

(1997) 09 PAT CK 0002

In the Patna High Court

Case No : Miscellaneous Appeal No. 14 of 1987

Ram Sarup Khetan and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 25-09-1997

Acts Referred:

Arbitration Act, 1940 — Section 20
Civil Procedure Code, 1908 (CPC) — Section 34
Limitation Act, 1963 — Article 158
Sales of Goods Act, 1930 — Section 61, 61(2)

Citation : (1998) 1 PLJR 34

Hon'ble Judges : J.N. Dubey, J

Bench : Single Bench

Advocate : Arun Behari Mathur, Ajoy Kumar Mathur and N.N. Tiwary, for the Appellant; T.N. Maitin, for the Respondent

Judgement

J.N. Dubey, J.—This appeal is directed against the judgment and decree dated 7.6.86 of the Subordinate Judge, Khagaria, passed in Title Suit No. 50 of 1965 partly dismissing the suit of the Appellants.

2. The Appellants filed Title Suit No. 50 of 1965 in the Court of Subordinate Judge, Khagaria u/s 20 of the Arbitration Act, for directing the Defendants to file deed of agreement No. 25F-2 of 1960-91 executed between the parties on 21.2.60 and refer the dispute to an independent Arbitrator and further to make the award as Rule of the Court.

3. The case of the Appellants is that 61 tenders were invited for construction of N.H. 31 Kurasela Section Group D from mile post 32 to mile post 38 in the year 1960-61. The tender of the Appellants was accepted on 21.2.61 and agreement No. 25F-2 of 1960-61 was executed between the parties. The Appellants completed the works but the Respondents did not make payment and, therefore, they filed suit for referring the matter to an Arbitrator. On 23.12.66, the Court appointed the Superintending Engineer of the Circle as sole Arbitrator and

referred the dispute to him. He did not submit the award within the stipulated time and, therefore, one Janardan Prasad, Advocate was appointed Arbitrator in his place on 6.3.80. The Arbitrator after considering the matter filed his award on 18.10.85.

4. The Respondents filed objection stating that the Arbitrator has misconducted the proceedings by awarding interest on the amount found due, where there was no such clause in agreement between the parties. It was further stated that while the Appellants have claimed interest @ 12% per annum, the Arbitrator has illegally awarded interest @ 15%. The Appellants contested the objection claiming that apart from being devoid of merit it was also barred by time. The court below after considering the entire facts and circumstances of the case came to the conclusion that the objection of the Respondents was not barred by time and further that the Arbitrator misconducted the proceedings by awarding interest to the Appellants in absence of any such clause in the deed of agreement. He, accordingly, decreed the suit in part on 7.6.86. Feeling aggrieved the Appellants have filed this appeal.

5. Heard the learned Counsel for the parties and perused the record.

6. Learned Counsel for the Appellants contended that the objection of the Respondents was barred by time and the view to the contrary of the court below is wrong and erroneous. According to him, counsel for the parties were informed by the court below on 12.8.85 that the award will be filed on 18.10.85 and, therefore, objection of the Respondents filed on 2.1.86 was clearly barred by time. I find no substance in this argument of the learned Counsel. The fact that the counsel for the parties were informed that the award will be filed in the court on 13.10.85 cannot construe notice of filing of award. Similarly, the fact that the counsel for the parties appeared in the court on 18.10.85 when the award was filed cannot amount notice of award to them. Admittedly, the award was shown to the counsel for the parties on 29.11.85 and, therefore, it cannot be reasonably claimed that the Respondents had knowledge of the award before that date. Learned Counsel for the Appellants has relied upon a decision of Supreme Court in Nilkantha Shidramappa Ningashetti Vs. Kashinath Somanna Ningashetti and Others, , in support of his contention that oral intimation of filing of the award to the counsel for the parties is sufficient service of notice on them. The relevant paragraph of the decision of the Supreme Court reads thus:

We see no ground to construe the expression "date of service of notice" in col. 3 of Article 158 of the Limitation Act to mean only a notice in writing served in a formal manner. When the Legislature used the word "notice" it must be presumed to have borne in mind that it means not only a formal intimation but also an informal one. Similarly, it must be deemed to have in mind the fact that service of a notice would include constructive or informal notice. If its intention were to exclude the latter sense of the words "notice" and "service" it would have said so explicitly. It has not done so here. Moreover, to construe the expression as meaning only a written notice served formally on the party to be

affected, will leave the door open to that party, even though with full knowledge of the filing of the award he has taken part in the subsequent proceedings, to challenge the decree based upon the award at any time upon the ground that for want of a proper notice his right to object to the filing of the award had not even accrued. Such a result would stultify the whole object which underlies the process of arbitration the speedy decision of a dispute by a tribunal chosen by the parties.

