

(1973) 01 KL CK 0011
In the High Court Of Kerala
Case No : A.S. No. 357 of 1972

The State of Kerala and Another

APPELLANT

Vs

K.P. Poullose

RESPONDENT

Date of Decision : 29-01-1973

Acts Referred:

Arbitration Act, 1940 — Section 28, 28(1), 28(2), 3, 30

Citation : (1973) KLJ 365

Hon'ble Judges : V.P. Gopalan Nambiyar, J; N.D.P. Namboodiripad, J

Bench : Division Bench

Advocate : V.K.K. Menon and C.J. Balakrishnan, for the Appellant; M.P. Abraham and U.K. Ramakrishnan, for the Respondent

Judgement

V.P. Gopalan Nambiyar, J.—Certain disputes arising between the State or Kerala and the 1st respondent, a contractor, were referred on 26-10-68 for arbitration of the Chief Engineer in accordance with the Arbitration Clause-Clause 34-of the tender notification Ext. P21. The Arbitrator issued notice dated 3-1-69 to the petitioner to appear before him. The petitioner filed his written statement on 22-2-69. The first hearing was on 4-6-69. and the second, on 17-6-69. The award was passed on 11-9-69. At the instance of the petitioner the award was filed in court and the court ordered notice of filing the award to the petitioner on 4-4-70. In response to the notice, the petitioner filed an application under S. 33 of the Indian Arbitration Act 1940 (referred to hereinafter as the Act) to set aside the award on various grounds. The court below set aside the award on two of the grounds alleged, and rejected the rest. The two grounds which found favour with the court below were: first that the award was passed beyond the period of four months provided in R. 3 of the First Schedule to the Act, and second that the Arbitrator was guilty of misconduct in so far as the award disclosed an error apparent on the face of the record as the Arbitrator had not adverted to, or considered, two documents, Exts. P11 and P16, Against this decision the State has preferred this appeal. The respondent was the successful tenderer for the construction of three zonal R.C.C. over head Reservoirs, two in Mattancherry and

one in Cochin, in connection with the Ernakulum-Mattancherry Water Supply Scheme. The tender notification (Ext. P21) contained Clause. 34, which was the arbitration clause, which specified for a reference in cases of dispute to the Chief Engineer. It is unnecessary to extract the Clause. Clause. 13 of the notification reads:

The contractor shall be bound to carry out all extra items not included in the schedule, but found necessary during the actual execution of the work and these extra items will be paid for at rates based on the departmental data rates, for such items plus or minus the proportionate difference between the P.A.C. as per the accepted tender and estimate amount as per the current schedule. The tender difference shall be calculated less value of the departmental materials to be supplied,

In Schedule A3 to the notification, under the heading: "SITE", it was stated that the soil at the site for Reservoir No. 1 and Reservoir No. 2 is loose-clay, and for Reservoir No. 3, sandy. Clause No. 11 stated that intending tenderers are expected to inspect and study carefully the conditions at site. Condition No. 18 required the successful tenderer to execute an agreement on stamp paper before commencing work. By report No. 22 of the Kerala Engineering Research Institute, Peechi, Soil Mechanics and Foundation Division, dated 14-9-65, (Ex. P19), it was reported that the sub-soil at the three places chosen as sites for the reservoirs up to 16, showed that the top soil was sand, the middle layer clay, and the bottom layer, silty sand or sand. It was stated that the clay found at the three places was of a highly compressible nature and hence pile foundation was preferable; and that as the top strata at three places was sandy, jetting had to be resorted to for driving the piles through this strata. It was the respondent's claim that whereas the work tendered for was to be executed by "pile driving", it was actually done by "jetting" having regard to the nature and condition of the soil at the sites, and that this was an extra item of work, for which he was entitled to extra remuneration in accordance with the terms of Clause. 13 of the tender notification. The State took the view that "jetting" was not an extra item of work but only a revised or improved technical method of executing the work tendered and contracted for, and therefore the contractor was not entitled to any extra remuneration. The Arbitrator by his award Ext. P10 decided this against the respondent. The court below set aside the award on the two grounds noticed earlier.

