
(2000) 04 GUJ CK 0006

In the Gujarat High Court

Case No : First Appeal No's. 217 to 220 of 1986

O.N.G.C.

APPELLANT

Vs

Anil Construction Co. and Another

RESPONDENT

Date of Decision : 06-04-2000

Acts Referred:

Arbitration Act, 1940 — Section 27, 29, 30

Citation : AIR 2000 Guj 284 : (2000) 3 GLR 2244

Hon'ble Judges : H.K. Rathod, J;D.C. Srivastava, J

Bench : Division Bench

Advocate : Rajni H. Mehta, for the Appellant; R.P. Bhatt, for the Respondent

Final Decision : Dismissed

Judgement

D.C. Srivastava, J.—These appeals arising out of the common judgment and decree of the City Civil Judge involving common questions of law and facts are proposed to be decided by a common judgment.

2. The brief facts giving rise to these appeals are as under :--

In terms of Clause 25 of the Arbitration Agreement between the parties, the arbitrator was appointed by the Court under Sections 8 and 9 of the Arbitration Act. The disputes between the parties were referred to the arbitrator who entered upon the reference. The arbitrator gave first interim award in favour of the first opponent before the Court below on 12-2-1983. This first interim award was admittedly accepted by the parties though with slight hesitation. The first opponent submitted second application on 25-4-1983 for second interim award, whereafter, second interim award was given by the arbitrator on 20-5-1983. Upon coming to know of the second interim award, the applicant moved before the arbitrator for time to file revision against the second interim award. Objection to the second interim award was also filed before the arbitrator through Civil Miscellaneous Application No.: 487 of 1983. The second interim award was passed in Civil Misc. Application No. : 418 of 1983 in Civil Misc. Application No :

555 of 1983. Objections to the interim award had been raised.

3. The main grievance of the Oil and Natural Gas Commission (for short "Commission") was that the arbitrator had no jurisdiction to give second interim award and that too without fixing the date of hearing and in spite of knowing the fact that Shri J.N. Gupta, nominee of the Commission before the arbitrator for conducting arbitration proceedings had proceeded on leave. The arbitrator did not wait and on 2nd July, 1983, final award was given by him. It was also alleged that sufficient time was not given to the Commission in the arbitration proceedings as a result of which, principles of natural justice were violated. It was also objected that the arbitrator had no jurisdiction and authority to award interest. Misconduct on the part of the arbitrator was also alleged on two grounds. Firstly, that the award was illegally procured and secondly that there was misconduct on the part of the arbitrator by giving ex parte award.

4. These averments were controverted by the other side.

5. The trial Court after considering the factual and legal aspects repelled these contentions and rejected the Civil Misc. Applications Nos : 555 of 1983 and 487 of 1983.

6. First Appeal No.: 217 of 1986 has been filed against the order of the Court below as appellant's objections in Misc. Civil Application No : 555 of 1983 were rejected, First Appeal No : 218 of 1986 has been filed against the order rejecting the objections of the Commission in Misc. Civil Application No. : 487 of 1983. First Appeal No. : 219 of 1986 has been filed against the order passed in Misc. Civil Application No : 418 of 1983 and First Appeal No : 220 of 1986 has been filed against the order on Misc. Civil Application No : 505 of 1983 which was an application for making the award rule of the Court.

7. Shri Rajani H. Mehta, learned counsel for the appellant and Mr. R.P. Bhatt, learned counsel for the respondent have been heard.

8. The first contention of Shri Mehta, learned counsel for the appellant, has been that no doubt the first interim award of the arbitrator was accepted by the parties, yet the arbitrator had no authority or power or jurisdiction to render second interim award and the interim award thus, suffers from vice of want of jurisdiction and manifest illegality. The learned counsel for the respondent on the other hand contended that interim awards could be rendered by the arbitrator and for this Section 27 of the Arbitration Act is complete answer.

9. Section 27(1) of the Arbitration Act provides that unless a different intention appears in the arbitration agreement, the arbitrators or umpire, may, if they think fit, make an interim award.

10. Sub-section (2) of Section 27 of the Act provides that all references in this Act to an award shall include references to an interim award made under Sub-section (1).

