

(1982) 05 KL CK 0007

In the High Court Of Kerala

Case No : C.R.P. No's. 1940, 1941, 1942, 1976 and 1991 of 1981

P.S. Abdulla

APPELLANT

Vs

The Director, Forest Research Institute, Peechi

RESPONDENT

Date of Decision : 31-05-1982

Acts Referred:

Arbitration Act, 1940 — Section 28

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1983 Ker 162

Hon'ble Judges : Sukumaran, J

Bench : Single Bench

Advocate : K. Raman and K.G. Pavithran, for the Appellant; K.S. Rajamony, for the Respondent

Judgement

Sukumaran, J.—These revision petitions raise the same question. They arise in proceedings initiated under the Arbitration Act, 1940 (hereinafter referred "to as "the Act"). The question concerns the exercise of the power of a civil court u/s 28 of the Act.

2. P.S. Abdulla is a P. W. D. contractor. He tendered for the works in the Forest Institute, peechi. His ten- ders were accepted. The works were therefore entrusted with him. Agreements in the stipulated forms were executed. Five agreements were thus executed for five distinct works -- those relating to the library, vehicle shed and stores, economics and statistics block, pathology and entomology block and administration block. The agreements contained an arbitration clause providing for arbitration in the event of disputes between the contracting parties. The Chief Engineer (Arbitration) is the named sole arbitrator.

3. Though "final payments" had been received in respect of the works, the contractor contended that such receipts were under protest and without prejudice to his claims. According to him he was entitled to further amounts for carrying out the works. He invoked the arbitration clause. The Arbitrator entered on the reference on 27-11-1979. The awards were normally to be passed within

a four-months period, unless the time is extended in accordance with law. The deadline for these arbitration proceedings was therefore 26-3-1980. By communication dated 25-3-1980 the Arbitrator sought concurrence of the parties for the extension of the period. The contractor agreed, but the institute did not. The contractor thereupon sought relief from the court for extension of the Period for making the award -- the respective original applications in that behalf being A. O. Ps. 58, 60, 57, 56 and 59 of 1980, in turn relating to contract Nos. 127. 129. 126, 128 and 125 of 1979. The court below declined the prayer and dismissed the petitions. The contractor has challenged the orders. It is complained that in so dismissing the applications, there has been an illegal and unjustified failure on the part of the court below in exercising the jurisdiction vested in it. This complaint needs scrutiny in the light of the brief but admitted or proved facts given below.

4. It was on 28-10-1979 that the petitioner submitted his claims before the Arbitrator under Ext. B2- This was a detailed petition and was styled by the petitioner as "statement of facts and claims". All necessary particulars of the claims and the basis thereof had been indicated therein. A copy of it had been sent simultaneously to the respondent. As is usual in such cases, the Arbitrator, by Ext. B3 letter dated 27-11- 1979, called upon the claimant (the contractor) to forward his "statement of case" not later than 27-12-1979. Pleadings of each parties with counterclaims were to be filed on or before 27-1-1980. The respondent, however, was apparently awaiting the receipt of the "statement of case" referred to in the Arbitrator's notice and which had to be filed on or before 27-12-1979. As it did not receive the statement of the case, by Ext. B4 the respondent intimated the Arbitrator about its inability in submit-ting its pleadings by the stipulated time of 27-1-1980. Thereupon, the petitioner's counsel by Ext. B5 addressed to the Arbitrator, pointed out that the claim had been already submitted by him on 20-10-1979 with copy to the respondent, and that "it may not be necessary to forward a copy of the same claim". They confirmed and clarified that the claim statement of 28-10-1979 may be treated as the "statement of the case. on 3-3-1980. the respondent sought further instructions of the Arbitrator in the matter (vide Ext. B6). The Arbitrator by Ext. B7 dated 7-3-1980 directed the respondent to file its defence statement on or before 21-3-1980. This was in reply to the aforesaid letter of the respondent. Ext. B6 dated 3-3-1980. A further communication dated 14-3-1980 (Ext. B8). in reply to the earlier communication dated 24-1-1980 of the respondent was sent, also directing the filing of the defence statement on or before 21-3-1980. On that day the claimant submitted to the Arbitrator detailed statements of claim and forwarded copies thereof to the respondent Ext. B9. In essence, it appears to be the computation in terms of money of the various claims made by him and the working details thereof. On 20-3-1980. the respondent wrote a detailed letter (Ext. B10) to the Arbitrator, pointing out inter alia, that Exts. B7 and B8 had been received by it only on 17-3-1980 and 19-3-1980, and that the detailed statement of the claim of the contractor had been received only on 18-3-1980. It

was complained that the claimant had not stated any reason for the delay and default in the submission of his claim earlier and that it had not received any orders from the Arbitrator permitting the claim and detailed statement to be taken on file. The respondent requested for rejection of the claim of the contractor. and sought specific orders on:

"(i) Whether you reject the claims of the claimant summarily as it has been made long after the time allowed by you without assigning any reason for the delay? or

(ii) Whether you condone the delay and if so for what reasons ?"

