
(1981) 04 OHC CK 0015
In the Orissa High Court
Case No : Misc. Appeal No. 18 of 1981

State of Orissa and Another

APPELLANT

Vs

Consolidated Construction Company (Engineers and
Contractors) and Another

RESPONDENT

Date of Decision : 28-04-1981

Acts Referred:

Arbitration Act, 1940 — Section 14, 2, 29, 39
Evidence Act, 1872 — Section 115

Citation : AIR 1981 Ori 166 : (1981) 52 CLT 63

Hon'ble Judges : R.N. Misra, C.J

Bench : Single Bench

Advocate : Additional Government Advocate, for the Appellant; P. Palit, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, C.J.—This appeal u/s 39 of the Arbitration Act calls in question the decision of the learned Subordinate Judge of Bhubaneswar by which he has made an award Rule of the Court u/s 17 of the Act. Respondent No. 1--a firm of contractors--undertook construction of the School of Mining Engineering at Keonjhar by entering into a contract in the standard F-2 Form on 22-8-1962. Work order had, however, been given on 30th of June, 1961, and the construction of the ground floor was over by 31-12-1961, and of the first floor by 30th of June. 1962. The claimant-contractor have notice u/s 8 of the Arbitration Act for appointment of an arbitrator. The Additional Chief Engineer appointed respondent No. 2 as the arbitrator. When the contractor's application for revocation of the authority of the appointed arbitrator was rejected the contractor had moved this Court in Civil Revision No. 489 of 1978 and a learned single Judge by his Judgment on 15-5- 48 (1979) CLT 138: AIR 1980 Ori 31 Consolidated Construction Co. v. State of Orissa allowed the application and appointed Sri Abhimanyu Misra, a retired Judge of this Court, as arbitrator. From paragraph 7 of the reported decision, it appears :--

".....In course of the hearing of this case, I wanted to know from both the parties if they had any objection to the appointment of retired justice Shri Abhimanyu Misra as the arbitrator in this case. None of the parties expressed any objection against him....."

The learned single Judge further observed :--

".....To avoid further delay and to allay all apprehensions in the mind of the petitioner, I deem it just and proper to directly appoint an arbitrator of integrity, personality and judicial experience so that there would be or could be no scope for any objection on that score by any of the parties....."

The new arbitrator after hearing parties gave his award on 9-7-1980. On behalf of the State of Orissa objection was raised to the award. After hearing both parties, the learned Subordinate Judge overruled the objections and made the award a rule of the court,

2. Five objections in the main have been raised in this appeal by learned Additional Government Advocate :--

(i) The claim which led to reference to arbitration was barred by limitation by the time the dispute was raised and therefore, the arbitrator should have held that the claim was not tenable in law:

(ii) The State Government had advanced a counter-claim which has not been properly discussed and the arbitrator has rejected the claim without indicating any ground for it.

(iii) The manner in which the different claims have been considered clearly indicates that the contractor will ultimately be paid more than once under the same head of claim which should not have been permitted;

(iv) The claim has been allowed to be enhanced in the midst of the proceeding which was not justified;

(v) The claim of interest from the alleged date of dues could not have been granted by the arbitrator, inasmuch as there was no power in the arbitrator to grant interest prior to the date of claim in any event and the pendente lite interest also could not be granted in the present case, as it was not covered by any of the principles indicated by the Supreme Court.

3. Admittedly, the arbitrator has not given any reasoning for the award. In the operative part thereof, the arbitrator has stated :--

"The parties addressed elaborate arguments in support of their respective contentions and referred to the documents and other material in respect of different items of claim and counterclaim. Having given my full and careful consideration to the claims of the petitioner and counter-claim made by the opposite parties, their contentions, contained in the written statements, the documents referred to and relied upon and arguments advanced in detail in

respect of each item of the claims and counter-claim. I proceed to record my conclusions and findings as detailed below :....."

As against all the thirtyfour items excepting item No. 25 the arbitrator has only indicated the amount in case he has allowed the whole or a part of the claim. As against item No. 25, the claim and counter-claim have been dealt with at some length.

Section 37(1) of the Arbitration Act provides that all the provisions of the Indian Limitation Act of 1908 would apply to arbitration as they apply to proceedings in court. The Supreme Court pointed out in the case of Wazirchand Mahajan and Another Vs. Union of India (UOI), .

