
(2001) 07 BOM CK 0074

In the Bombay High Court

Case No : Appeal Under Arbitration Act No. 2 of 1994

State of Goa

APPELLANT

Vs

J.L. Baptista, Civil Contractors

RESPONDENT

Date of Decision : 04-07-2001

Acts Referred:

Arbitration Act, 1940 — Section 30, 33

Citation : (2002) 1 BomCR 327

Hon'ble Judges : K.K. Baam, J;A.S. Aguiar, J

Bench : Division Bench

Advocate : H.R. Bharne, for the Appellant; C. Mascarenhas, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Baam, J.—This appeal has been filed by the appellant State of Goa represented by the Executive Engineer, Works Division XII, P.W.D., Sanguem, Goa, against the respondent M/s. J.L. Baptista, Civil Contractors by which the appellants seeks to challenge the judgment passed by the Civil Judge, Senior Division, Quepem on 22nd December, 1993.

2. The brief facts pertaining to the cause of action in this appeal is stated as under :-

On 16th June, 1987, an agreement was entered into between the appellant and the respondent for construction of service road along 1400 mm diameter pipe line across Sirvoi Hillock in Quepem Taluka. The contract was terminated by the appellant on 28th June, 1988. On 5th February, 1991, the respondent made claim for payment of monies against the appellant as a dispute was raised as per the terms of the agreement and as per the arbitration clause provided in the contract, the Chief Engineer appointed Shri B.V. Khandolkar as the Sole Arbitrator to adjudicate the dispute raised by the appellant and the respondent.

3. As regards the dispute, arbitration proceedings commenced. An order was passed by which the learned arbitrator directed the appellant to give inspection

of documents against which order the appellant herein filed a civil suit in the Court of Civil Judge, Senior Division, Quepem, by which the appellant herein sought directions for the removal of arbitrator for misconduct and also applied for stay of arbitration proceedings. It is the case of the appellant that by order dated 6th February, 1992 stay was granted of the arbitration proceedings. However, it transpires that the order was not communicated to the arbitrator or to the respondent.

4. The arbitrator had fixed the hearing of the arbitration proceedings on 22nd, and 24th January, 1992. However, it is the case of the appellant that on 22nd January, 1992 the arbitrator was not present. On 23rd and 24th January, 1992, the appellant did not remain present. Sittings were thereafter fixed on 8th, 9th and 10th February, 1992. However, according to the appellant he had filed an application for stay, which order was granted on 6th February, 1992 by the learned Civil Judge, Senior Division, Quepem. Though, copies of the said order were not served on the arbitrator, no hearing was held on 8th, 9th and 10th February, 1992. Thereafter, hearing was fixed on 10th, 11th and 12th March, 1992 at hotel Paulino, Margao. On the said dates, the arbitrator despite the said order of injunction conducted the proceedings at Margao. The appellant did not remain present on account of the fact that stay was granted of the arbitration proceedings vide order dated 6th February, 1992. In the meanwhile, the respondent filed a written statement in the suit which was placed for final arguments on 24th April, 1992. On 1st April, 1992, the respondent filed Civil Revision Application No. 56 of 1992 against the order dated 6th February, 1992 which was disposed of on 13th April, 1992 by which it was brought to the notice of the Court that the arbitrator is likely to publish his award as a result of which directions were given to the arbitrator not to publish his award as the parties had agreed to dispose of the main application for removal of the arbitrator. The order further recorded that in the event, the application of the appellant herein for removal of the arbitrator is rejected, the arbitrator shall be entitled to publish his award only seven days after the rejection of the said application. As time for rendering the award was running out, the same was extended to the extent that the order covered the said period and the ex parte order of injunction was set aside. It transpires that the arbitrator published his award in respect of which objections were raised in the suit which was filed wherein there was a challenge to the said award. It is urged on behalf of the appellant herein that the award was passed by the arbitrator without hearing the appellant or giving the appellant an opportunity to place facts before the learned arbitrator. As a result of these ex parte proceedings injustice has been caused to the respondent as the same has affected the public exchequer that the arbitrator had misconducted himself in the proceedings inasmuch as he had continued to hold arbitration proceedings despite the notice of the fact that there was a stay of the proceedings as the orders issued by the arbitrator allowing inspection to the respondent herein was challenged by the appellant herein by filing a suit to which the respondent and the arbitrator were made parties. Despite knowledge

of these proceedings, the learned arbitrator proceeded and passed the ex parte order.