If the Arbitrator was inclined to condone the delay in the submission of claim by the contractor, the respondent prayed that it may be given "extension of time by two months from 21-3-1980" for the the submission of defence. Ext. B10 was preceded by a telegram of even date (Ext. BID. conveying the same ideas to the Chief Engineer (Arbitration). On 25-3-1980, the Chief Engineer wrote to the parties about the eventuality of the expiry of the time for passing the award on 26-3-1980 and requested both parties to communicate their concurrence to extend the period by four months from 27-3-1980 for passing the award (See Ext. B12). The re-quest for concurrence was not acceded to by the respondent. It addressed Ext. B13 letter, detailing its points of objection to the extension of the time. Mainly it related to the omission of the claimant to file the statement on the stipulated date of 27-12-1979. According to the respondent, "the whole thing could have been disposed of as early as on 27-12-1979 for default in filing its plea". In paragraph is it elaborately dealt with the inability on the part of the respondent to file the claim statement en 21-3-1980, having regard to the fact that no statement of claim had been filed, according to it, by the contractor necessitating a defence statement. The belated receipt of the communications of 7-3-1980, 14-3-1980 and 15-3-1980 from the Arbitrator was also emphasized. According to it there was non-application of the mind by the Arbitrator.

5. It was this negative reaction on the part of the respondent that led to the application before the court u/s 28 of the Act. As stated earlier, the application did not succeed before the court below. The court below has considered the question whether it should invoke the discretion under the section, in paras 4 to 6 of its order. It had) declined the prayer for extension of time mainly for the following reasons:--(i) There was delay on the part of the claimant in moving the Arbitrator, after the final payment had been made on 31-3-1978. Additional payment was demanded by the claimant only about three months later, on 22-6-1978. The respondent did not either make the payment or even send a reply; vet the claimant approached the Arbitrator only on 20-10-1979. Such delay in the pre-arbitration proceedings also had to be taken note of while exercising the discretion u/s 28 of the Act. (ii) The claimant did not file a statement or even send and reply to the Arbitrator's notice before the stipulated date of 27-12-1979: he cared to make his stand known to the Arbitrator only after the respondent had pointed out the fact that a statement of case had not been filed within the stipulated time. There was no attempt to explain why the

claimant kept quiet until 29-1-1980 and this indicated the lack of seriousness on the part of the claimant. The Arbitrator did not immediately refile the date for filing the statement of defence, even after the intimation about the clarification from the claimant about treating his statement dated 20-10-1979 as a statement of the case. The claimant submitted a detailed statement of claims only on 14-3-1980, whereas he should have done it by 27-12-1979. (iii) Even after the expiry of the normal period on 26-3-1980, and after the respondent had intimated about its declining the concurrence sought for the extension of the time on 9-4-1980, the applications under Sec. 28 were moved only on 23-6-1980: they should have been filed at least soon after the reopening of the courts.

6. In considering the question whether the court below exercised its discretion in accordance with law, it may be necessary to advert to the provisions of the section, and the legal principles governing the exercise of the discretion thereunder. Even if the order is found to be a mere erroneous exercise of the discretionary power, it may not, for that reason alone, be amenable to correction in revisional jurisdiction. The further question would be whether the order complained of suffers from a jurisdictional error or other error justifying the invocation of the power u/s 115 of the Civil p. C.

7. The revisional jurisdiction of this court u/s 115. C. P. C.-no doubt is a limited one. However, when on matters which have a bearing on jurisdiction, a court has not borne in mind the correct principles, or is carried away by erroneous assumption of law it is open to this court to intervene u/s 115 of the C. P. C. The position has now been clarified by the decision of the Supreme Court in *Shri M.L. Sethi Vs. Shri R.P. Kapur*, where an exhaustive survey of the legal decisions on that aspect had been undertaken by Mathew, J., who spoke for the court. The decision extracted the passage from the earlier Supreme Court decision in *Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav*, of which the following is particularly apposite in this case :--

"It is conceivable that points of law may arise in proceedings instituted before subordinate courts which are related to questions of jurisdiction. It is well settled that a plea of limitation or a plea of *res judicata* is a plea of law which concerns the jurisdiction of the court which tries the proceedings. A finding on these pleas in favour of the party raises them would oust the jurisdiction of the court and so an erroneous decision on these pleas can be said to be concerned with questions of jurisdiction which fall within the purview of Section 115 of the Code. But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High Court under Sec. 115."