"There is no doubt that Clause (1) of Section 37 of the Arbitration Act deals only with the authority of the arbitrator to deal with and decide any dispute referred to him : it has no concern with an application made to the Court to file an arbitration agreement and to refer a dispute to the arbitrator. After an agreement is filed in Court and the matter is referred to the arbitrator, it is for the arbitrator to decide by the application of the law contained in the Limitation Act, whether the claim is barred....."

This view has received support from subsequent decisions. The question of limitation has not been specifically dealt with in the award, but as it appears the final bill for the work done in the sixties was finalised on 19-4-1980 and the arbitrator's records support this stand of Mr. Palit for the contractor. In view of the fact that the final bill is dated 19-4-1980, when the arbitration proceeding itself was pending, the question of limitation loses importance. Confronted with this situation, learned Additional Government Advocate instead of pressing the question of limitation, contended that the dispute itself seemed to be premature if the final bill had not been drawn up till April, 1980. Such a contention had never been raised when the arbitrator was appointed or when this Court directed the new arbitrator to give his award expeditiously. The State of Orissa participated in the proceedings, placed records concurred in the extension of time and did not raise the plea of the proceedings being premature. While the question of limitation does not arise in view of the fact that the final bill was drawn up in April, 1980. I do not think, in the facts and circumstances of the case, it would be at all appropriate to hold that the dispute was premature and therefore, the reference to arbitration was not tenable.

4. Admittedly, there was a counterclaim. The arbitrator did refer to the counter-claim and while dealing with the item No. 25, stated :--

"Item No. 25 in the claim petition and items 1 and 2 of counter claim made by the respondents are taken up together. Item No. 25 of the claim petition is in substance a defence to and denial of the counter claims made by the respondents towards the value of the excess departmental materials alleged to have been supplied to the claimants and not consumed in the work nor returned after completion of the work. In the counter claim item No. 1 enumerates 14

different items of departmental materials which are alleged to have remained in excess with the contractor and not returned by him. The value of the said materials is estimated at Rs. 82,330.76 and as per stipulation in the agreement, together with penalty of 5 times, the total amount claimed is Rs. 4,11,570/-. Counter claim No. 2 is for interest on the aforesaid amount. In item No. 25 of the claim petition these alleged excesses in the departmental material issued has been denied and it is asserted that departmental materials issued have been fully consumed in the work. Though in the counter claim. 14 items were mentioned during the course of the proceeding, the respondents modified and reduced their claim to cement. M. S. Rods, coal, paint and asphalt, turpentine. D. B, Oil and empty cement bags. They also modified and reduced the quantities originally alleged. After considering the material placed before me and perusal of the documents sought to be relied upon by the respondents I reject the counter claim of any excess material having been left with claimant petitioner. It follows that respondents are not entitled to recover any amount towards such excess material as made out in their counter claim and much less any interest on the value of the same."

In view of what has been stated above, the criticism of learned Additional Government Advocate that the arbitrator rejected the counter claim without any discussion is uncharitable. The arbitrator is entitled to give reasons, but there is no obligation for him to support his conclusion in favour of or against a party by giving reason. I must, therefore, hold that the tenability of the counter claim had been duly dealt with by the arbitrator and he has found that the counter claim has no justification. Keeping the nature of the award in view. I do not think it is open to the State to raise any further challenge to the finding.

5. According to learned Additional Government Advocate, this is a case where same payment had been made to the contractor. It is maintained that the contractor laid claim in respect of certain items for which he had once been paid. The manner in which the claim has been treated, according to learned Additional Government Advocate, yields room for the same claim to have been taken into account more than once and, therefore, it cannot be ruled out that the claimant has not received payment on more than one occasion for the same head. I suggested to learned Additional Government Advocate to demonstrate with reference to actual record whether there is any foundation for the allegation. There is nothing on record which yields scope for the foundation of the argument. I, therefore, do not think, there is any merit in the contention even if such a contention was maintainable.

6. It was the next contention of learned Additional Government Advocate that there has been enhancement of the claim in the midst of the proceeding. According to him, the rate at which the claim has been allowed is higher than the contractual rate. Since this is an unreasoned award, the contention of learned Additional Government Advocate is not verifiable from the record and I do not find there is any mistake on the face of the award on that score.

