

(1983) 10 KL CK 0009
In the High Court Of Kerala
Case No : C.R.P. No. 2544 of 1981I

Paulose

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 14-10-1983

Acts Referred:

Arbitration Act, 1940 — Section 12, 28, 28(1)

Citation : (1983) 10 KL CK 0009

Hon'ble Judges : K.K. Narendran, J

Bench : Single Bench

Advocate : M.A. George, A.T. Santhamma and Annie John, for the Appellant;
Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Narendran, J.—The Petitioner was a contractor who executed some Works in the Kallada Irrigation Project. Certain disputes which arose out of the contract was referred for arbitration to the Government Arbitrator for engineering contracts. He entered on the reference on 26th June 1975. On 15th January 1976 the matter was partly heard and then adjourned to 2nd March 1976 for further hearing. In the meanwhile, the arbitrator was transferred, and the matter came up for hearing before the Chief Engineer (Arbitration). The Petitioner did not attend the hearing on that date. The Chief Engineer disposed of the matter without hearing the Petitioner, and by letter dated 4th March 1976 asked the Petitioner to produce stamp paper to write the award.

2. The Petitioner then filed O.P. (Arbitration) No. 7 of 1976 before the Sub Court, Kottarakkara. That original petition was disposed of restraining the Chief Engineer (Arbitration) from proceeding with the arbitration. The above order was challenged in revision before this Court and this Court by its order dated 2nd November 1978 allowed that revision and dismissed O.P. No. 7 of 1976. As the arbitrator did not resume the proceedings, the Petitioner made an application on 10th October 1980 requesting the arbitrator to proceed with the matter. The

arbitrator by proceedings, dated 1st December 1980 dismissed the above application of the Petitioner, stating:

On examining the circumstances relating to this case I find that there has been delay of about 2 years, in approaching the Arbitrator to pass the Award after the judgment of the Hon"ble High Court and that even the application for enlarging time is yet to be filed by the claimant. As one of the parties has not agreed to enlarge time it is not possible for me to proceed in the matter in the present circumstances. The application to proceed with the Arbitration is therefore dismissed.

Thereupon, the Petitioner filed O.P. (Arbitration) No. 39 of 1980 before the Sub Court u/s 28 of the Arbitration Act, 1940 for enlarging the time for making the award. Respondents 1 and 2 in the objections filed in court, contended that the arbitration proceedings were finalised within the period of limitation, no acceptable reason was stated in the petition as to why the time should be extended, there was no bona fides in filing the petition and the Petitioner was not entitled to exclude the time from 2nd November 1978. The Sub Court came to the conclusion that there was no acceptable explanation in the petition regarding the delay after 2nd November 1978 and that the whole delay was of the making of the Petitioner himself. Hence the court dismissed the application holding that no worthy reason was either alleged or proved qualifying the Petitioner for enlargement of time. It is the above order that is challenged by the Petitioner in this civil revision.

3. The point that arises for consideration is whether the court below was justified in dismissing the application for enlargement of time for making the award filed u/s 28(1) of the Arbitration Act, 1940 in view of the fact that the arbitrator heard the matter ex parte and took a decision, even if there was considerable delay in moving the court though this cannot be termed as a dilatory tactics? In *Hindustan Steel Ltd. v. A. Sharma* AIR 1971 Ori 288 it has been held:

Law is well settled that the Court has got wide discretionary power to extend time. But as the amplitude of the power is wide the discretion must be exercised judiciously with care. In this regard I respectfully agree with the observations of a Division Bench in AIR 1935 191 (Lahore) . Their Lordships observed thus under the corresponding Section 12 of the Arbitration Act, 1899.

The Arbitration Act prescribes a procedure for the expeditious and speedy settlement of disputes by private tribunals especially those arising in commercial transactions, and the Legislature has in the schedule fixed a period of three months for the delivery of awards in cases where no time is fixed in the reference. The Court has no doubt a discretion to extend time u/s 12 but it will do so only if cogent reasons are forthcoming. Obviously the discretion cannot be exercised in favour of a party who himself has been negligent and as in the present case, has been guilty of dilatory tactics.

In the above case, the parties were called upon to get extension of time for

passing the award in 1966. The application u/s 28(1) was filed only three years later. There was no proper reason for the delay also. In *Gladwin v. Chilcote* 61 E.R. 825 : (1841) 9 Dowl 550 it has been held:

In. order to justify an arbitrator proceeding ex parte a very strong case must be shown of wilful delay by the party not attending; and, therefore if a reasonable excuse for his not attending is shown, the court will set aside the award made pursuant to such proceeding.

In Russel on Arbitration on page 270, 19th Edn., it has been stated:

If, therefore, one of the parties, after having been duly summoned, neglects to attend before the arbitrator, and the latter is of opinion, from the circumstances which are brought to his notice that the party is absenting himself with a view to prevent justice and defeat the object of the reference, it is the arbitrator's duty to give due notice to the absent party that he intends, at a specified time and place, to proceed with the reference, whether the said party shall attend or not. If this notice is ineffectual to secure his attendance, and he does not allege some excuse satisfactory to the arbitrator, the latter not only may, but ought, to proceed ex parte.

The above statement of law, it seems, is on the basis of the decision in *Waller v. King* (1724) Mod. 63.

4. No doubt, arbitration is for speedy justice. But justice should not be a casualty in arbitration. This does not mean that dilatory tactics should be tolerated. In other words, if a party cannot be said to be guilty of any dilatory tactics, the arbitrator will not be justified in deciding the dispute ex parte if he is informed by the party of his inability to attend the hearing on a day when the case stood posted. Asking for one adjournment cannot, at any rate, be dubbed as a dilatory tactics. In a case where the award was not made within the time allowed, the arbitrator can proceed with the reference only if the court enlarges the time for making the award u/s 28(1) of the Arbitration Act, 1940. So, the court dealing with the application u/s 28(1) should not simply be carried away by the fact that there was considerable delay in making the application. If the arbitrator was not justified in proceeding with the matter ex parte at the first hearing date on which the party was absent, and the party was not notified that the matter will be proceeded with in his absence, it cannot but be said that there was a failure of justice. In such a case, an application for enlargement of time cannot be refused if it was made a little late. But if the delay was the result of dilatory tactics, the position will be different. In this case, the matter was part-heard before the State Arbitrator. The then Chief Engineer (Arbitration) took over. On 2nd March 1976 the Petitioner could not appear before the arbitrator. On 4th March 1976 an order was issued directing the Petitioner to produce stamp paper for writing the award. The Petitioner went to the court immediately. The Sub Court accepted the case of the Petitioner. This Court reversed that order on 2nd November 1978. Thereafter, the arbitrator did not do anything in the matter. On 10th October

1980 the Petitioner, made a representation to the arbitrator to proceed with the matter. That was rejected on 1st December 1980. In the above facts and circumstances, it cannot be said that the Petitioner was guilty of any dilatory tactics. The arbitrator was not justified in proceeding with the matter ex parte simply because the Petitioner was absent at the hearing on 2nd March 1976. So, this is a case where the court below ought to have allowed the application for enlargement of time because otherwise justice will be denied to the Petitioner. The court below has committed a material illegality in the exercise of its jurisdiction u/s 28(1) of the Act in dismissing the Petitioner's application.

5. In the result, the order impugned is set aside. There will be a direction to the court below to retake the Petitioner's application on the file and dispose of the same in accordance with law. Fresh orders are to be passed as expeditiously as possible and, at any rate, within, three months of the receipt of this order by the court. The civil revision is allowed as above. No costs.