
(2008) 03 CAL CK 0003
In the Calcutta High Court
Case No : A.P.O. No. 5 of 2008

Union of India (UOI)

APPELLANT

Vs

Ambica Construction

RESPONDENT

Date of Decision : 31-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 34
Interest Act, 1978 — Section 3

Citation : (2008) 2 CHN 949

Hon'ble Judges : Tapas Kumar Giri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : N.C. Roy Chowdhury, Rabindra Nath Bag, Deepak Kumar Singh and Sujata Chaudhury, for the Appellant; Dipak Kumar Basu and Sabyasachi Chowdhury, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Parties to the above appeal entered into an arbitration agreement to resolve their disputes. The Arbitrator published a non-speaking award which was made subject-matter of challenge in this Court. This Court directed the Arbitrator to assign reasons. The matter was remanded back to the Arbitrator on that score. The Arbitrator thereafter supplied reasons in support of his award. The appellant filed an application for setting aside of the said award challenging the reasons so supplied by the Arbitrator in terms of the direction of this Court. It was contended in the said application that the respondent/contractor having received payment in full and final settlement of its claim was not entitled to raise any claim before the Arbitrator. It was also urged that the claims made by the respondent/contractor were outside the scope of the arbitration agreement. The learned Single Judge by His Lordship's well versed judgment rejected the contentions of the appellant save and except the submissions made on account of interest. His Lordship modified the award to the extent that the principal claim would carry interest @ 10% per annum on and from September 1, 1992 being the date when the Arbitrator entered upon reference until payment. His Lordship, however, did not feel inclined to interfere

with the rest part of the award. Hence, this appeal by the appellant.

2. Although several points were canvassed in the Memorandum of Appeal. Mr. Roy Chowdhury, learned Senior Counsel appearing in support of the appeal raised three issues:

(i) In terms of the agreement no interest was payable on any circumstance. Hence, the Arbitrator was not entitled to award interest. The learned Single Judge accepted such submission with regard to interest for the pre-reference period. His Lordship, however, erred in awarding interest pendente lite and interest on judgment.

(ii) His Lordship failed to appreciate that claim Nos. 5, 6 and 7 could not have been allowed by the Arbitrator as it was made clear by the appellant while granting extension to the respondent that no claim for any additional amount on escalation would be entertained by the appellant.

(iii) His Lordship failed to appreciate that the Arbitrator erred in not considering the supplementary agreement entered into by the and between the parties.

3. To elaborate his submission on interest Mr. Roy Chowdhury relied on the Apex Court decisions in the case of Secretary, Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, and in the case of Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Ors. v. N.C. Budharaj and Ors. reported in 2001(2) SCC 721 and in the case of The Board of Trustees for the Port of Calcutta Vs. Engineers-De-Space-Age, . Citing the aforesaid three decisions Mr. Roy Chowdhury contended that pre-reference interest or interest pendente lite to the contrary. Mr. Roy Chowdhury further contended that interest pendente lite and interest on judgment could be allowed by the Court in terms of Section 34 of the CPC and in terms of the provisions of the old Interest Act. Interest Act, 1978, (hereinafter referred to as the "said Act of 1978") however enlarged the scope of awarding interest and Section 3 of the said Act of 1978 empowered the Arbitrator to award interest pendente lite and interest on judgment if there was no contract to the contrary. However, in the instant case the agreement categorically provided that no interest would be paid in case of delayed payment. Hence, Arbitrator was bound by the said provision of the contract and as such was not entitled to award interest. Learned Judge erred in appreciating such argument of the appellant.

4. On claim Nos. 5, 6 and 7 Mr. Roy Chowdhury contended that such claims could not have been allowed by the Arbitrator in view of the specific condition imposed by the appellant while granting extension of time to the respondent. In this regard Mr. Roy Chowdhury relied upon the Apex Court decision in the case of State of Orissa Vs. Sudhakar Das (Dead) by Lrs., .