5. So far as the respondent is concerned, it is their case that ample opportunities were given to the appellant to remain present. Appellant had notice of the proceedings pending before the arbitrator. Appellant had not served the ex parte order of stay which they had obtained against the respondent herein and the arbitrator. It is only when the respondent realised that the ex parte order had been obtained. They challenged the same and the same was set aside. It is also urged on behalf of the respondent that this appeal is not maintainable and the same is barred by the principles of constructive res judicata as after the award was passed the appellant herein made an application to amend the proceedings and the said award was considered and in the proceedings originally filed wherein the application of the appellant challenging the order have been rejected. The same cannot be reagitated in this appeal.

6. Considering the arguments advanced on behalf of the appellant and the respondent, it is necessary to note that the arbitrator who was appointed to determine the dispute between the appellant and the respondent was appointed as per the terms of the contract, a person of the choice of the appellant as the learned arbitrator was appointed by the Chief Engineer of the appellant. Having been appointed, the appellant had imposed faith in him. At this stage, it is not open to the appellant herein to challenge his authority on the grounds of misconduct which has not been specifically spelt out against the learned arbitrator as the directions given by the learned Arbitrator calling upon the appellant to give inspection of documents in his possession can by no stretch of imagination tantamount to any misconduct. However, though, it is alleged on behalf of the appellant herein that the appellant had filed a suit challenged the order and sought to revoke the authority of the arbitrator on grounds of alleged misconduct in granting inspection of the files at serial Nos. 2 and 3. The appellant herein had obtained an ex parte stay of the proceedings before the arbitrator. Whilst advancing arguments on behalf of the appellant, it was contended that the learned arbitrator proceeded in the matter even though, he was aware of the fact that there was a stay of the proceedings before the arbitrator. How and under what circumstances the learned arbitrator was aware of the stay of the proceedings is an aspect in respect of which the appellant has not been able to throw any light as the appellant has in terms stated that the order of stay was not communicated to the learned arbitrator as the packet which was sent communicating the proceedings was returned as the learned arbitrator was not available at Pune. It is contended on behalf of the appellant that the respondent herein was aware of the stay order being passed. So far as this contention is concerned, the same is also without any basis. As the order was not communicated to the respondent, appellant has not been able to bring any proof of the same and on that account also the contention to the effect that the arbitration proceedings were stayed, and that the arbitrator and the respondent were aware of the same is unwarranted. It is urged on behalf of the

respondent that as soon as they became aware of the order of stay proceedings before the learned arbitrator they made an application and the order of stay was vacated. This application was made by filing a Civil Revision Application No. 56/92. By order dated 13th April, 1992, the matter was referred back to the trial Court who was directed to hear the main application and decide the same on or before 15th June, 1992. Directions were given to the learned arbitrator not to publish his award and in the event the application of appellant herein for removal of arbitrator was rejected, the arbitrator was directed to publish his award seven days after the rejection of the application. Hence, it is apparent that so far as the learned arbitrator and the respondent are concerned, they were not aware of the stay of the arbitration proceedings. Therefore, it is not open for the appellant to contend that despite the stay of the proceedings, the learned arbitrator proceeded ahead with the arbitration and passed his award ex parte.

