
(1991) 07 KL CK 0050
In the High Court Of Kerala
Case No : M.F.A. No. 417 of 1987

State of Kerala and Another

APPELLANT

Vs

K. Kurian P. Paul

RESPONDENT

Date of Decision : 17-07-1991

Acts Referred:

Arbitration Act, 1940 — Section 13, 29, 30
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2, 99

Citation : AIR 1992 Ker 180 : (1991) 3 ILR (Ker) 723

Hon'ble Judges : Varghese Kalliat, J;G.H. Guttal, J

Bench : Division Bench

Advocate : M.C. John, Govt. Pleader, for the Appellant; Mathai M. Paikady and K.L. Varghese, for the Respondent

Final Decision : Partly Allowed

Judgement

G.H. Guttal, J.—This appeal by the State of Kerala is against the order dt. 14-8-1986 made in O.P. (ARB) No. 332/85 by the Principal Sub Judge, Thiruvananthapuram. By the impugned order, the learned trial Judge (a) dismissed the appellant's petition No. 332/85 for setting aside the award in favour of the respondent Contractor and (b) made a decree in terms of the award of the Arbitrator which granted to the respondent a sum of Rs. 3,64,986.00 under various claims made by him.

2. The appellant awarded to the respondent contract for the construction of KIP -- RBC formation of Sasthamkotta branch canal. Under this contract dt. 26-2-1982, the work was to be completed within 12 months from 17-4-1982. Certain differences arose between the parties. The disputes in the terms of claims made by the respondent were referred to the arbitration of Gopinathan Nair, retired Chief Engineer, P.W.D. The appointment of the Arbitrator was made in accordance with Clause 52 of the contract styled as "local competitive bidding" in respect of "Kallada Irrigation Project."

3. Clause 52 of the contract provides, inter alia, the mode of appointment of the

sole arbitrator. Mr. Gopinath Nair, Chief Engineer, P.W.D. Kerala State, was appointed the sole arbitrator in accordance with Clause 52 of the contract. However, Mr. Nair subsequently retired from service of the Government. Nevertheless the parties proceeded with the arbitration, the Arbitrator completed the proceedings and made the award.

An important stipulation in Clause 52 relevant to this appeal is this :

"All awards shall be in writing and in the case of awards amounting to Rs. 1 lakh and above, such awards shall State the reasons for the amount awarded".

4. The appellant wants us to set aside the award. Therefore, it is necessary to bear in mind the grounds on which a court can set aside awards made by arbitrators. Section 30 of the Arbitration Act provides the grounds on which an award of the Arbitrator can be set aside. It lays down that an award shall not be set aside except on one or more of the grounds set out therein. One of such grounds is that the arbitrator or umpire has "misconducted himself of the proceedings". The appellant urged that the arbitrator "misconducted the proceedings". An arbitrator misconducts the proceedings (i) when there is a defect in the procedure followed by him (ii) commits breach and neglect of duty and responsibility (iii) acts contrary to the principles of equity and good conscience (iv) acts beyond the reference (vi) proceeds on extraneous circumstances (vii) ignores material documents (viii) bases the award on no evidence. While it is difficult to give an exhaustive list of acts which constitute misconduct of the proceedings, the above stated grounds broadly cover such grounds. These acts constitute legal misconduct.

5. According to learned counsel for the appellant the misconduct of the proceedings has occurred for this reason. The contract between the parties enjoins the Arbitrator to "state the reasons for the amount awarded." The award of various amounts under Items Nos. 17(a), 17(b), 17(c), 17(g), 170 and 17(1) of the statement of claims are not based on proper and adequate reasons. In other words, the grounds stated in support of the award do not constitute reasons. It is true that under Clause 52 of the contract the Arbitrator is bound to state reasons, not generally, but "for the amount awarded". The literal meaning of "reason" is "a ground or motive for a belief or a course of action, a statement in justification or explanation of belief or action"". It is in this sense that the award must state reasons for the amount awarded.