2. We shall first deal with the question whether the award is liable to be set aside as having been made beyond the four months stipulated by R. 3 of the First Schedule. S. 3 of the Act enacts that an arbitration agreement, unless a different intention is expressed, shall be deemed to include the provisions set out in the First Schedule, in so far as they are applicable. We find no different intention expressed in Ext. P7 agreement; nor, in the tender notification (Ext. P-21), the conditions of which were, by Clause. 5, to be part of the agreement. R. 3 of the Schedule I of the Act reads:

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

The power of the court to extend the time is provided by S. 28, as follows:

28(1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

On these provisions, and having regard the dates we have mentioned earlier, of reference to the Arbitrator (26-10-68), notice for appearance (3-1-69). first hearing (4-6-69), second hearing (17-6-69), and the award (11-9-69), the period of four months should commence from the date on which the Arbitrator entered on the reference (there being no notice calling upon him to act). His notice dated 3-1-69 supplies this date; and the 1st and 2nd hearing, and the award, are all beyond four months from that date. The question has been debated before us whether the petitioner having participated in the hearings, beyond the period of four months, is precluded from objecting to the award on the ground that it was passed beyond time. In the view that we take, it seems unnecessary to pronounce upon it, but as the matter was argued at length, we shall indicate our opinion. Under S. 28(1) of the Act the court has power to extend the time for making the award beyond the period of four months, whether before or after the passing of the award. It was agreed before us that this power which was available to the court below can be exercised by us as the appellate courts. That being so, we are of the opinion that on the facts set out above, this is a fit case for the extension of time for making the award till it was passed, viz. 11-9-69, and we would extend time accordingly. We cannot but record our surprise that the request for extension of time under S. 28(1) of the Act was not made to the court below; nor was it made to us, till we asked the Government Pleader if we did not have the power. Even after our power to do so was conceded by the counsel for the Respondent, there was no application for extension of time, but an oral request for extension was made by the Government Pleader. There is authority that an application in writing is not necessary, and an oral request for extension of time would suffice. (See Sakalchand Moti Vs. Ambaram Haribhai, and Madura Mills Co. Ltd. Vs. N.M.S. Krishna Ayyar,).

3. From S. 28(2) of the Act it seems implicit that a provision in the arbitration agreement that the Arbitrator may, with the consent of all parties to the agreement enlarge the time for making the award, is valid. This was a view taken of S. 28(2) of the Act by Dhawan J. in Seth Shambhu Nath Vs. Sm. Surja

Devi and Others, . A Full Bench of the Patna High Court in Bokaro and Ramgur Ltd. Vs. Dr. Prasun Kumar Banerjee, took the view that under S. 28, the court alone can extend the time for submission of the award, and the parties have no such power, except in the case of arbitration without the intervention of court, where they have the right to enlarge the time by executing a fresh agreement. The same view was expressed in Sowaran Singh Vs. Municipal Committee, Pathankot and Another, . With respect, we are inclined to take a somewhat different view from the Patna and the Punjab rulings. The Patna Full Bench recognised, as did Dhawan J. in the Allahabad ruling, that it is implicit in S. 28(2) that a term in the agreement to extend time by consent of parties is valid. We share the same view. Were it necessary for us to express ourselves, we should think, that there can be an extension of Time by the arbitrator in pursuance of a term in the agreement enabling him to do so by consent of parties. In this case there is no such term in the agreement, and no question of extension of time by the Arbitrator with consent of the parties can arise.