11. Thus, it is clear from these two subsections that interim award can be given by the arbitrator and interim award so given shall be deemed to be an award. In other words, the award shall include interim award as well. Shri Mehta however, contended that even if u/s 27, the arbitrator is authorised to give interim award, the intention of the legislature in enacting Section 27 is to permit and authorise the arbitrator to give only one interim award and not more than one interim award. He argued that the word interim award u/s 27 makes the intention of the legislature clear and the legislature did not intend to authorise the arbitrator to render more than one Interim award otherwise, the word should have been "interim awards" and not "interim award". However, this contention of Shri Mehta does not seem to be acceptable. In our opinion, the arbitrators have unfettered discretion to pass interim awards so long as the arbitration agreement does not provide otherwise. A similar view was taken by the Madras High Court in *Alagu Pillai (died) and Others Vs. Veluchami alias Mayilappa Pillai and Others*, and by the Calcutta High Court in *Durga Prosad Chamria Vs. Anardeyi Sethani*, . The arbitration agreement before us does not provide otherwise, Consequently, the authority of the arbitrator can hardly be challenged with success. The position under the Arbitration Act of 1899 was altogether different. There was no provision either under the Arbitration Act of 1899 nor under second schedule of CPC enabling the arbitrator to make interim award. Under the old law, award was required to be entire and complete and unless there was an agreement between the parties which authorised the arbitrator to make several awards, it was not competent for him to make award piecemeal. It was not permissible under the old law for him to give provisional or incomplete award which did not finally decide the matter in dispute and if he did so, it was not treated as an award and it could not be filed for the basis of any proceedings thereon but this position has been reversed under Sub-sections (1) and (2) of Section 27 of the Arbitration Act. Consequently, the order of the arbitrator giving second interim award does not suffer from any jurisdictional error nor it renders the final award invalid or illegal.

12. The next contention of Shri Mehta has been that there was misconduct on the part of the arbitrator. It was canvassed before the trial Court that the award was illegally procured. However, the trial Court has rightly repelled this contention as there was no material on record to uphold the objection of the Commission that the interim awards or final award, were illegally procured. As such it cannot be said that on the ground of misconduct on the part of the arbitrator, the award was liable to be set aside. There was no personal misconduct of the arbitrator nor any personal misconduct was proved by any cogent and reliable evidence on record.

13. The procedural misconduct on the part of the arbitrator was highlighted by Shri Mehta in the course of his argument but we are unable to accept his argument. The trial Court has dealt with in detail from the record maintained by the arbitrator and has after giving detailed reasonings recorded finding that principles of natural justice were not violated. The arbitrator was keen to decide

the proceedings before him expeditiously and still he granted several adjournments which have been mentioned in the judgment under appeal. It is not necessary to reproduce those dates in this judgment to make it unnecessarily bulky. It cannot be said that the final award was ex parte.

14. Shri Mehta emphasized that two witnesses were examined behind the back of the representative of the Commission and the Commission had no opportunity to cross-examine these witnesses which amounts to misconduct on the part of the arbitrator. Normally if one party examines one witness or more than one witness, the other party before the arbitrator has right to cross-examine such witness or witnesses. If that is not done, then it can be argued that the arbitrator misconducted with the proceedings and also violated the principles of natural justice and further relied upon the statements of the witnesses who were not cross-examined by the other side. In the case before us, the position is otherwise. The grievance of Mr. Mehta seems to be that two representatives of the Commission were called by the arbitrator and examined behind the back of the Commission. We have gone through the record and found that these two witnesses were not actually examined but on being asked by the arbitrator, submitted two letters dated 20th May, 1983 and 23rd May, 1983 which were taken on record. These two persons viz. Shri S.G. Kothari, Mr. Thomas and one Shri Prajapati were employees of the Corporation. Mr. Prajapati was authorised to remain present at the site on 8-5-1983. From the minutes of the proceedings of the arbitrator, it appears that the arguments were concluded in presence of Shri Prajapati on 7-5-1983 and 8-5-1983 was fixed for measurement at the site when also Mr. Prajapati was present. He never raised any objection that he was not authorised to participate in the proceedings before the arbitrator or that he was authorised only to remain present at the site on 8-5-1983. On 7-5-1983 Mr. Prajapati did not object to the proceedings before the arbitrator that he was not authorised or that he was not ready for argument. No doubt, Shri J.N. Gupta, who was overall in-charge of the arbitration proceedings from the side of the commission had proceeded on leave under intimation to the arbitrator but the arbitrator was not expected to go on granting adjournments. The trial Court has observed from the record of the arbitrator that detailed arguments were heard on 7-5-1983. The trial Court further found that as late as till 20-5-1983, the arbitrator had asked the parties to submit papers and other documents in support of their rival claims, still nothing was done. The arbitrator also indicated that the papers may be filed by the parties latest by 20th May, 1983 to enable him to declare the final award by 20th May, 1983. Since no documents were filed by the parties, final award was given by the arbitrator on 20-5-1983. In these circumstances, it cannot be said that simply because Mr. J. N. Gupta who had proceeded on leave, the arbitrator conducted the proceedings ex parte. There was no statement on oath given by Shri Kothari and Shri K.T. Thomas, Moreover, they were the persons under the employment of the commission and there was no occasion for the arbitrator to permit these witnesses to be cross-examined for two reasons. Firstly, they did not give any statement on oath. Secondly, they