The rationale of the requirement of reasons is that reasons assure that the Arbitrator has not acted capriciously. Reasons reveal the grounds on which the Arbitrator reached the conclusion which adversely affects the interests of a party; The contractual stipulation of reasons means, as held in *Poyser and Mills*" Arbitration In Re (1963) 2 QB 467 "proper, adequate reasons". Such reasons shall not only be intelligible but shall be "a reason connected with the case which the court can see is a proper". While the court is empowered to set aside the award on the ground of misconduct of proceedings, the limitations of this power

should not be lost sight of.

In the context of clause 52 of the contract, failure to state reasons for the amount awarded does constitute misconduct of the proceedings . It follows that if reasons are unconnected with the case they are not reasons. We will in the course of this judgment analyse the award and consider whether the award furnishes reasons for the amount awarded. But before we do so, we wish to remind ourselves of the basic limitations of the judicial interference in arbitration award.

The need to confine to the limitations was placed in perspective by the Supreme Court in Food Corporation of India Vs. M/s. Veshno Rice Millers, and U.P. Hotels and Others Vs. U.P. State Electricity Board, The propositions emerging from these decisions are summarised below :

(i) While the functions of the courts of law is to oversee that the arbiters act within the norms of justice, the courts should as far as possible give effect to the award, and if the arbitrator acts within the norms of justice, the courts should compel obedience to the decision of the chosen adjudicator.

(ii) Where reasons have been given for the award, the challenge to the award cannot be sustained unless, the arbitrator has taken a view of the matter which could not be sustained on any view of the matter.

iii) judicial interference with the arbitrator's award is justified only if it is shown that the arbitrator has reached a decision which no reasonable arbitrator could have done.

iv) If the conclusion of the arbitrator is based on a possible view of the matter the court should not interfere with the award.

6. The limits of judicial interference were highlighted again in Gujarat Water Supply and Sewerage Board Vs. Unique Erectors (Gujarat) (P) Ltd. and Another, , where it was laid down this :

i) even where the arbitrator is required to assign reasons, he is not bound to deliver a detailed judgment

ii) the award should be read reasonably as a whole and it is enough if short intelligible indications of the grounds in the mind of the arbitrator are discernible,

iii) the Court does not sit in appeal over the award and review the reasons.

7. In the light of the principles enunciated by the Supreme Court, we will now endeavour to discover whether the award is based on a possible view of the matter, whether a reasonable arbitrator could have reached the decision impugned in the appeal and whether the view of the arbitrator could not be sustained on any view of the matter. The arbitrator has examined in a span of five pages the grounds on which compensation was sought by the respondent. We will examine each item of the claim granted by the award.

8. In paragraph 17 of the claim petition, claims have been made under Clauses (a) to (p). But in view of the fact that certain claims were rejected and therefore the award in respect of them not appealed from and also the fact that certain claims have been conceded before us, the scope of this appeal is considerably narrow one. There is no controversy about the award in respect of items 17(d), 17(i), 17(h), 17(i), 17(k), 17(m), 17(o) and 17(p) because these claims were rejected by the Arbitrator. The claims in respect of 17(e) relates to the grant of Rs. 13,800/- to the claimants towards excess costs of gelatine. Mr. John, counsel for the appellant conceded this claim. Therefore, the appeal in regard to this claim is hereby dismissed.

The claim under 17(g) is for compensation at the rate of 300 per day of 132 days, during which period, the respondent's workers were on strike. Learned counsel for the respondent, Mr. Varghese, rightly did not press this claim because the appellant could not be responsible for a strike by the respondent's workers. Therefore, to this extent we allow the appeal and dismiss the respondent's claim under Clause 17(g) of the claim petition.

The claims under Clause 17(1) of the claim petition was for compensation of Rupees 1,20,136/- for loss due to enhanced cost and labour charges resulting from the delay by the appellants in handing over possession of the site. The Arbitrator has awarded Rupees 1,20,136/- on this account. Learned counsel for the respondent Mr. Varghese did not press this claim also. We, therefore, allow the appeal so far as the claim No. 17(1) is concerned.