How the word "jurisdiction." a verbal cast of many colours, has moved far from the traditional concept was demonstrated in that decision with reference to the dicta of the majority of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission*, 1969) 2 AC 147. It was then observed:

"The effect of the dicta in that case is to redcap the difference between jurisdictional error and error of law within jurisdiction almost to vanishing point. The practical effect of the decision is that any error of law can be reckoned as jurisdictional."

The Supreme Court wound up the discussion with posing a query and making a statement in the following words:--

"Why is that that a wrong decision on a question of limitation or res judicata was treated as a jurisdictional error and liable to be interfered with in revision? It is a bit difficult to understand how an erroneous decision on a question of limitation or res judicata would oust the jurisdiction of the Court in the primitive sense of the term and render the decision or a decree embodying the decision a nullity liable to collateral attack. The reason can only be that the error of law was considered as vital by the Court. And there is no yardstick to determine the magnitude of the error other than the opinion of the Court,"

8. The orders of the court below have to be considered bearing in mind the limitations of the revisional jurisdiction.

9. Section 28 of the Act. under which the applications have been filed, is relevant and is to the following effect:--

"28. (1) The Court may if it thinks fit whether the time for making the award has expired or not and whether the award has been made or not enlarge from time to time the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award shall be void and of no effect."

10. This section corresponds to Section 12 of the earlier enactment on the question, viz., the Arbitration Act, 1899 and para 8 of Schedule II of the Civil Procedure Code, 1908. There is provision in the English Arbitration Act. 1950, which enables a court to enlarge the time for making the award. That section reads as follows :--

"13. (2) The time, if any limited for making an award, whether under this Act or otherwise, may from time to time be enlarged by order of the High Court or a Judge thereof, whether that time has expired or not."

11. The topic relating to the enlargement Of time for making award is dealt with in Russeil on Arbitration, 19% Edition, at p. 349. It has been observed at page 350 as follows:--

"The power conferred by the section is entirely discretionary and will not be exercised unless the court thinks fit in each particular case. Where there has been inexcusable delay in applying for an enlargement, the application will as a rule, be refused".

These principles have been followed in various decisions in England and in India. It is unnecessary to refer to all such cases where the particular exercise of the powers under the section had been conditioned by the peculiar facts and circumstances therein. Even from every early times, court-; have always favoured enlargement of time for making the award even when one of the parties to the arbitration expressed disinclination or even opposition to such extension, where the party seeking such an extension had not been faulty of a condonable delay or contumacious conduct. Power for enlargement of the time had been exercised even in cases where the motion had been made after the expiry of the period fixed for making the award. Such was held to be the law even under the Common Law Procedure Act, 1854, which was followed by the Arbitration Act of 1889 in England. Way back in 1868 Blackburn, J. construing Section 15 of the Common Law Procedure Act. 1854 said;--

"I feel no doubt that under the clause in the section which says that "it shall be lawful for the Court or a Judge, for good cause, from time to time, to enlarge the time for making the award, the judge may at any time give much further time to the arbitrator to make his award as he shall think fit under the circumstances."

In the same case Lush. J. said;--

"No limit of time is given within which the judge may enlarge the time, and he is not limited to the time within which the arbitrator himself could enlarge it, even although it be said in the submission that the arbitrator shall make his award on or before a certain day."

12. It is not unusual that either in the submission to arbitration or otherwise, a short period is fixed for the making of the award: sometimes four months, sometimes even two months. While the period so indicated is to be borne in mind in the exercise of the power for enlargement of the time of making the award the stipulation of such a short time does not deprive the court of its power for ordering such enlargement, in a similar situation in Knowles & Sons Ltd. v. Bolton Corporation (1900) 2 QB 253. Romer LJ observed at p. 259 :--

"No doubt, in exercising its discretion as to the enlargement of time, the Court should bear in mind the provisions of Sub-section (9) but in a proper case the Court will exercise its discretionary power of enlarging the time beyond the two months."