7. The last contention is in regard to payment of interest. According to learned Additional Government Advocate, the Arbitrator has no jurisdiction to award interest for the period prior to the raising of the dispute and he has also no jurisdiction to award interest for the pendente lite period unless there be provision in the agreement, claim for interest is covered by statute such as the Interest Act, or the question of payment of interest has been specifically referred to for decision of the arbitrator. He has placed reliance on three decisions of the Supreme Court being *Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore*, : *Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd.*, : and the *State of Madhya Pradesh Vs. Saith and Skelton (P) Ltd.*, . In *Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore*, the Court explained the earlier decision in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, , by saying :-- (At p. 1032)

".....But. in later cases, this Court has pointed out that the observations in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, , were not intended to lay down such a broad and unqualified proposition, see *Ct. A. Ct. Nachiappa Chettiar and Others Vs. Ct. A. Ct. Subramaniam Chettiar*, . *Satinder Singh and Others Vs. Amrao Singh and Others*, . The relevant facts regarding the claim for interest in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, . will be found (at Pp. 477 to 478 of AIR) and in Paras. 2, 17 and 24 of the judgment of the Patna High Court reported in *The Union of India (UOI) Vs. Premchand Satram Das and Another*, . The arbitrator awarded interest on unliquidated damages for a period before the reference to arbitration and also for a period subsequent to the reference. The High Court set aside the award regarding interest on the ground that the claim for interest was not referred to arbitration and the arbitrator had no jurisdiction to entertain the claim. In this Court, counsel for the claimant contended that the arbitrator had statutory power under the Interest Act of 1839 to award the interest and, in any event, he had power to award interest during the pendency of the arbitration proceedings u/s 34 of the Code of Civil Procedure. 1908. Bose. J. rejected this contention. It will be noticed that the judgment of this Court in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, is silent on the question whether the arbitrator can award interest during the pendency of arbitration proceedings if the claim regarding interest is referred to arbitration. 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....."

In *Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd.*, the Court referred to

the same decision in Seth Thawardas Pherumal Vs. The Union of India (UOI), and observed ;-- (at p. 1035)

".....but it should be noticed that the judgment of this Court in Seth Thawardas Pherumal Vs. The Union of India (UOI), does not deal with the question whether the arbitrator can award interest subsequent to the passing of the award if the claim regarding interest was referred to arbitration. In the present case. all the disputes in the suit, including the question of interest, were referred to the arbitrator for his decision. In our opinion, the arbitrator had jurisdiction, in the present case, to grant interest on the amount of the award from the date of the award till the date of the decree granted by Mallick. J. The reason is that it is an implied term of the reference that the arbitrator will decide the dispute according to existing law and give such relief with regard to interest as a Court could give if it decided the dispute. Though, in terms, Section 34 of the CPC does not apply to arbitration proceedings, the principle of that section will be applied by the arbitrator for awarding interest in cases where a Court of law in a suit having jurisdiction of the subject-matter covered by Section 34 could grant a decree for interest.,...."

In the case of State of Madhya Pradesh Vs. Saith and Skelton (P) Ltd., , the Supreme Court observed (at page 1514):--

"From the decision in Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, it is clear that if all the disputes are referred for arbitration, the arbitrator has power to award interest pendente lite. i.e. during the pendency of the arbitration proceedings.

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... .."

Relying on these decisions, learned Additional Government Advocate contended that in the absence of clear proof that the claim of interest had also been referred to arbitration, the arbitrator could not have awarded interest, On the other hand, Mr. Palit for the claimant-respondent has relied upon a decision of the Supreme Court in the case of Ashok Construction Co. v. Union of India (1970) SCD 530. where Shah. J. as the learned Judge then was spoke for a Bench of three learned Judges thus :--

".....In the view of the Deputy Commissioner under Clause 25 of the arbitration agreement, the arbitrator was not empowered to go into the questions of loss of goodwill, or damages by way of interest, and that the arbitrator could not award

interest, by way of damages for detention of money and that is really what the claim for damages amounts to". The appellants made a claim for interest on the amount withheld after the due date and the arbitrator was competent to decide that claim. The arbitration agreement by Clause 25 provides :--

"Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other questions, claim, right, matter or thing, whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whatever, arising during the progress of the work or after the completion or abandonment thereof shall be referred to the sole arbitration of the Superintending Engineer....."

The terms of the arbitration agreement did not exclude the jurisdiction of the arbitrator to entertain a claim for interest, on the amount due under the contract. The award of the arbitrator cannot be said to be invalid,"

Relying on these observations of the Supreme Court in Ashok Construction Company's case, there have been a series of decisions in this Court that unless there be clear exclusion, the arbitrator would have jurisdiction to entertain a claim for interest. I am inclined to think that on the basis of this clear decision, the award of interest for the period from the date of detention of the money up to the raisins of the claim as also for the period the arbitrator was in season of the proceeding was tenable and the award was not vitiated on that account.