9. In view of what we have stated in the last paragraph this appeal is confined to claims under Clauses 17(a), 17(b), 17(c), 17(j) and 17(n).

10. The claim under Clause 17 (a) arises in this manner: The respondent-contractor, hired a bull dozer for the purpose of carrying out the work. The bull dozer remained idle for 40 days from 30-4-1982 to 28-5-1982, and from 14-9-1982 to 6-10-1982. The local workers unconnected with the work of the contractor, prevented the use of the bull dozer. The appellant could not provide the site free from obstruction for carrying out the work. Therefore, compensation for loss caused by payment of hire charges of Rs. 3,500/ - per day for 40 days was claimed. The arbitrator awarded Rs. 1 lakh at the rate of Rs. 2,500/- per day.

11. The reason for the grant of compensation on account of idling of the bull dozer is this :

The work had to be performed within 12 months which necessarily implied the use of the bull dozer. The correspondence with the Government and the discussions held in regard to the obstruction of the work caused by the local people proved that only the police protection by the appellant could enable the respondent to carry out the contract. Since the appellant could not provide the site free of hindrance and obstruction, the contractor was prevented from using the bull dozer resulting in loss of money awarded as compensation.

12. The Arbitrator knew that the work had to be completed within 12 months, necessarily implying the use of the bull dozer and exclusion of manual work. The use of the bull dozer implies that conditions necessary for the use of the bull dozer existed. In the circumstances of this case, the contractor alone could not have removed the obstruction caused by the local workers who did not approve of the use of the bull dozer. For this purpose the fact that the appellant failed to remove the obstruction by use of police received importance in this thinking of the Arbitrator. The correspondence between the parties, the discussions held and the request for police protection made by the respondent highlighted the need for assistance by police, so as to enable the contractor to use the bull dozer. In the circumstances, the Arbitrator considered that the contractor had lost money for no fault of his. The loss could have been avoided had the appellants taken steps to remove the obstruction. Therefore, he concluded that the appellants were liable to pay compensation.

13. It is an accepted principle of law of contracts that no man can complain of another's failure to do something which he himself made impossible. It is implied in the contract that the contractor had to use the bull dozer if he was to complete the work within 12 months. The implication follows not only from the stipulation of time limit but also from the magnitude of the work. The prevention of work, envisaged by this principle need not be direct or forcible prevention. It is enough if the appellant neglected doing or providing anything which he ought to do or provide and without which the respondent could not perform the part. Section 53 of the Contract Act enacts the principle of English Law that prevention by one party is constructively tantamount to fulfilment of the contract by the other. The party aggrieved by such prevention of fulfilment of one particular term is entitled to insist on payment.

If the award finds support from valid rules, of law, it cannot be impeached, as unreasonable. Application of these principle to contracts of work is not unknown to case law. At page 383 Pollock and Mulla refer to English cases where these principles were applied⁷.

14. At this stage, a brief reference to the contents of the award which reveal the arbitrator's mind may be made. He observes "the fact that the labourers object to the use of the bull dozer has been admitted by the respondent also". Then he invites attention to the responsibility of the appellant in connection with the removal of the obstruction, in this sentence ".....that there was acute labour problem which could not be solved by the respondent himself". Finally after referring to the documents, the arbitrator fixes the responsibility for the delay in these words. "The respondent, alone is responsible for the delay 7. Roberts v. Bury Commissioner (1869) L.R. 5 C.P. 300 Mackay v. Dick (1881) 6 App Cas 251. in creating an atmosphere for coming to a settlement". The conclusion of the arbitrator that the appellant was responsible for the situation, is founded on numerous letters in which the appellants, the State of Kerala, realising their responsibility insisted on assistance from the police -- their own wing ---which

never come forth, to remove the impediment caused by local labour.