4. For the respondent it was sought to be contended on the authority of the decision of the Supreme Court in Hari Shankar Lal Vs. Shambhunath Prasad and Others, that an award passed beyond the period mentioned in R. 3 of Schedule I is non est, and that the arbitrator after that period becomes functus officio. On this ground, it was said that even the court cannot extent time. But this is opposed to the express language of S. 28(1). Subba Rao J. who spoke for himself and the learned Chief Justice and Mudholker J. in the Supreme Court case, expressed himself thus:

The legal position may be formulated thus: (a) A notice to act may be given before or after the arbitrators entered upon the reference, (b) If notice to act is given before they entered upon the reference the four months would be computed from the date they entered upon the reference, (c) If a party gives notice to act within four months after the arbitrators entered upon the reference, the arbitrators can make an award-within four months from the date of such notice. And (d) in the event, after the expiry of the said four month the arbitrators become functus officio, unless the period is extended by court under S. 28 of the Act, such period may also be extended by the court, though the award has been factually made.

(Underlining ours)

Earlier it was said:

...if time was not extended by court the document described as an award would be treated as non est,

It is plain that the observations about the arbitrator becoming functus officio and the award becoming non est are all subject to the period for submission of the award not being extended. Raghubar Deyal J. in a separate concurring judgment held that if the arbitrators had entered on the reference, the four months" period began from the date when they so entered, and that any notice subsequently

given, calling upon them to act will not make the period start afresh from the date of such subsequent notice. In the Supreme Court case the reference to arbitration was on 17-8-48; within 10 days thereafter, the arbitrator gave notice and entered on the reference; on 25th July 1949 the mother of one of the parties died and the proceedings were held up; on 31-8-50, one of the parties (the appellant before the Supreme Court) gave notice to the Arbitrators to proceed with the reference; the Arbitrators proceeded and made an award on 1-10-50; the appellant before the Supreme Court filed an application on 23-1-51 to file the award; it was then objected that the award was filed beyond time and was invalid. The objection was upheld. As pointed out by the Full Bench of the Patna High Court in the decision noticed supra, it does not appear from the facts that the parties participated before the Arbitrator after the expiry of the four months" period. And no question of waiver or acquiescence or estoppel was raised or argued before the Supreme Court. The question directly considered by the Supreme Court, viz. whether a notice subsequent to the arbitrator entering upon the reference can give a fresh start of time, does not arise here; and the observations of the Court about the award being non est and the arbitrators being functus officio have to be read and understood in their proper context.

5. In *Bokaro and Ramgur Ltd. Vs. Dr. Prasun Kumar Banerjee*, the parties had participated without objection in the proceedings before the Arbitrator beyond the four months" period mentioned in R. 3 of the First Schedule of the Act. The Full Bench held that R. 3 gets statutorily incorporated in the arbitration agreement under S. 3 of the Act; but it is nevertheless a term of the contract; and therefore if a party who participates in the proceedings beyond four months is sought to be barred by estoppel by conduct, the plea cannot be met by urging that there can be no estoppel against a statute. It was therefore held that the parties were barred by the principles of estoppel and also by the principles of waiver and acquiescence from challenging the award. A learned judge of the Orissa High Court in *Ganesh Chandra Misra Vs. Artatrana Misra and Others*, also took the view that R. 3 of the Schedule I is statutorily incorporated into the arbitration agreement, and that by reason of such incorporation there can be no question of estoppel against a statute. The same view was also expressed by Dhawan J. in *Seth Shambhu Nath Vs. Sm. Surja Devi and Others*, . This view appeals to us; and as nothing was said to show that the Respondent was not aware of his rights when he participated in the two hearings before the Arbitrator we think he is barred from attacking the award as beyond time on ground of estoppel, waiver and acquiescence.