13. When would non-prosecution for a long period justify a court in putting an end to the arbitration proceedings? This question had arisen recently in England and the decisions of the Court of Appeal and the House of Lords demonstrate the clear cleavage of judicial opinion in that area. The decision of the Court of Appeal in Bremer Vulkan's case (1980) 1 All ER 426 was reversed by the House of Lords, the decision being reported in Bremer Vulkan v. South India Shipping (1981) 1 All ER 289 The decision of House of Lords came up for further discussion before the Court of Appeal in Andre & CIA v. Marine Transocean Ltd. (1981) 2 All ER 993. Lord Denning characterised the ruling of House of Lords as

one which "has given much anxiety to many." The implication of the House of Lords' decision is depicted by the learned Lord (Justice in these words:--

"It would appear to put on each party to an arbitration a duty to get on with the case. If the claimant does nothing it is the duty of the respondent to apply to the arbitrator. If the respondent does not fulfil that duty, the claimant can delay indefinitely, even for years, and then restore the case for hearing before the arbitrators; and the arbitrators must go on and hear and determine the case." Lord Denning made a further general observation at p. 997:--

"As we all know, the cases are legion in which arbitrators are appointed and nothing more is heard of the case. Sometimes it is settled. At other times the claimant simply lets it drop, and the respondent does nothing. Does that mean that the claimant can revive it five, eight, fifteen or twenty years-later on? I cannot believe that the House of Lords intended any such thing. I think that we must have misunderstood the ruling in some way or other. Take this very case. If there- really is a mutual obligation, the charterers, at the end of 1969, ought themselves to have roused the sleeping shipowners or have applied to the arbitrators for directions; and, as they did not do so they are now in 1981 being faced with an arbitration, when all their evidence is lost. It would be most unjust to put such an obligation on the charterers, which no one had ever thought of before."

These observations have been extracted not because they are very relevant for the consideration of the exercise of discretion u/s 28 of the Act. The observations, however, give an indication about the concept of a delay which has adverse repercussion in the matter of extending the period for making an award. One of the basic ideas in discountenancing delay in arbitration proceedings is the possibility of the long lapse of time resulting in loss of the valuable evidence of the parties. When such is not the case, a greater latitude has to be given by the court in the extension of time for making an award

14. There are arbitral bodies of international character where businesslike methods of a high order are maintained and every attention is given in the expedition in the disposal of arbitration cases. The Association of Food Distributors, New York is one such body. Parties in numerous cases and from all over the world appear before their arbitration panel for the settlement of their disputes. I had opportunities of appearing and participating in the arbitration cases before that arbitration panel. Even that arbitral authority does not appear to be so rigid in the matter of allowing parties to make their claims or adduce their evidence notwithstanding the fixation of a short period for the completion of the proceedings under their rules.

15. The provision for making the extension of the award obtains in other Jurisdictions too, Swedish arbitral awards which are reported to be awards which "stand the best possible chances of recognition abroad," also are conducted with provisions enabling extension of the period of award. Following passage occurs in

"Arbitration in Sweden" at page 117:--

"The other case of extension of the award period, which is more important, is dependent on application for extension being made to the Overexekut or by a party. Application must be lodged before the expiration of the period and special reasons must be shown. Repeated applications are possible but the aggregate period of extension must not exceed six months unless reasons of "great importance" are presented."

The reference to the Overexekutor is to the agency known to the Swedish Law which is the Chief Execution Authority in relation to arbitral matters. Its functions are briefly referred to in pages 1 and 2 of the above publication in the following words :--

"It is a feature of the Swedish system that the assistance rendered by the Stale to keep the arbitration machinery running -- for instance by appointing an arbitrator where party fails to do so -- is furnished by this very agency, the Overexekutor (and not as in most countries, by the courts). Where the parties arbitrate under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce (the "SCC Institute"), the Institute will in large measure perform the functions otherwise carried out by the Overexekutor."

16. It has also been my persona] experience that in respect of important arbitration matters involving very huge claims, where eminent Judges function as arbitrators (such as the one between the Stale of Kerala and the Gwaliyor Ravons Silk Manufactures Co. where arbitrators were Dr. P. V. Raja Mannar, former Chief Justice of the Madras High Court and Mr. Justice S. Velu pillai of this court), extension of the period for making the award had been availed of by parties on a number of occasions. Neither the Arbitrators nor the parties nor the court declined the prayer for such extensions, having regard to the massive evidence required in connection with the substantiation of claims of either party. To decline such extension, oblivious of the requirements of the case would result in a deflection of the course of justice. A "resort to arbitration is a method for ensuring speedy justice. Speed should not commend itself for preference, if justice suffers: for, in that eventuality, the motto which received the auditory remarks of Lord Denning -- "Arbitrate, Do not litigate" -- may lose its appeal to many who would otherwise wholeheartedly welcome it.