It is these reasons which bring into operation the principle of justice and fair play set out by us in paragraph 12 of this judgment. The award is based on these reasons : (i) that the appellants were under an implied obligation to provide obstruction-free site (ii) that the appellant conceded this by repeatedly asking police help (iii) that they did not fulfil the implied obligation and (iv) were therefore bound to compensate the contractor.

In our opinion, the arbitrator's award finds support from the principles set out in paragraph No. 12 above and his reasons summarised above.

15. The arbitrator has concluded that the appellants were responsible for the loss to the respondent. The reason discernible from his award is that the appellants, armed with the State's power, failed to create conditions in which the contractor could fulfil the contract. This view of the matter is a possible view. The conclusion that the appellants by their failure to remove obstruction by local workers caused the loss in a finding of fact based on evidence. Our jurisdiction is limited by considerations laid down in Section 30 of the Arbitration Act which have been amplified by the Supreme Court in the judgments referred to earlier. We are of the opinion that the approach of the arbitrator was fair, just and based on common sense. He has given reasons for the payments awarded by him. It cannot be said that the view of the arbitrator is a view "which could not be sustained on any view of the matter" or that "no reasonable arbitrator could have taken such a view". We hold that the arbitrator's view that the appellant was liable to compensate the respondent contra-tor, for the loss sustained by keeping the bull dozer idle, is a possible view of the matter. The reasons given by him for the amounts awarded are connected with the claim and are adequate. This applies to all items of the claim granted by the arbitrator.

We wish to caution that we should not be understood to have laid down as a general principle that in every case of the Government's contract, the Government has the obligation to provide police assistance to create conditions in favour of the contractor. We have discussed the general principles underlying Section 53 of the Contract Act for the limited purpose of ascertaining whether the award is reasonable and fair.

16. The claim under item No. 17(b) proceeds on the same basis as item No. 17(a). During the 156 days between 3-4-1982 and 6-10-1982 when work under the contract was disrupted the respondent had to keep his supervisory staff in his employment. He could not discharge the staff as it would have been difficult to get the staff if and when the obstruction was removed. The inability of the appellant to create conditions in which the bull dozer could be used and the work under the contract proceeded with induced the arbitrator to award compensation at the rate of Rs. 150 per day for the loss caused.

The reason assigned by the arbitrator is the same as under Clause 17(a). It is the appellant, State of Kerala who failed to create conditions necessary for

fulfilment of the contract. The respondent could not have discharged the supervisory staff. He expected that the negotiations which the appellant initiated would bring police help and the work would start. These are the indications of the thinking of the arbitrator in this matter. In the circumstances, the arbitrator chose to grant compensation to the respondent. For the reasons stated while dealing with claim under item No. 17(a) we hold that the arbitrator was right.

17. The award is right so far as claim No. 17(c) is concerned. The amount of work found to have been done at the stage of the final bill was much less than the amount of work measured and found at the stage of the third bill. The claimant had been paid only in respect of 17,294 m³ whereas the work done by him was in the region of 23,000 m³. He claimed at the rate of 25,000 m³. The appellants act in withholding the payment is based on the final measurement taken without inviting the contractor to remain present when the work was measured. The arbitrator considered that since the measurement up to the third bill were admitted and since the respondent was not invited to remain present, when the final measurement was taken, the contractor should be paid at the rate of the third bill. While the appellants have the right to contest the award in this respect, we do not think that the view of the arbitrator is not based on reason. We do not think that the arbitrator acted unreasonably. Another arbitrator might have taken a different view. But the decision of this arbitrator is based on reason and is a possible view of the matter.

18. Item No. 17(j) relates to payment for excess work in respect of 13 items. Out of these items, the contractor agreed to accept payment at agreed rates in respect of items 6 and 7. There was no agreement as to the rates for excess work in respect of items 1 -- 5 and 8 -- 13. The arbitrator awarded payment in respect of excess work specified as items Nos. 1 -- 5 and 8 -- 13. A sum of Rs. 19,199/- was granted in respect of these items. The appellant urged under Clause 32 of the Contract, the rate of payment for extra work had to be fixed by mutual agreement. This is no doubt true. But the arbitrator decided it because there was dispute about these items. But the submission of the appellant that since the rates had to be fixed by mutual agreement, the arbitrator had no authority to award the payment for excess work is unfounded. It is not the case of the appellant that different rates for excess payment in respect of items Nos. 1 to 5 and 8 to 13 were agreed upon. The arbitrator acted within his authority and has assigned reasons for the grant of Rs. 19,199/-. No error justifying judicial interference is discernible.

