

(1996) 07 DEL CK 0011

In the Delhi High Court

Case No : Suit No. 2783 of 1991, Petition No. 2041 of 1992 and Interim Application No. 11160 of 1992

Sandvik Asia Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 08-07-1996

Acts Referred:

Citation : (1996) 3 AD 631 : (1996) 63 DLT 417 : (1996) 38 DRJ 483

Hon'ble Judges : N.G. Nandi, J

Bench : Single Bench

Advocate : A.M. Setalvad, S.S. Rajadhyaksha, Rajiv Kapur and Jyoti Singh, for the Appellant;

Judgement

N.G. Nandi, J.

(1) The record and proceedings of the arbitration case suggests the disputes arising between the petitioner and the respondent in respect of the contract contained in At No. SCA-1/107/91/409/29-8- 72/I/PAOB/1149 dated 30.9.74 were referred for adjudication to the agency of arbitration. It is also suggested that the number of arbitrators were appointed and they left for one reason or the other and finally Mr. C. Achuthan, Additional Legal Advisor to the Government of India, Ministry of Law & Justice (Department of Legal Affairs, Shastri Bhawan, New Delhi was appointed as the sole arbitrator by the Director General of Supplies & Disposals, Jeevan Tara Building, Sansad Marg, New Delhi vide letter No. Lit.II/A(154)/81/VI, dated 21.12.1990 under the terms and conditions agreed to by the parties with reference to the contract mentioned above and the differences between the parties relating to the said contract which were referred to the sole arbitrator. The reference was entered upon on 31.1.1990 by Mr. C. Achuthan, the last sole arbitrator, who rendered the award dated 30.5.1991.

(2) The award dated 30.5.1991, rendered by the sole arbitrator Shri C. Achuthan was numbered as the Suit. Notice of filing of the award was issued to the parties to the award, directing the parties to file objections, if any, within the statutory

time limit. Thereafter, the claimant/contractor, one of the party to the arbitration proceedings award filed petition under Sections 17 & 30 of the Arbitration Act, 1940 (hereinafter referred to as "the Act"), praying for a judgment and decree in terms of the award in so far as it awards to the petitioner a sum of Rs.6,05,259.00 and Rs. 8,14,373.00 with interest thereon from 10.2.78 to 10.12.81 @ 9% and 18% on the aforesaid sums from the date of the award till the realization of the decree, further praying for the setting aside of the impugned award dated 30.5.1991 rendered by the learned arbitrator in so far as it holds that the parties hereto had mutually agreed to the rounding off the price variation factor from 0.486 per core and 0.144 per nose to 0.4 per core and 0.12 per nose, further praying for the remittance of the award to the learned arbitrator for awarding the sum of Rs. 17,96,506.39, further praying to set aside the award dated 30.5.91 in so far as it refuses interest to the petitioner for the period from 11.12.81 to 31.1.91, in the alternative, to modify the award in so far as it reduces the variation factors from 0.486 per core and 0.144 per nose to 0.4 per core and 0.12 per nose and disallows interest to the petitioner for the period 11.12.81 to 31.1.91 together with the costs of the petition.

(3) The claimant/objector also filed is 11160/92 u/s 17 of the Act read with Section 151 CPC praying for the pronouncement of judgment in terms of the portion of the award allowing claims of the petitioner and upon judgment so pronounced an order/rule be issued for a decree in terms of clauses (ii), (iii), (iv) and (v) of the Award. The Union of India, the other party to the award - respondent filed reply to the petition under Sections 17 and 30 of the Act.

(4) The objections by the petitioner to the award dated 30.5.91 are :-

(I)Objections against point No.1 in the award whereby the learned arbitrator held that the reduction of Rs. 17,96.506-39 by the respondent on account of the adoption of the refused price variation is justified. (ii) The petitioners were not found entitled to interest from 10.12.81 and that the claimants are found entitled to receive interest from the respondent @ 9% on the amount awarded for the period 10.2.78 to 10.12.81.

(5) These are the two points which have been urged before me in course of the hearing by Mr. Setalwad, learned senior counsel for the petitioner. It may be noted here that the respondent/Union of India, has not filed any objections to the award.

(6) It is submitted by Mr. Selalwad, learned counsel that question No.1 in the award whether the respondents are justified in applying the price variation factors 0.4 per core and 0.12 per nose instead of 0.486 per core and 0.144 per nose; that this question was decided against the petitioner because of the finding of the learned arbitrator that in the meetings held on 26th & 27th December 1977, it was agreed to adopt the price variation factors; that the finding of the learned arbitrator on this question is that the contract was varied regarding the price variation factor at oral discussion in December, 1977 which was the case of

the respondent; that the petitioner had denied the correctness of the minutes (1/235) as the same were not proved and Therefore, can not be relied upon; that the contract can only be varied by another agreement and as the contract was with the Union of India, Article 229 of the Constitution is attracted and there can be no valid variation except in compliance with the requirements of Article 229.

