(1990) 12 OHC CK 0012

In the Orissa High Court

Case No : Misc. Appeal No. 20 of 1989

The New India Assurance Co. Ltd. APPELLANT

Vs

Sri Harbanslal Agrawal RESPONDENT

Date of Decision : 19-12-1990

Acts Referred:

Arbitration Act, 1940 — Section 23, 29
Civil Procedure Code, 1908 (CPC) — Section 34
Interest Act, 1978 — Section 2, 3

Citation : AIR 1991 Ori 187

Hon'ble Judges : D.P. Mohapatra, J

Bench : Single Bench

Advocate : P. Roy and S.B. Das, for the Appellant; S.C. Ghose, for the Respondent

Final Decision : Partly Allowed

Judgement

D.P. Mohapatra, J.—The question that falls for determination in this appeal relates to award of interest by the Arbitrator. Indeed Shri S. S. Das, learned counsel for the appellant, stated at the commencement of his argument that his challenge to the award is confined to the direction for payment of interest only.

2. The New India Assurance Co. Ltd. ("Insurance Company" for short) filed this appeal u/s 39 of the Arbitration Act, 1940 assailing the judgment of the Subordinate Judge, Rourkela in Title Suit No. 36 of 1988 by which he confirmed the award passed by the Arbitrator and made it a rule of the court overruling the objection raised by the appellant. The facts relevant for proper appreciation of the case may be stated thus:

The car bearing registration No. OAO 1213 belonging to the claimant-respondent was insured with the appellant-Company under policy No. 4323609798 vide certificate No. 543488 dated 29-1-82. It was involved in an accident on 13-4-82. Certain dispute having arisen in connection with the claim raised by the respondent on the Insurance Company, the respondent filed Misc. Case No. 82 of

1983 in the court of the Subordinate Judge, Rourkela for appointment of an arbitrator. The learned subordinate Judge by the order dated 11-5-84 appointed Shri A. K. Misra, an advocate of the local bar as the sole Arbitrator. The award initially passed by the Arbitrator was set aside by the subordinate Judge and the case was remitted to the former for consideration. Thereafter the Arbitrator after hearing the parties and considering the materials placed before him passed the award that the respondent is entitled to get a sum of Rs. 29,210.33 from the appellant towards cost and expenses incurred by him for repair of the car; the respondent is entitled to get interest at the rate of 12.5 per cent per annum on the sum of Rs. 29,210.33 from 16-2-83 till the date of claim i.e. 16-2-83 to 31-7-84; and he is entitled to interest at the rate of 12.5 per cent per annum on the said amount from 1-8-84 to 20-6-1989, the date of filing of the award. Certain other claims made by the respondent were negatived by the Arbitrator.

3. Totaling up the amount, the Arbitrator directed for payment of Rs. 48807.25 to the respondent. On the award being challenged before the court, notices were issued to the parties to file their objection, if any. As revealed from the impugned judgment, various objections were raised on behalf of the appellant including the award of interest.

4. The learned Subordinate Judge on consideration overruled all the objections, corrected a few typographical errors in the award and thereafter confirmed it and made it a rule of the court.

The question relating to the award of interest was discussed in paragraph 7 of the judgment. Referring to several decisions of the Supreme Court as well as this Court, the learned Subordinate Judge took the view that since the agreement between the parties did not contain any specific clause prohibiting grant of interest, the arbitrator has jurisdiction to award interest. He further held that since reference was made through court, the arbitrator was competent to award not only interest till the date of institution of the arbitration proceeding, but also pendente lite interest u/s 22 of the Arbitration Act. On analysis of the matter he held that in awarding interest from l6-3-83 to 3l-7-84 and from 1-8-84 to 20-6-88 at the rate of 12.5%per annum, the Arbitrator neither exceeded nor went beyond his power and jurisdiction, specially in view of the facts the transaction in question is commercial in nature and the agreement entered into between the parties does not contain any clause prohibiting award of interest.

As noted above, the correctness of this part of the award is in question in the present appeal.

5. The point to be determined is whether in the facts and circumstance of the case, the arbitrator was competent to award interest for the period prior to initiation of the proceeding and for the period of pendency of the proceeding or, in other words, pendente lite interest. It will be relevant to state here certain facts of the case which were not disputed. It was agreed at the Bar that the appointment of the Arbitrator was made by the Court u/s 8 of the Arbitration Act,

but no specific issue/ dispute was referred to by the court to the arbitrator for adjudication. It was further agreed that there is no specific stipulation in the agreement between the parties regarding payment of interest by the insurance Company to the claimant. It was not disputed that there is no material to indicate any prevalent practice in the trade which has the effect of law regarding payment of interest by the insurer to the claimant. The accident in question having taken place on 13-4-82, the Interest Act, 1978 is applicable to the case.