19. In respect of item No. 17(n) no error has been pointed out.

20. The arbitrator has awarded interest at the rate of 6% p.a. payable with effect from three months after the date of the award. The correctness of this decision is challenged.

Having regard to the decision of a Division Bench of this Court in *State of Kerala v. Mythiri Constructions*, (1990) 2 KLT 735 we hold that the arbitrator was in

error in awarding interest for the period after the award. To this extent the appellants are right. Therefore, the award directing payment of the interest after the award by the arbitrator is set aside.

21. It was argued by learned counsel for the respondent that the misconduct of the proceedings by the arbitrator has not been pleaded in the grounds of appeal. We are urged to dismiss the appeal on this ground alone. Having regard to the provisions of the Rule 2 of Order 41 of the Civil P.C. this Court's authority is not confined to the grounds of objection set forth in the memorandum of appeal by taken by the leave of the Court under that rule. We have expressly granted to the appellants leave to urge the point of misconduct of the proceedings by the arbitrator. The appeal was therefore argued on all points. In view of this the judicial decisions in Chavalier I.I. Iyyappan and Another Vs. The Dharmodayam Company, , M.P. Shreevastava Vs. Mrs. Veena, and Illikkal Devaswom Vs. Pottakkatt Narayanan Raghavan and Another, are of no assistance to the appellants.

22. We set out below a summary of the amounts awarded by the arbitrator and confirmed by the trial Court item No.

17(a) ... Rs. 1,00,000.00	17(b) ... Rs. 23,400.00	17(c) ... Rs. 68,651.00
17(d) ... rejected	17(e) ... Rs. 13,800.00	17(f) ... rejected
17(g) ... Rs. 19,800.00	17(h) ... rejected	17(i) ... rejected
17(j) ... Rs. 19,199.00	17(k) ... rejected	17(l) ... Rs. 1,20,136.00
17(m) ... rejected	17(n) ... security refund ordered	17(o) ... rejected
17(p) ... rejected	_____ Total ... Rs. 3,64,986.00 _____	

In view of what we have stated in paragraph 8 of the judgment, the claim in respect of item No. 17 (g) was erroneously allowed. The amount of Rs. 19,800/- representing this claim shall be deducted from the amount awarded. Similarly, the claim in respect of item No. 17 (1) of Rs. 1,20,136/- was erroneously allowed by the arbitrator. This amount too will have to be deducted from the total amount awarded. Therefore, the appeal is allowed only in respect of item Nos. 17(g) and 17 (1). The amounts awarded were respectively Rs. 19,800/- and Rs. 1,20,136/- which total up to Rs. 1,39,936/-. Out of the total amount of Rs. 3,64,986/- awarded, the sum of Rs. 1,39,936/- will have to be deducted. The amount awarded shall now be Rs.2,25,050/-.

23. For the reasons stated in this judgment we make the following order. The order of the Principal Sub Judge, Thiruvananthapuram is confirmed in so far as item Nos. 17(a), 17(b), 17(c), 17(e), 17(j) and 17(n) are concerned. The award is set aside and the order of the learned Principal Sub Judge is reversed in respect of the amounts awarded under item Nos. 17(g) Rs. 19,800/- and 17(1) Rs. 1,20,136/-. The award in favour of the respondents is confirmed only in respect of a sum of Rs. 2,25,050/-subject to the modification of interest as stated in paragraph 20. The O.P. (Arb) 332/1985 made by the State of Kerala is allowed to the extent of the amount of Rs. 1,39,936/- is concerned. Subject to

this, the appeal is disposed of.