7. The question that arises for consideration is whether the award was passed ex parte or whether the appellant was determined not to remain present before the arbitrator who was appointed as per the arbitration clause and was an arbitrator of their choice. It is necessary to note that after the order of inspection was passed, directions were given as regards the date of inspection which was to be completed before the 12th December, 1991 and the hearing was fixed on 13th, 14th and 15th January, 1992. It is also necessary to note that time limit for making the award which was to expire was extended upto 30th April, 1992. The appellant was aware of the fact that the learned arbitrator was required to submit his award by 30th April, 1992. In spite of the directions given as regards inspection of documents by the arbitrator vide his letter dated 23rd September, 1991, instead of complying with the same, the appellant herein sought to challenge the same and challenged the authority of the arbitrator and sought his removal by filing a suit in the Court of Civil Judge, Senior Division, Quepem in Arbitration Suit No. 43/91. Curiously enough, though the appellant herein had filed the suit and he was aware of the fact that the arbitration proceedings was to take place at Margao on 13th, 14th and 15th January, 1992, the respondent by his letter of 11th October, 1991 which was despatched prior to the filing of the suit which was in November, 1991, intimated to the arbitrator to postpone the hearing fixed on 13th, 14th and 15th January, 1992 on three dates prior to 4th January, 1992 or after 21st January, 1992 because during the interregnum, the Advocate appearing for the respondent would be out of station. Bearing in mind, the above request of the appellant herein, the learned arbitrator posted the arbitration proceedings to 22nd, 23rd and 24th January, 1992 which was communicated to the appellant herein. It is necessary to note that this communication to the appellant was by letter dated 28th October, 1991. Whereas, the suit was filed by the appellant herein on 14th November, 1991 alleging misconduct to the arbitrator seeking his removal on account of the fact that he had acted in undue haste and had given inspection of the documents.

8. So far as the appellant is concerned, it is necessary to note that though they had filed the suit they presumed that the summons and proceedings were

despatched to the arbitrator and further presumed that the arbitrator would not conduct the hearing on 22nd, 23rd and 24th January, 1992 and, therefore, they did not attend the same. According to the appellant, the learned arbitrator did not hold the proceedings on 22nd, January, 1992, and, therefore, it is the case of the appellant that they did not attend the arbitration meeting on 23rd and 24th January, 1992 on the presumption that the learned arbitrator had notice of the proceedings pending in Court. It is apparent that the appellant had adopted this conduct to delay the proceedings as by attending the same they would have brought to the notice of the learned arbitrator that proceedings were pending in the Court. This argument is a palatably false argument on the part of the appellant and the presumption is also fallacious that the summons and show cause notice was served on the sole Arbitrator and for that reasons the proceedings were deferred and could not appear on 23rd and 24th January, 1992. This presumption is on the basis of an erroneous premise as the appellant had not obtained any stay of the arbitration proceedings, mere service of summons and proceedings would not entitled the appellant to conclude that the arbitrator had notice of the proceedings and, therefore, did not appear. Failure on the part of the party to attend the proceedings is unwarranted and without any justification.

9. Further, this argument has no basis and is contrary to the affidavit of the appellant's Executive Engineer K.P. Nambiar who in his affidavit dated 8th April, 1993 filed before the Civil Judge, Senior Division, Quepem in Civil Suit No. 43/91 has stated on oath that they appeared at the venue of Hotel Paulino on 22nd January, 1992 and that he had approached the arbitrator on 22nd January, 1992 and the Sole Arbitrator was informed of the Civil Suit filed in the Court of Civil Judge, Senior Division, Quepem and he was requested not to proceed with the case pending further orders of the Court. Curiously enough, no written intimation to that effect has been communicated to the learned arbitrator. This aspect is also borne out by the Minutes of the Meeting dated 22nd January, 1992. Hence, in the light of this affidavit and minutes dated 22nd January, 1992, the argument advanced on behalf of the appellant that the arbitrator was not present in the meeting on 22nd January, 1992 and, therefore, they presume that the arbitration proceedings would not be held on 23rd and 24th January, 1992 is a fallacious argument, further at that point of time though proceedings were filed the appellant has not applied for nor obtained an order of they stay of the proceedings. Hence, there is no question of the appellant presuming that proceedings would not be held on 23rd and 24th January, 1992 and there is no premise for this presumption.