8. Learned Additional Government Advocate thereafter sought leave to raise a further contention which had not been raised in the court below, namely that the arbitrator had no jurisdiction at all to arbitrate and the award made was illegal, inasmuch as, it was not a joint reference to him. In support of this proposition reliance has been placed on the observations of the Supreme Court in Seth Thawardas Pherumal Vs. The Union of India (UOI), and a Bench decision of the Delhi High Court in Madhubala Private Ltd. Vs. Naaz Cinema and Others, as also a Bench decision of the Madhya Pradesh High Court in the case of Dilip Construction Company Vs. Hindustan Steel Ltd., . The Supreme Court observed in Seth Thawardas Pherumal Vs. The Union of India (UOI), :--

"A reference requires the assent of both sides. If one side is not prepared to submit a given matter to arbitration when there is an agreement between them that it should be referred, then recourse must be had to the Court u/s 20 of the Act and the recalcitrant party can then be compelled to submit the matter under Sub-section (4).

In the absence of either, agreement by both sides about the terms of reference, or an order of the Court u/s 20(4) compelling a reference the arbitrator is not vested with the necessary exclusive jurisdiction.

Therefore, when a question of law is the point at issue, unless both sides specifically agree to refer it and agree to be bound by the arbitrator's decision, the jurisdiction of the Courts to set an arbitration right when the error is apparent on the face of the award is not ousted. The mere fact that both parties submit incidental arguments about a point of law in the course of the proceedings is not enough....."

Relying on these observations of the Supreme Court, the Delhi High Court in *Madhubala Private Ltd. Vs. Naaz Cinema and Others*, took the view that the appellant before it had assented to the terms of reference. In the *Dilip Construction Company Vs. Hindustan Steel Ltd.*, , the Court held (at p. 265) :--

"(i) The existence of a difference or dispute is an essential condition for the arbitrator's jurisdiction to act under an arbitration Clause in an agreement;

(ii) The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. A dispute implies an assertion of a right by one party and repudiation thereof by another;

(iii) A failure to pay is not a difference, and the mere fact that a party could not or would not pay does not in itself amount to a dispute unless the party who chooses not to pay raises a point of controversy regarding, for instance, the basis of payment or the time or manner of payment."

The Court referred to a later decision of the Supreme Court in the case of *Khaddah Co. Ltd. v. Raymon and Co. (India) Pvt. Ltd.* AIR 1962 SC 1810, where it was observed (at pages 1815-16) :--

".....But what confers jurisdiction on the arbitrators to hear and decide a dispute is an arbitration agreement as defined in Section 2(a) of the Arbitration Act, and where there is no such agreement, there is an initial want of jurisdiction which cannot be cured by acquiescence. It may also be mentioned that the decision in (1860) 30 LJ Bey 10 has been understood as an authority for the position that when one of the parties to the submission is under a disability that will not be a ground on which the other party can dispute the award if he was aware of it. Vide *Russel on Arbitration*. 16th. Edition, 320....."

After quoting from the Supreme Court, the Madhya Pradesh High Court proceeded to say (at p. 267) :--

"When the respondent was not willing to join in the submission, the remedy of the appellant lay by way of an application u/s 20 of the Arbitration Act,....."

and support for this observation was drawn from *Thawardas*'s case.

In the instant case, there was an arbitration Clause. An arbitrator was appointed to handle the dispute. Both parties were before this Court on an earlier occasion when the arbitrator was substituted. Before the arbitrator both parties participated in the deliberations. They jointly applied for extension of time, as the award was not ready within four months from the date of reference. A counter

claim was raised by the State requiring the arbitrator to go into that question. No objection at all was raised until the appeal was heard in this Court about want of jurisdiction of the arbitrator. In these circumstances I do not think, it would at all be appropriate to entertain the contention of learned Additional Government Advocate of want of arbitrator's jurisdiction. On the other hand, the single Judge decision of this Court in the case of Union of India (UOI) Vs. Ch. Radhanath Nanda and Another, and the Full Bench decision of the Patna High Court in the case of Bokaro and Ramgur Ltd. Vs. Dr. Prasun Kumar Banerjee, should be applied and the appellants should be held estopped from raising such a contention.

9. All the objections raised against the award having been overruled, this appeal is bound to fail and the same is accordingly dismissed with costs. Hearing fee is assessed at rupees two hundred .