly in error in holding that the arbitrator had no

jurisdiction to award interest from 1-4-1984 till 8-2-1985 (pre-reference period) in the post-Interest Act, 1978 era. So far as the grievance of the

appellant pertaining to the disallowance of the claim of Rs. 23,685 under Clauses. 1, 3 and 4 is concerned, we do not find any error to have been

committed by the High Court. The above view of the Division Bench, therefore,

cannot be sustained.

17. In *State of Orissa Vs. B.N. Agarwalla, etc.,*, on the basis of applicability of Interest Act, 1978, it was held that the arbitrator had the power to

grant pre-reference interest from the date when this came into force. Thus the award of pre-reference interest was upheld w.e.f. 10-3-1981, the

date when Interest Act, 1978, came into force.

18. On this aspect of the case Shri Rehman vehemently urged that since Interest Act is not applicable in the State of Jammu and Kashmir, as such

the aforesaid decisions in regard to pre-reference period are inapplicable and thus they do not advance the submission urged on behalf of the

petitioner-non-claimant for upholding the award of interest for the pre-reference period and he submitted that the award in no case can be

sustained.

19. On the other hand learned counsel appearing for the petitioner-non-objector, pointed out that the matter need not detain the Court any further

in view of a Division Bench judgment of this Court reported in *Smt. Manjit Johl Vs. Dewan Modern Breweries Ltd.,* wherein it has been held as

under :-

17. The second limb of Mr. Gupta's submission regarding the question of interest pertains to the jurisdiction of the arbitrator to award interest

prior to the making of the reference. The argument was that since the Interest Act does not apply to the State of Jammu and Kashmir, the

arbitrator had no jurisdiction to award interest for the period anterior to the reference. We find no merit in this submission of Mr. Gupta either. The

entitlement of a party to claim interest depends upon either the availability of a statutory provision like the Interest Act or the existence of an

agreement to pay the same or the existence of a trade usage. Interest prior to the reference cannot be said to be payable only if the Interest Act is

applicable; it can be claimed even in a case where no statutory provision like the Interest Act is applicable, but the parties have entered into an

agreement, which envisages the making of such payment. It may also be payable where the party claiming interest proves the existence of a trade

usage of paying interest on the outstanding amount.

18. In the instant case even when the provision of the Interest Act do not apply, the admitted case of the parties is that the agreements executed by

them out of which the disputes and the reference to the arbitration has arisen do provide for payment of interest. The existence of such a

contractual stipulation was in our opinion enough to entitle the respondent to the payment of interest, no matter the Interest Act did not apply to the

Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, , is in our opinion misplaced. The said judgment dealt with the

question of grant of interest by an arbitrator pre-reference and pendente lite. As regards the pendente lite interest, the view taken was that the

arbitrator not being a Civil Court within the meaning of Section 34 of the Code of Civil Procedure, was not competent to award interest pendente

lite. This view, however, did not find favour with the Constitution Bench of the Supreme Court of India in Secretary, Irrigation Department,

Government of Orissa and others Vs. G.C. Roy, . Their Lordships have specifically overruled Executive Engineer (Irrigation), Balimela and Others

Vs. Abhaduta Jena and Others, insofar as the same held that [he arbitrator could not award interest pendente lite.

19. In regard, however, to the second issue, namely, the power of the arbitrator to award interest for pre-reference period, their Lordships held

thus Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, :

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 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 Usage of trade having the force of law or any other provision of law under which, the claimants were entitled to

recover interest. They are not entitled to claim pendente lite interest as the arbitrator is not a Court nor were the reference 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 the arbitrator to award interest under certain circumstances was undeniable. The award not being a speaking award, it was not permissible to

speculate on the reasons for the award of interest and the Court was not entitled to go behind the award and disallow the interest,: 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. On the other hand, if there was slightest possibility of the entitlement of the claimant to interest on one or other of the legally permissible grounds, it may not be open to the Court to go behind the award and decide whether the award of interest was justifiable.

20. It is, therefore, apparent that in a case where an agreement to pay interest existed like the present, the power of the arbitrator to award interest for pre-reference period was undeniable. It is also apparent that once there was the slightest possibility of the claimant being entitled to interest on one the other ground including the existence of a trade usage, the Court dealing with the award was not entitled to go behind the award and examine whether or not the interest had been justifiably awarded.

Admittedly, in the instant case, there is nothing to suggest on the file of the arbitrator as to in what terms the arbitration clause is couched and whether there was any prohibition regarding grant of interest by the arbitrator for pre-reference period or the pendente lite interest.

20. As already noticed, and is evident from the record of the case, that the petitioner-non-objector had imported the goods as out-agents of the Railways from August, 1972 till April, 1974, disputes relate to this period. Thus it is evident that the amount for which the non-objector has been held to be entitled had in fact been withheld by the objector without any justifiable cause. In these circumstances, it would be too late in the day for, either the objector to say and/or for this Court to hold that for want of applicability of the Interest Act, the non-objector is not entitled to pre-reference interest, as awarded by the arbitrator. The view being taken in this behalf is fully supported by the Division Bench judgment of this Court.

21. Although this is a case of no evidence produced by the respondent-State/objector in support of its objections despite numerous opportunities having been allowed right from 31-7-1991 till 4-12-1996, still the aforesaid questions have been determined because it was vehemently urged by Shri Rehman, who made all out effort to persuade the Court for allowing the

objections filed by the objector-respondent and consequently, setting aside the award. It is in these circumstances that matter was required to be gone into in detail and has been decided as such.

22. Learned Government Advocate was not at all in a position to point out with reference to the records of the arbitrator, that he has either

misconducted himself or the proceedings as was urged, nor any such infirmity has been found from the records. Accordingly, this plea is negatived.

23. In the background of this case it is also held that objector as well as non-objector, both are entitled to interest on the amounts awarded by the

arbitrator to each one of the parties in terms of his award from the date of this judgment till the date of payment in accordance with provisions of

Section 29 of the Act.

24. In view of the aforesaid discussion, objections filed by the objector-State against the award of the arbitrator, dated 21-9-1989, are hereby

rejected and the Award is ordered to be made rule of the Court with a further direction that both the parties shall be entitled to interest at the rate

of 15 percent per annum from the date of this judgment till payment as per the Award on the sums allowed to them by the arbitrator.

25. Decree sheet be drawn accordingly.

26. Petition stands dispose of. Costs on the parties.