6. In order to highlight the grounds to set aside an award under S. 30 of the Act, we may briefly notice the historical background (noticed also in the Patna Full Bench case). Under the CPC of 1859, S. 312 to 329 made provision for arbitration. The time for passing the award had to be fixed in the order of reference under S. 315, and could be extended from time to time under S. 318. Under the Code of 1882, the matter was dealt by S. 506 to 526. S. 521 expressly enacted that no award would be valid unless made within the period allowed by

the court. The Code of 1908 adopted a different stand. Proceedings for arbitration were governed by the 2nd Schedule. Para. 1 to 16 of 2nd Schedule deal with the matter. There was provision in Para. 8 for extension by court of the time limit within which the award had to be made, as specified in an order of reference under paragraphs. Under Para. 15 the award could be set aside on the ground that it had been made after expiration of the period allowed by the court. Unlike S. 521 of the Code of 1882, under which an award beyond time was treated as null and void, Para. 15 required such an award to be set aside. Then came the Arbitration Act of 1940. S. 30 of the Act lists the grounds for setting aside an award. That an award was made beyond the period of four months is not expressly made a ground for setting aside the award. It should be brought under the category of "misconduct" under clause (a) of S. 30, or of being "otherwise invalid" under clause (c). The court below relied on the following observations of the Supreme Court in *Seth Thawardas Pherumal Vs. The Union of India (UOI)*, :

An arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. He is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not, he can be set right by the courts provided his error appears on the face of the award. The single exception to this is when the parties choose specifically to refer a question of law as a separate and distinct matter.

But these observations were made with reference to S. 16 (1) of the Act, which expressly provides for remitting the award on the ground that objection to its legality is apparent on the face of it. Those expressions do not occur in S. 30 of the Act. We shall assume, without deciding, that an error apparent on the face of the record may, in conceivable cases, amount to "misconduct" under Clause (a) of S. 30 and would also suffice to render the award "otherwise invalid" under clause (c) of the Section. But was there an error apparent on the face of the record? Or was there at least any circumstance which would render the award "otherwise invalid"? That the award was beyond time is a plea not available to the Respondent for reasons that we have discussed.

7. The court below concluded that there was an error apparent on the face of the award as the Arbitrator did not choose to refer to Ext. P11 and P16, letters by the Superintending Engineer (who was the Arbitrator himself at the time) and the Executive Engineer, respectively, indicating that jetting is an extra item of work. We are unable to agree with the reasoning and conclusion of the court below. As observed in AIR 1923 66 (Privy Council) :

An error of law on the face of the award means, in their Lordships' view, that you can find in the award or a document actually incorporated therein, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of award and which you can then say is erroneous. It does not mean that if in a narrative, a reference is made to a

contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend, to see if that contention is sound.

In the present case Exts. P11 and P16 were not documents marked before Arbitrator. Only Ext. P1 to P9 were marked before him. Ext. P11 and P16 which were filed in the lower court, were not even referred to in the award and we are unable to say that they had been incorporated in the award or otherwise formed part of it. No advertence to these documents does not amount to an error apparent on the face of the record; nor does it make the award otherwise invalid,

8. Counsel for the respondent sought to sustain the order of the court below on certain other grounds stated to have been urged before it and rejected by that court. We shall turn to those grounds. It was said that the order of reference to the Arbitrator proceeds on the basis that jetting is an item of work and therefore the Arbitrator acted beyond the scope of the reference in considering whether it was an extra item of work, and deciding that it was not. The objection in this form was not raised before the court below. Ext P6 order of reference dated 26-10-68 states that there was difference of opinion between the contractor and the Public Health Engineering Department relating to the contractor's claim for extra payment for jetting. We consider that the difference of opinion set out in Ext. P6 sufficiently reflects the scope of the controversy and was wide enough to cover the question whether jetting was an extra item of work or not.