7. This case is of no help to the Appellants. It is true that oral intimation of filing of award to the counsel for the parties is sufficient service of notice but advance notice of intention of the Arbitrator to file the award cannot be considered as sufficient service of notice to the parties. This being so, the fact that the counsel for the parties were informed 12.8.85 that the award will be filed on 18.10.85, cannot be considered as date of knowledge of filing of the award and, therefore, question of limitation running against the Respondents from that date did not arise. If this contention of the learned Counsel is accepted then objection should have been filed before 11.9.85, more than one month before the actual filing of the award in the court. Neither any party could be compelled to file objection against the award before its actual filing in the court nor was it possible for it to do so inasmuch as objection can be filed only after knowing the contents of the award. Similarly, the fact that the counsel for the parties had appeared in the court on 18.10.85, the date on which award was filed in the court, is of no significance when it was not shown to them on that date. As stated above, the award was shown to the counsel for the parties on 29.11.85 and, therefore, limitation for filing the objection will start running from that date and not from any prior date, as claimed by the Appellants. The limitation for filing the objection expired during the X-Mas holidays and objection was filed on reopening of the courts on 2.1.86. Moreover, it is not disputed by the Appellants that objection was within time from 29.11.85.

8. The second contention of the learned Counsel for the Appellants is that the view of the court below, that the Arbitrator was not legally justified in awarding interest in absence of any clause in the arbitration agreement in this regard, is wrong and erroneous. According to him, the Appellants had claimed 12% interest in the plaint of the suit filed by them and entire dispute was referred by the court to the Arbitrator and, therefore, it cannot be claimed that there was no dispute before the Arbitrator regarding interest, I find substance in the argument of the learned Counsel. The Appellants had specifically claimed 12% interest in their plaint and the entire dispute was referred to the Arbitrator. This being so, it cannot be legally claimed that the dispute regarding interest was not before the Arbitrator. In other words, when entire dispute between the parties was referred to the Arbitrator the claim for payment of 12% interest in the plaint would also deem to have been referred to him. Since the dispute regarding payment of 12% interest was also referred to the Arbitrator, he committed no mistake in awarding interest to the Appellants. Moreover, it is now well settled that interest could be awarded by the Arbitrator even in absence of any clause in the arbitration

agreement in this regard. My this view finds support by a decision of Supreme Court in Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, . The relevant portion of which is quoted below:

In the present case, all the disputes in the suit were referred to the arbitrator for his decision. One of the disputes in the suit was whether the Respondent was entitled to pendente lite interest. The arbitrator could decide the dispute and he could award pendente lite interest just as a Court could do so u/s 34 of the Code of Civil Procedure. Though, in terms, Section 34 of the CPC does not apply to arbitrations, it was an implied term of the reference in the suit that the arbitrator would decide the dispute according to law and would give such relief with regard to pendente lite interest as the Court could give if it decided the dispute. This power of the arbitrator was not fettered either by the arbitration agreement or by the Arbitration Act, 1940. The contention that in an arbitration In a suit the arbitrator had no power to award pendente lite interest must be rejected.

9. In the State of Madhya Pradesh Vs. Saith and Skelton (P) Ltd., , relying on the decision of Firm Madanlal Roshanlal Mahajan (supra) the Supreme Court held as under:

In the case before us there is no controversy that all the disputes Including a claim for payment of the amount with interest was referred to the arbitrator. The arbitrator, as pointed out earlier, found that the firm was entitled to the payment as price in the sum of Rs. 1,79,653.18 P. The arbitrator has further found that this amount became payable as balance price for the goods supplied by the firm on June 7, 1958, on which date the final inspection took place. If that is so, Section 61 of the Sale of Goods Act, 1930 squarely applies and it saves the right of the seller (in this case the firm) to recover interest, where by law interest is recoverable. Sub-section (2) of Section 61, which is material is as follows:

61(2). In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price -

(a) to the seller in a suit by him for the amount of the price-from the date of the tender of the goods or from the date on which the price was payable.

(b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller from the date of which the payment was made.

10. In Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, , the Supreme Court held as under:

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

11. In this view of the matter, in my opinion, the court below erred in holding that the Arbitrator was not legally competent to award interest to the Appellants in absence of any such clause in the arbitration agreement.

12. Now it has to be seen whether the Arbitrator was legally justified in granting 15% interest to the Appellants when they had claimed only 12% in their plaint. Learned Counsel for the Appellants contended that it is true that Appellants had claimed interest @ 12% in their plaint but in view of the fact that the bank interest was enhanced from 12% to 15% subsequently, the Arbitrator did not commit any mistake in awarding interest at the enhanced rate. I find no substance in this agreement of the learned Counsel. The Arbitrator could decide only that dispute which was referred to him by the court. Admittedly, in the plaint the Appellants had claimed only 12% interest and, therefore, the Arbitrator could not grant interest @ 15%. In my opinion, the Arbitrator misconducted himself by awarding 15% interest to the Appellants as against 12%, claimed by them in their plaint.

13. In the result the appeal succeeds and is allowed in part. The decree of the court below is modified to the extent that the Appellants will get 12% interest in terms of the award.

No order as to costs.