10. The appellant has urged before the Court that there was confusion in the dates. However, the so-called confusion in the mind of the appellant is on the basis of their own conjunctures which are not founded on the basis of documents. On the contrary, documents belie the case of the appellant herein. From the contents of the affidavit, it is, therefore, apparent that the appellant's Engineer met the arbitrator on 22nd January, 1992. There is no documentary

evidence to show that the learned arbitrator was informed of the proceedings pending in the Court at Quepem and that at that point of time, the appellant, has not obtained the order of stay. Hence, there was no question of the proceedings being adjourned or postponed.

11. Another important circumstance to be seen is that notice was sent to the appellant vide letter dated 27th February, 1992 that proceedings will be conducted on 10th, 11th and 12th March, 1992. Though, it is contended on behalf of the appellant that the said letter was not signed, however, nothing precluded them from approaching the arbitrator and ascertaining whether the same was sent by the learned arbitrator and whether the meetings were in fact scheduled for 10th, 11th and 12th March, 1992. Once again, the appellant herein proceeded on presumptions and conjunctures that the letter was not signed and in view of the order of stay obtained which was ex-parte, which to their knowledge was not communicated to the arbitrator, they once again presumed that the arbitration proceedings were not being held on 10th, 11th and 12th March, 1992. The appellant has not brought before the Court any evidence to show that they had communicated the order of stay to the learned arbitrator. In that event, it is not open to the appellant to allege that there was misconduct on the part of the learned arbitrator in conducting the proceedings.

12. It was urged on behalf of the appellant that the appellant being a public body they were not heard because of the so-called confusion in their mind and, therefore, an opportunity be given to them and the matter be remanded back in the interest of seeking justice. However, the question arises whether the appellant is entitled to this relief more particularly because a perusal of the conduct adopted by the appellant clearly reflects that the appellant was not vigilant in proceeding with the matter before the learned arbitrator or the suit filed in the Civil Court at Quepem as they did not bother to ensure that the ex parte order of stay was communicated to the arbitrator or the respondent. Though, it is urged on behalf of the appellant that there was confusion in the mind of the appellant as regards the date of hearing, this confusion was created on account of the appellant's conduct for which they are to be blamed and they cannot lay the blame on the respondent or the learned arbitrator. The dispute which was referred to the arbitrator arises out of an agreement dated 16th June, 1987. The dispute arose in 1988 when a claim was made by the respondent for payment. The arbitration proceedings commenced in 1991. The award was in 1992. Till 2001, respondent has not been able to obtain any relief in respect of their claim on account of the indifferent and callous conduct adopted by the appellant. The entire purpose of referring the matter to arbitration under the Arbitration Act is defeated as the same is meant to ensure speedy justice to the parties who have a grievance whose claims have not been determined. Whereas, here is a case of the respondent who has waited from 1998 till 2001 to have his rights determined which the appellant has successfully sought to defeat on account of the so-called confusion, conjunctures and presumption which are without any basis. Nothing prevented the appellant from remaining present

before the arbitrator but the appellant instead of proceeding before the arbitrator sought to raise frivolous issues by resorting to civil proceedings obtained ex parte orders and thereby sought to delay and hamper the progress of arbitration.

13. The conduct adopted by the appellant herein needs to be deprecated rather than supported by setting aside the award. Further, the notice dated 27th February, 1992 gave a clear intimation of the fact that the parties failed to remain present and that the hearing will continue ex parte. The appellant had due notice of the fact that the hearing would continue. Despite the notice, the appellant did not care to remain present before the learned arbitrator nor did the appellant bring the ex parte order to the notice of her Advocate.