submitted two letters before the arbitrator and those letters were not supported by any affidavit. It could not be shown before us that the arbitrator pressurised these two witnesses to file those two letters which were treated as evidence. The letter dated 23rd May, 1983 of Shri K.T. Thomas cannot vitiate arbitration award inasmuch as the award was already rendered on 20th May, 1983 and this letter which was subsequent to the declaration of award could not have influenced the mind of the arbitrator. The award was a speaking award. It cannot be said that the arbitrator was influenced or impressed only by these two letters and other evidence which was in favour of the commission appellant was ignored. Consequently, we are of the view that neither the award can be said to be ex parte nor it can be said that the arbitrator misconducted himself personally or with the proceedings. As such, the award in question cannot be rendered illegal.

15. The last contention of Shri Mehta has been that the arbitrator had no jurisdiction to award interest as well as pendente lite and future interest. He has relied upon one decision in support of his contention.

16. In *Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others*, the Supreme Court has laid down that the general statutory provisions in regard to the award of interest by the Courts are contained in the Interest Act and Civil Procedure Code. Both the Interest Act of 1839 and Interest Act of 1978 provide for award of interest up to the date of the institution of proceedings. Neither the Interest Act of 1839 nor the Interest Act of 1978 provides for award of pendente lite interest. That relief to award of interest pendente lite is provided in Section 34 of the CPC. Section 34, however, applies to arbitration in suits for the simple reason that where the matter is referred to arbitration in a suit, the arbitrator will have all the powers of Court in deciding the dispute. Section 34 does not otherwise apply to arbitration as arbitrators are not Courts within the meaning of Section 34 of the CPC. While under the Interest Act, 1978, the expression "Court" was defined to include the arbitrator under the interest Act of 1839. It was not so defined. Result is while in cases arising after the commencement of the Interest Act of 1978, arbitrator had same powers as a Court to award interest up to the date of institution of the proceedings. In cases which arose prior the commencement of the interest Act of 1978, the arbitrator has no such powers under the Interest Act of 1839.

17. As against this, the learned counsel for the respondent has relied upon two decisions of the apex Court. One is the *State of Orissa and another Vs. Shri Uchhaba Pradhan*, and other is *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*. The judgment in *Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others*, was rendered by three Hon'ble Judges of the Apex Court, whereas, the judgment in *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*, was rendered by five Hon'ble Judges of the apex Court. In the later decision rendered in the year 1992, the apex Court has specifically overruled the earlier decision of the apex Court, reported in *Executive Engineer (Irrigation), Balimela*

and Others Vs. Abhaduta Jena and Others, for which, reference to para 45 of the judgment can be safely made. The apex Court laid down in this case that 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 the 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 the facts and circumstances of the case, keeping the ends of justice in view.

18. Thus, from the above decision, it is clear that when the dispute regarding interest is specifically referred to, the arbitrator, he has jurisdiction to award pendente lite interest as well. Secondly where such dispute is impliedly referred to, even then the arbitrator has jurisdiction to award pendente lite interest. The discretion of the arbitrator however, cannot be challenged. Even if he is authorised to award pendente lite interest, it does not necessarily follow that he must award pendente lite and future interest. It is within his jurisdiction to be exercised on the facts and circumstances of each case whether pendente lite interest should be awarded or not. As such the earlier law laid down by the apex Court in Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, cannot be preferred since overruled by the apex Court.

19. In earlier decision of Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, . The Apex Court observed that the objection of the appellant with regard to the interest awarded for the period subsequent to the reference of the dispute to the arbitrator was well found.

20. The latest decision of the apex Court, reported in Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, settles the controversy on the point of jurisdiction of the arbitrator to award interest pendente lite. There can be no dispute that the arbitrator has jurisdiction to award interest prior to the institution of proceedings before him. From what has been discussed above, it follows that according to the apex Court, the arbitrator has jurisdiction to award interest pendente lite.

21. Shri Mehta however, contended that the dispute of interest was not referred to the arbitrator and as such, he had no jurisdiction to award interest. He further contended that there was no implied reference to the arbitrator to consider whether interest could be awarded or not. The learned counsel for the respondent has rightly pointed out from the reference that the interest was also one of the points of reference to the arbitrator. For the reasons stated hereinabove, it cannot be said that award of interest by the arbitrator is without jurisdiction or that it has rendered the award either partly or wholly illegal. No

other point was pressed before us. Consequently, the lower Court committed no error of law in rejecting the objection of the appellant and in making the award rule of the Court. Interim awards also cannot be interfered because they have merged in the final award. As a result, all these four appeals have no merit and are liable to be dismissed.

22. First Appeal Nos. 217, 218, 219 and 220 all of 1986 are hereby dismissed with no order as to costs.