6. The question of award of interest by an Arbitrator came up for consideration before the Apex Court in a batch of cases the decision of which is reported in Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, . In that case the Apex Court has exhaustively dealt with the question of award of interest during the period prior to reference and during the pendency of arbitration proceeding by an arbitrator has considered a plethora of decisions of the Court and has settled the position in the manner which I shall discuss a little later. The Court took into account the provisions of Interest Act, 1839, Interest Act 1978, Section 34 of the CPC and certain other provisions of the substantive law like Section 61(2) of the Sale of Goods Act and Section 80 of the Negotiable Instruments Act. The Court also traced the development pf the law on the point referring to the decisions reported in AIR 1938 67 (Privy Council) , Seth Thawardas Pherumal Vs. The Union of India (UOI), , Ct. A. Ct. Nachiappa Chettiar and Others Vs. Ct. A. Ct. Subramaniam Chettiar, , Satinder Singh and Others Vs. Amrao Singh and Others, , Union of India (UOI) Vs. Watkins Mayor and Co., , AIR 1966 SC 295 (Union of India v. West Punjab Factories), Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, , Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., , Ashok Construction Company Vs. Union of India (UOI), , State of Madhya Pradesh Vs. Saith and Skelton (P) Ltd., and State of Rajasthan Vs. Raghubir Singh and Others, . Some of the observations of the Court setting out the different aspects of the question and the findings of the court are extracted hereunder;

"It is important to notice at this stage that both the Interest Act of 1839 and the Interest Act of 1978 provide for the award of interest up to the date of the institution of the proceedings, Neither the Interest Act of 1839 nor the Interest Act of 1978 provides for the award of pendente lite interest. We must look else where for the law relating to the award of interest pendente lite. This, we find, provided for in Section 34 of the CPC in the case of Courts. Section 34, however, applies to arbitrations in suits for the simple reasons that where a matter is referred to arbitration in a suit, the arbitrator will have all the powers of the Court in deciding the dispute, Section 34 does not otherwise apply to arbitrations as arbitrators are not Courts within the meaning of Section 34, Civil Procedure Code, Again, we must look elsewhere to discover the right of the arbitrator to award interest before the institution of the proceedings, in cases where the proceedings had concluded before the commencement of the Interest Act of 1978. While under the Interest Act of 1978 the expression ''Court'' was defined to include an arbitrator, under the Interest Act of 1839 it was not so defined. The result is that while in cases arising after the commencement of the Interest Act of 1978 an arbitrator has the same power as the Court to award interest up to the date of institution of the proceedings, in cases which arose prior to the commencement of the 1978 Act, the arbitrator has no such power under the Interest Act of 1839. It is therefore necessary, as we said, to look elsewhere for the power of the arbitrator to award interest up to the date of institution of the proceedings. Since the arbitrator is required to conduct himself and make the award in accordance with law we must look to the substantive law for the power of the arbitrator to award interest before the commencement of the proceedings. If the agreement between the parties entitles the arbitrator to award interest no further question arises and the arbitrator may award interest. Similarly if there is a usage of trade having the force of law the arbitrator may award interest. Again, if there are any other provisions of the substantive law enabling the award of interest the arbitrator may award interest. By way of an illustration, we may mention Section 80 of the Negotiable Instruments Act as a provision of the substantive law under union the court may award interest even in a case where no rate of interest is specified in the promissory note or bill of exchange. We may also refer to Section 61(2) of the Sale of Goods Act which provides for the award of interest to the seller or the buyer as the case may be under certain circumstances in suits filed by them. We may further cite the instance of the non-performance of a contract of which equity could give specifies performance and to award interest. We may also cite a case where one of the parties is forced to pay any interest to a third party, say on an overdraft, consequent on the failure of the other party to the contract not fulfilling the obligation of paying the amount due to them. In such a case also equity may compel the payment of interest. Loss of interest in the place of the right to remain in possession may be rightfully claimed in equity by the owner of a property who has been dispossessed from it. (Para 6)

As a result of the discussion of the various cases, We see that AIR 1938 67 (Privy Council) , Union of India (UOI) Vs. West Punjab Factories Ltd., and. Union of India (UOI) Vs. Watkins Mayor and Co., were cases of award of interest not by an arbitrator, but by the Court. It was laid down in these three cases that interest could not be awarded for the period prior to the suit in the absence of an agreement for the payment of interest or any usage of trade having the force of law or any provision of the substantive law entitling the plaintiff to recover interest. Interest could also be awarded by the Court under the Interest Act if the amount claimed was a sum certain payable at a certain time by virtue of a written instrument. In regard to pendente lite interest, the provisions of the CPC governed the same. (Paragraph 17)