14. So far as the award is concerned, the same has already been considered in the judgment dated 23rd October, 1992 in Special Civil Suit No. 43/91. The learned Single Judge has given reasoned order which cannot be faulted with. The challenge to the order having been considered in Special Civil Suit No. 43/91, the appellant herein has challenged the same in Special Civil Suit No. 77/92 though the matter was already considered in Special Civil Suit No. 43/91. In respect of the order dated 22nd December, 1993, the appellant has not been able to bring before the Court any material to challenge the order which cannot be faulted with.

15. On behalf of the respondent, reliance is placed on a ruling in the matter of K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another, . To support the contention that the appellant's cause of action is barred by the principles of res judicata and constructive res judicata which principles apply to arbitration proceedings as the issue having been already adjudicated upon in Special Civil Suit No. 43/91 subsequently adjudicated under Special Civil Suit No. 77/92, the appellant cannot have a third round pertaining to the same cause of action in the present proceedings. This ruling would apply in all the facts of the present case. On behalf of the respondent, reliance is also placed in the matter of N. Khadervali Saheb and Another Vs. N. Gudu Sahib and Others, wherein it is held that parties directed by notice to appear on a certain date before the Arbitrator, default in appearance, Arbitrator can proceed ex parte. Failure to give second notice before the proceedings does not amount to legal misconduct. In the instant case, the ruling would apply to the facts of the present case as the Arbitrator had by notice dated 27th February, 1992 intimated to the appellant herein that the Arbitration proceedings were scheduled to be held on 10th, 11th and 12th March, 1992. The notice further reads that failure to attend the meeting implies the parties would suffer consequences of an ex parte order. Appellants were therefore, put to the notice of the fact that if they did not attend the meeting, the matter would proceed ex parte. Despite notice, the appellant did not care to attend the proceedings. This callous attitude on the part of the appellant is not justifiable neither can the appellant seek that the matter be reverted back to the Arbitrator on the ground that they were not heard as ample opportunities were given to the

parties to be heard in the proceedings.

16. On behalf of the respondent, reliance is also placed in M/s. Dalmia Cement (Bhart) Ltd. v. M/s. Advance Commercial Co. Ltd., reported in 1995 ALR (1) wherein it is observed that where the respondent did not appear despite warning, no further notice is required to be given to him. In the instant case, notice was given to the appellant to remain present failing which the matter will be decided ex parte. The appellant despite the notice did not care to attend the proceedings but to suffer the consequences. The appellant was not vigilant enough. They did not care to appear before the arbitrator neither did they bring the ex parte order of injunction to the notice of the arbitrator. On account of their indifferent conduct they cannot contend that their rights are prejudiced or when they were put to notice they did not care to pursue the matter before the arbitrator. In support of the aforesaid contention, reliance is also placed on a ruling in the matter of Hemkunt Builders Pvt. Ltd. v. Punjabi University, Patiala, reported in 1993 (3) ALR 349 wherein it is observed:--

"Where despite several opportunities being given by the arbitrator and notice that in case of absence proceedings would be taken ex parte, the party does not appear before the arbitrator, the arbitrator can make ex parte award and it does not amount to misconduct of the arbitrator."

17. The aforesaid ruling applies in all force to facts of the present case.

18. Hence, so far as the appellant is concerned, they have not been able to bring before the Court any material to support their contention that there was any misconduct on the part of the arbitrator, more particularly since he is a person of their own choice, they have not cared to be vigilant and did not attend the proceedings despite due notice of the Arbitration proceedings for 10th, 11th and 12th March, 1992. Further, there is no prejudice caused to the appellant as the Arbitrator has proceeded on pleadings and documents. No evidence was led hence there is (sic no) prejudice on the case of the appellant. Hence, so far as this appeal is concerned, same is not maintainable and deserves to be dismissed. The respondent is directed to withdraw the amount deposited by the appellant herein. The order is stayed for ninety days. Respondent has withdrawn the amount against the Bank Guarantee given by him. Bank Guarantee to be discharged after ninety days.