9. It was then said that the conclusion of the Arbitrator that jetting was not an item of work was based on no evidence at all, and that such evidence as there was, pointed only to the opposite conclusion. The point in this form, again was not raised before the lower court; and we feel there is no substance in it. Counsel for the respondent referred us to Ext. P18 letter dated 13-7-66 from the contractor to the Chief Engineer, where he prayed for the extra charges for jetting, to Ext.P17 dated 21- 7-66 from the Chief Engineer to the Executive Engineer, forwarding the contractor's letter and seeking clarification on certain points, to Ext. P16 dated 25-7-66 of the Executive Engineer clarifying the points referred to him, and indicating his opinion that, in the circumstances, jetting done by the contractor can be considered as an extra item of work; and to Ext. P15 memo dated 27-7-69 of the Chief Engineer asking the Executive Engineer to submit through the Superintending Engineer the financial commitment which the extra item might involve. This was submitted by the Executive Engineer (Ext. P14 dated 2nd August 66); whereupon by Ext. P13 memo dated 5-8-66 of the Chief Engineer, the Superintending Engineer, was asked to verify the data furnished and propose a reasonable rate for the extra item. By Ext.P12 dated 5-8-66 the Superintending Engineer made certain deductions from the data supplied. Thus far, it would appear that the Department had either accepted, or came very near to accepting, the contractor's claim for payment for jetting as an extra item. Then came certain objections from the Accountant General to the payment. The objection itself is not on record, but Ext. P11 dated 8-9-66 is a

letter from the Superintending Engineer to the Chief Engineer offering his remarks on the objection. It is enough to record that Ext. P11 does not expressly state that jetting is an extra item of work although it states that the Accountant General's stand that the Department is not bound to pay extra for adopting the method of jetting for pile driving does not appear to be correct. From these records (none of which were marked before the Arbitrator), we are unable to hold that the conclusion of the Arbitrator that jetting is not an extra item of work was based on no evidence at all. The question whether it was an extra item of work was referred to him for decision and he was bound to decide it to the best of his lights and judgment.

10. Next, it was said that by Ext. P9 letter dated 1-8-64 the contractor had stipulated along with his tender, certain conditions, one of which was that excess and extra work other than in design will have to be paid at the estimate rate plus 20 per cent, and that this was accepted by Ext. P20 memo of the Chief Engineer dated 28-10-65. Even then, the question remained whether jetting was an extra work or only a revised method of performing the original work. We find no merit in these additional grounds urged by counsel for the contractor to sustain the order of the Court below, setting aside the award.

11. In the result we allow this appeal, set aside the decision of the court below, and direct that the Respondents' application to set aside the award will stand dismissed. The proceedings for filing the award if not completed, will be proceeded with in accordance with law. There will be no order as to costs in this appeal. Before closing, we wish to venture certain observations. Clause. 13 of the tender notification places an obligation on the contractor to carry out all extra items not included in the schedule and found necessary "during actual execution of the work"; and an obligation on the Department to pay for such extra items. Clause. 18 provides for the successful tenderer executing an agreement before commencing the work. The agreement in this case (Ext. P7) was on 2-11-65. Consistent with Clause. 18 this must have been before the commencement of the work. This is also indicated by Ext. P1 dated 7-10-65, from the Chief Engineer to the contractor informing him that jetting has to be resorted to in the top strata, and asking the contractor meanwhile, to execute the agreement and start, the work. We have again Ext. P2 dated 21-2-66 from the contractor intimating that he has started the work of driving piles at Thoppumpadi. The discovery of the sandy nature of the soil at the sites at certain layers was by the report of the Executive Engineer, Peechi Research Institute, dated 14-9-65 (Ext. P19) which was long prior to the execution of the agreement and the commencement of the work. On the terms of Clause. 13, therefore, even if jetting is an extra item of work, it does not appear to be one found necessary "in the course of the actual execution of the work". Indeed the contractor's claim for extra payment for jetting appears to have been rejected on this ground in a short but instructive order dated 3-10-68 (Ext. P3) by the then Chief Engineer. He referred to Ext. P1 intimation conveyed before the execution of the agreement, and held that therefore the claim for jetting as an extra item was

inadmissible. The contractor's attempt to have the decision re-considered also failed. (Vide Ext. P4 dated 13-12-66). Despite these the point that on the terms of Clause. 13 the contractor was not entitled to extra payment was never raised before the Arbitrator, nor, if it could be raised at all, at any of the subsequent stages.