(7) The learned arbitrator while rejecting the claim of the objector/claimant has referred to and discussed clause 19 of the Special Instructions, particularly sub-clause (b)(i), which deals with price variation for tungsten, ore and cobalt. The learned arbitrator has also referred to an admitted fact of holding of the meeting in DGS&D Office on 26 and 27.12.1977 in respect of price variation claim made by the claimant vide their letter dated 13.9.1977 and in that meeting in presence of the representative of the claimant, certain decisions were arrived at. The learned arbitrator has also referred to the relevant portion of the claimant's letter dated 29.12.1977 (at page 164-165 Vol-I) which have been reproduced in the award. On the basis of the letter dated 13.9.77, reproduced in the award, the learned arbitrator found that the claimant had agreed without any reservation to round off the price variation factor to 0.4 and 0.12 and claimant had also furnished detailed calculation based on this revised factor as agreed to in the meeting. Thus, the learned arbitrator has found that there was mutual agreement to round off the price variation factor to 0.4 and 0.12 and to the consequential reduction of Rs. 17.86 lakhs from their claim dated 13.9.77 and the claimant was also found to have subsequently added a rider unilaterally vide their letter dated 29.12.1977. The learned arbitrator has also referred to another letter of the claimant dated 30.1.1978 (at page 171 Vol.-1) addressed to the respondent and giving the reasoning has found question No.1, reproduced above, against the petitioner.

(8) In this regard, reliance has been placed on the decision in the case of Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., . While considering the provisions contained in Section 74 of the Contract Act, wherein the breach of contract was alleged, the Supreme Court held that "it is well settled that the construction of a document of title or of a document which is the foundation of the rights of parties necessarily raises a question of law." Further held that "the term regarding the sum to be paid as liquidated damages in contract is enforceable u/s 74. It excludes rights to claim unascertained sum of money as damages."

(9) In this regard, the counsel for the petitioner has also referred to para 570 at page 392 of "HALSBURY'S Law Of ENGLAND" Forth Edition Volume 9 and contended that a contract can only be varied by another agreement. Para 570 refers to "Form of Variation". It is stated therein that "in modern law a contract under seal may be varied by written or oral agreement. Similarly, a contract in writing may be varied by an oral agreement. Where, however, the contract is required by law to be evidenced in writing it cannot be varied by an oral agreement, even if the variation relates only to a part of the contract which, if it

stood by itself, would not be required to be evidenced in writing." There can be no disagreement with this proposition of law. In the instant case, there is no question of varying the contract orally as it is suggested from the arbitration record that the agreement was mutual with regard to the reduction in the price variation factor, as aforesaid, and that the petitioner by its two letters (pages 164-165 and 171 respectively) has confirmed the agreement regarding the price variation factor, The basis of the claimant's agreement by these two letters was the discussion in the meeting but the same has been later on confirmed and agreed to by the claimant/objector. Under the circumstances, it can not be said that the learned arbitrator has violated the provisions contained in Section 92 of the Evidence Act and thereby making the award contrary to law viz. Section 92 of the Evidence Act. It may be appreciated that many a times in course of the trial or the arguments, concessions are made giving up certain rights and on the basis of that concession/statement, orders are accordingly made. Likewise, in the present case also, during the discussion, the contractor/claimant and the respondent mutually agreed to price variation factor which was later on evidence from the letters produced at pages 164-165 and 171, referred to above. I do not regard that mutual agreement and the concession regarding the price variation from 0.486 per core and 0.144 per nose to 0.4 per core and 0.12 per nose in course of discussion between the claimant/contractor and the respondent to be violative of Article 229 of the Constitution of India, as contended by Mr. Setalwad. It need hardly be said that this court is not sitting in appeal against the award rendered by the arbitrator nor can it substitute its own reasoning for the reasonings given by the arbitrator concerning the findings on facts and law. I do not find any substance in the contention in this behalf by the Petitioner/contractor and, Therefore, no interference is called for in this proceeding as far as finding on question No.1, arrived at by the learned arbitrator, is concerned.

(10) It has been next contended by Mr. Setalwad that the petitioner/contractor should have been allowed interest from 10.12.81 to 31.1.91. In this regard it is also submitted that the findings of the learned arbitrator are separable and should be read as (i) the arbitration proceedings had commenced on 10.12.1981 and (ii) no interest can, Therefore, be awarded from 10.12.1981; that it is clearly separate and distinct finding for awarding interest from 10.2.78.

(11) Admittedly, the reference has been entered upon on 31.1.91 by the learned arbitrator who rendered the award.

(12) It is not in dispute that the counsel for the petitioner in the arbitration proceedings, conceded/submitted that they are restricting their claim for the period 10.2.1978 i.e. the due date to 31.3.1991. Learned arbitrator, relying on the legal position prevailing then, in the case of Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, , found that the arbitration proceedings before the arbitrator had started on 31.1.1991 but in fact originally Mr. P.S. Kaicker was appointed on 10.12.1981 having accepted the appointment and issued the direction on the same date to the parties to file their

claim statements by 9.1.1982; that the date of commencement of proceedings in this arbitration is 10.12.1981 and the arbitrator had no power to award interest for the period after 10.12.1981 to the date of the award as the interest pendente lite can not be granted, as held in Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, and the learned arbitrator held that the claimants are entitled to interest on the amount due to them from 10.2.78 to 10.12.1981 @ 9%.