17. Arbitration machinery should not be a frightening one, as it appeared to the honest Mr. Tulliver who confronted with an unjust and disastrous award, which made him "a tree as is broke," gave expression to his agony thus :--

".....I should not have gone to law, they say. But who made it so as there was no arbitration and no justice to he got..... "

(See Chapt. 8 of The Mill on the Floss by George Eliot).

18. Judged by the relevant consideration discernible in the decisions on the subject, can it be said that the court below exercised its discretion judicially?

19. The court below has proceeded on the basis that the delay in making a claim before the commencement of arbitration also is relevant in the context. There does not appear to be much relevance in the pre-arbitral conduct while considering the exercise of power under Sec. 28 of the Act. Assuming that it is so, there does not appear such delay as to constitute a neglect on the part of the claimant. The question has to be approached in a pragmatic and practical sense. After a contract work is over, it will certainly take some time for the contractor, to evaluate the various aspects, and to find out whether he is entitled to a further amount in addition to what has been already paid and in various installments, as it happens quite often. A busy contractor will have necessarily to devote time for the execution of other works already on hand. Not that such pre-occupation with other works will be ground enough for indefinite drifting in the matter of making claims. The existence of such factors, however, cannot be overlooked. From that point of view, if, after the final payment, the contractor took about three months' time for making a claim, it cannot be characterised as an unreasonable delay. The conduct of the respondent in not replying, and not responding to the demand has also to be taken into consideration in that context. It is not reasonable to expect a contractor, to rush to the Arbitrator, even when there is delay of a few months, particularly when the other contracting party is a governmental or quasi-governmental authority. Further, an arbitration process, like any other process in a court of law has necessarily to be preceded by adequate preparation. When, waiting for a reasonable period, the contractor gets disillusioned in his expectations, and decides on legal proceedings it will take some time for a proper preparation of the claim and the collection of the relevant materials and evidence with which he is to substantiate the claim. In that view of the matter, the delay in approaching the Arbitrator in the present case cannot be said to be unreasonable.

20. Equally unsustainable is the finding that before the Arbitrator, there was negligence on the part of the claimant. As stated earlier, the claim dated 20-10-1979 is a self-contained one. It had given all the particulars and necessary averments, which would constitute valid pleading before a court of law or an Arbitrator. If by a misunderstanding, the Arbitrator felt that that did not answer a "statement of the case", or for that matter if a respondent did not understand it as a "statement of the case", the blame cannot be placed entirely on the claimant. It is not as though the respondent did not have a copy of the same. The copy so received, would be sufficient to inform the respondent the particulars of the claims therein. The Arbitrator himself understood the confirmatory letter sent by the claimant in that light. When that confirmation had been received, it was time enough for the respondent to make his defence statement. There is absolutely no justification in treating the detailed claim statement dated 14-3-1980 as the statement of the case. If the respondent misunderstood it in that fashion, it cannot blame either the Arbitrator or the claimant for such misunderstanding or misapprehension. The complaint that the claim statement was not filed within a reasonable time therefore falls to the

ground. Moreover, if the respondent did not have sufficient or reasonable time for the preparation of its defence, it is an entirely different matter to be taken up separately with the Arbitrator. It is not as though the Arbitrator was not prepared to give the respondent a reasonable time for the submission of its defence statement. The refusal to agree to the extension of time, in the circumstances, is an unreasonable conduct on the part of the respondent. When there was such an unreasonable conduct on the part of the respondent, the court below should not have allowed the claim of the contractor virtually to lapse without any other legal redress.

21. After the intimation of the 9th April, 1980, about the respondent's withholding of concurrence for extension of time, there was hardly any time before the commencement of the midsummer recess for civil courts, for extension of time. The fact that about a month's further time was taken for the preparation of the applications and filing the same in the court below, cannot also be characterised as unreasonable in the circumstances. The court below has proceeded on erroneous assumption in thinking that there was such negligence on the part of the claimant as to disentitle him for the extension of time u/s 28 of the Act.

22. In the result, I set aside the orders of the courts below. The petitions u/s 28 shall stand allowed.

23. Inasmuch as the respondent has been drawn to these proceedings to some extent unnecessarily, the respondent shall have the costs in these case, with Advocate's fee of Rs. 200 in each of the revision petitions.

24. The revision petitions are disposed of as above.