The question of award of interest by an arbitrator was considered in the remaining cases to which we have referred earlier. Ct. A. Ct. Nachiappa Chettiar and Others Vs. Ct. A. Ct. Subramaniam Chettiar, , Satinder Singh and Others Vs. Amrao Singh and Others, , Firm Madanlal Roshanlal Mahajan Vs. Hukumchand Mills Ltd., Indore, , Union of India (UOI) Vs. Bungo Steel Furniture Pvt. Ltd., , Ashok Construction Company Vs. Union of India (UOI), and State of Madhya Pradesh Vs. Saith and Skelton (P) Ltd., were all cases in which the reference to arbitration was made by the Court of all the disputes in the suit. It was held that the arbitrator must be assumed in those circumstances to have the same power to award interest as the Court. It was on that basis that the award of pendente lite interest was made on the principle of Section 34, CPC in Nachiappa Chettiar v. Subramaniam Chettiar (supra), Firm Madanlal Roshanlal Mahajan v. Hukumchand Mills Ltd. (supra), Union of India v. Bungo Steel Furniture Private Limited (supra) and State of Madhya Pradesh v. Saith and Skelton Private Limited (supra). In regard to interest prior to the suit, it was held in these cases that since the Interest Act, 1839 was not applicable, interest could be awarded if there was an agreement to pay interest or a usage of trade having the force of law or any other provision of substantive law entitling the claimant to recover interest. Illustrations of the provisions of substantive law under which the arbitrator could award interest were also given in some of the cases. It was said, for instance, where an owner was deprived of his property, the right to receive interest took the place of the right to retain possession, and the owner of immovable property who lost possession of it was, therefore, entitled to claim interest in the place of right to retain possession. It was further said that it would be so whether possession of immovable property was taken away by private treaty or by compulsory acquisition. Another instance where interest could be awarded was u/s 61(2) of the Sale of Goods Act which provided for the award of interest to the seller or the buyer, as the case may be, under the circumstances specified in that section. (Paragraph 18)

While this is the provision in cases in which arose prior to the coming into force of the Interest Act, 1978, in cases arising after the coming into force of the Act, the position now is that though the award of pendente lite interest is still governed by the same principles the award of interest prior to the suit is now governed by the Interest Act, 1978. Under the Interest Act, 1978 an arbitrator is, by definition, a Court and may now award interest in all the cases to which the Interest Act applies. (Paragraph 20)

..........In regard to pendente lite interest, that is, interest from the date of reference to the date of the award, the claimants would not be entitled to the name for the simple reason that the arbitrator is not a Court within the meaning of Section 34 of the C.P.C., nor were the references to arbitration made in the course of suits. In the remaining cases which arose before the commencement of the Interest Act, 1978, the respondents are not entitled to claim interest either before the commencement of the proceedings or during the pendency of the arbitration. They are not entitled to claim interest for the period prior to the commencement of the arbitration proceedings for the reason that the Interest Act, 1839 does not apply to their cases and there is no agreement to pay interest or any usage of trade having the force of law or any other provisions of law under which the claimants were entitled to recover interest. They are not entitled to claim pendente lite interest as the arbitrator is not a Court nor were the references to arbitration made in suits. One of the submissions made on behalf of the respondents was that in every case, all disputes were referred to arbitration and the jurisdiction of the arbitrator to award interest under certain circumstances was undeniable. The award not being a speaking award, it was not permissible to speculate on the reasons for the award of interest and the Court was not entitled to go behind the award and disallow the interest. It is difficult to agree with this submission. The arbitrator is bound to make his award in accordance with law. If the arbitrator could not possibly have awarded interest on any permissible ground because such ground did not exist, it would be open to the Court to set aside the award relating to the award of interest on the ground of an error apparent on the record. On the other hand, if there was the slightest possibility of the entitlement of the claimant to interest on one or other of the legally permissible grounds, it may not be open to the Court to go behind the award and decide whether the award of interest was justifiable.............. (Paragraph 22)

7. This decision was followed by the Apex Court in another case of State of Orissa v. Construction India, reported in the same volume at page 1530.

8. The position that emerges from the principles laid down by the authoritative pronouncement of the Apex Court, as I read, it, is that in respect of a case which is governed by the Interest Act, 1978, it is open to the arbitrator to award interest for the period prior to commencement of the arbitration proceeding in accordance with the provisions in the said Act, but the arbitrator has no jurisdiction to award pendente lite interest, i.e. for the period after commencement of the arbitration proceeding till the passing of the award since Section 34 of the CPC has no application to an arbitrator. The Supreme Court has pronounced no decision on the power of the Court to award interest after passing of the decree till the realisation of the sum awarded. Applying these principles to the facts of the present case, in my view, the petition is inescapable that the award of pendente lite interest was beyond the power/jurisdiction of the arbitrator. The learned Subordinate Judge was in error in confirming that part of the award which was patently illegal.

9. Regarding the period prior to commencement of the arbitration proceeding, as noted earlier, the arbitrator had the power to grant interest. Since the award is an unreasoned and non-speaking award, it has to be accepted that the arbitrator granted interest for the period of being satisfied about its tenability in law.

10. The net result is that the award of interest from 15-7-1963 till 31-7-1964, in the facts and circumstances of the case, is unassailable, but the award of interest for the period from 1-6-84 to 20-6-88 is unsupportable and has to be set aside.

11. Accordingly, the appeal is allowed in part, the decision of the Subordinate Judge, Rourkela confirming the award of the arbitrator awarding interest on the principle sum of Rs. 29,210.33 is set aside and the award is modified to that extent only. Both parties will bear their respective costs of this appeal.