(13) One of the arguments by Mr. Setalwad is that the only concession made by the petitioner was not to claim interest from 31.3.1991 onwards and the petitioner stands by that concession and that the arbitrator has jurisdiction to award interest from the date of the entering upon of the reference and that the finding to the contrary on the ground that arbitrator had no jurisdiction is wholly erroneous in law and ought to be set aside. There can be no disagreement with the proposition that the arbitrator has jurisdiction to award interest pendente lite in view of the legal position prevalent now. The learned arbitrator, in the instant case, entered upon the reference on 31.1.1991. The jurisdiction to award interest, in view of the decision subsequent to the publishing of the impugned award in the case of Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, would be from the date of reference i.e. pendente lite. The learned arbitrator, taking the legal position prevalent then, as pointed out above, can not be said to have erroneously held that he had no jurisdiction to award interest pendente lite. The petitioner's counsel, as pointed out above, restricted his claim for the period 10.2.78 to 31.1.91. The finding regarding non-awarding of the interest from 10.12.81 is on account of the concession by the counsel for the petitioner in light of the fact that according to the learned arbitrator, the arbitration proceedings commenced from 10.12.81. So there is no question of distinct and severable finding given by the learned arbitrator on the question of grant of interest. The finding of the learned arbitrator on question No. 1 can not be regarded as distinct and severable from his findings on questions No.2 and 3. Under the circumstances, the finding arrived at by the learned arbitrator on the position of law prevalent then, can not be said to be erroneous. The subsequent change in the legal position considering the concession made by the petitioner in this case, would not render the award liable to be set aside on that score.

(14) On behalf of the respondent reliance has been placed on the decision in the case of Union of India versus Jain Associates and another reported in 1994(1) Arb.L.R. page 494 wherein it is held by the Supreme Court that where the learned arbitrator did not award interest pendente lite, the court has no jurisdiction to grant pendente lite interest but from the date of decree and not from a prior date." In para 4, while considering Section 29 of the Arbitration Act it is observed that "in so far as award is, for the payment of money, the court may in the decree, order interest from the date of the decree at such rate as it deems reasonable, to be paid on the principle sum adjudged by the award and confirmed by the Decree.Section 29 of the Act empowers the court, that where the award is for payment of money, to grant reasonable rate of interest on

the principal amount adjudged and confirmed in the decree, only from the date of the decree. Section 34 CPC . empowers the court, where there is a decree for payment of money to grant interest pendente lite and future, till the date of realisation. Since Section 29, of the Act enables the court to grant interest on the principal amount adjudged in the award and confirmed in the decree only from the date of the decree, it carries a negative import with it that the court has no power to grant interest pendente lite. The High Court, Therefore, was not right in granting interest pendente lite, which the arbitrator himself had not granted."

(15) The effect of the finding by the learned arbitrator apart from the reasoning of want of jurisdiction to award pendente lite interest on the basis of the legal position prevalent then, is that no interest pendente lite has been granted to the petitioner claimant and according to the Supreme Court 1994 (1) Alr 494 considering Section 29 of the Arbitration Act and Section 34 of Cpc, the interest could be granted only from the date of the decree and after referring to the decision in the case of Secretary, Irrigation Department versus G.C.Ray (supra) it is observed that "the grant of pendente lite interest by arbitrator was not a settled principle till the constitution Bench decision of this court in The Secretary, Irrigation Department v. G.C.Roy was rendered. Earlier Division Bench of this court in Executive Engineer, Irrigation v. Abhaduta Jena, where it was held that arbitrator had no power to award interest pendente lite, was overruled .In this twilight zone of law, the arbitrator did not award interest pendente lite. In view of the Constitution Bench Judgment in G.C. Roy"s case, the grant of pendente lite interest by the court is legal." The Supreme Court, in this decision besides setting aside the award in respect of claims No.11 and 12, also set aside the decree of the High Court granting interest pendente lite. Thus, apart from the arbitrator having jurisdiction to award interest pendente lite on the legal position now settled in the case of Secretary, Irrigation Department versus G.C. Ray (supra), in view of the principle laid down in the decision in the case of Union of India versus Jain Associates & Another (supra), considering section 29 of the Act read with Section 34 of the Cpc, I do not find any substance in the contention raised by the petitioner/objector in this regard.

(16) In view of the above, the award dated 30.5.1991, rendered by the learned arbitrator, can not be said to have been vitiated by any legal misconduct or by error manifest from the record of the case or against the settled principle of law and, Therefore, no interference is called for in the award.

(17) In the result, the objections filed by the Petitioner/claimant/objector, to the award dated 30.5.1991 vide Petition 2041/92 under sections 17 and 33 of the Arbitration Act, are liable to be dismissed and the Award dated 30.5.1991 made rule of the court/decreed with 12% interest on the amount awarded, from the date of the decree till the realisation of the amount. is 11160/92 does not necessitate any separate order and disposed of accordingly.