5. Mr. Deepak Kumar Basu, learned Senior Counsel appearing for the respondent while opposing the appeal contended that Clause 15(2) of the contract was not binding upon the Arbitrator as Arbitrator derived power from the said Act of

1978. Hence, the principles laid down in the case of G.C. Roy (supra) and Budharaja (supra) would apply. The learned Single Judge applying the said principle rightly allowed interest pendente lite and interest on judgment. In this regard Mr. Basu referred to the Apex Court decision in the case of Bhagawati Oxygen Limited v. Hindustan Copper Limited reported in AIR 2005 SC 2071. Mr. Bose also relied on two Division Bench decisions of this Court reported in Union of India (UOI) Vs. Pam Development Pvt. Ltd., and 2001(2) CHN 470 (Union of India v. M. Muljee). On claim Nos. 5, 6 and 7 Mr. Basu drew our attention to ground X of the Memorandum of Appeal. Mr. Basu contended that the learned Single Judge rightly held that those claims could be saved in view of provisions of Clause 17(2) of the contract.

6. Before dealing with the rival contentions of the parties canvassed before us let us examine the law on the subject in the light of the Apex Court decision cited (supra). The power of the Arbitrator to award pre-reference interest, interest pendente lite and interest on judgment was considered by the Apex Court in the case of Executive Engineer (Irrigation), Balimela and Others Vs. Abhaduta Jena and Others, . In the said decision the Apex Court held that the Arbitrator to whom the reference is made without the intervention of the Court does not have jurisdiction to award interest pendente lite. The said decision of the Apex Court was reviewed by the five-Judge Bench in the case of G.C. Roy (supra) wherein the earlier decision in the case of Abadhuta Jena (supra) was overruled. The Apex Court held that when the agreement was silent the Arbitrator was within his right to award pendente lite interest. The said decision was again reconsidered in the case of N.C. Budharaj (supra) by a five-Judges' Bench when the Apex Court by majority held that the Arbitrator appointed with or without the intervention of the Court has jurisdiction to award the interest for the pre-reference period in absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. These decision were again considered by the Apex Court by recent decision in the case of Bhagawati Oxygen (supra). Our High Court also in the case of Union of India (supra) applied such ratio. The learned Single Judge in His Lordship's well versed judgment considered the aforesaid decisions and ultimately awarded interest pendente lite and interest on judgment. Clause 16(2) so relied upon by Mr. Roy Chowdhury was considered in the case of De Space Age (supra). The Apex Court observed that such clause could not operate as a bar on the Arbitrator to award pendente lite interest. We do not find any scope of disagreement as we find that the learned Single Judge approached the problem in right direction and rightly applied the ratio decided by the Apex Court in those cases referred to above. The contention of Mr. Roy Chowdhury on interest thus fails and is rejected.

7. Let us now come to the second contention raised by Mr. Roy Chowdhury being his objection on claim Nos. 5, 6 and 7. Claim No. 7 relates to enhancement of wages in view of change in law. The claimant made such additional claim as there had been an increase of the minimum wages by the State. From Clauses 17(2) and 17(3) of the agreement read together we find that this was an

eventuality not under the control of the respondent/contractor. It is true that while granting extension it was made clear that no additional amount on account of delay would be entertained by the appellant. In our view such Clause would not bar the claim of the respondent on difference of wages so made in claim No. 5. We, therefore, uphold the ultimate decision of His Lordship on claim No. 5 although on different reasoning.

8. Claim Nos. 6 and 7 were based on additional expenses for transportation of goods and infructuous expenditure for extended maintenance. His Lordship held that the appellant failed to demonstrate that those claims were covered under Clause 17(3) and not under Clause 17(2). Hence, the respondent was entitled to such claim and no interference was called for. With all humility may we differ with His Lordship on this score. While granting extension it was categorically made clear that no additional claim would be entertained. The respondent should have objected to such Clause contemporaneously. Having not done so they were precluded from making such claim for the extended period. Hence, we disallow the claim Nos. 6 and 7. Appeal succeeds to this extent. The award of the Arbitrator is modified accordingly.

9. On the issue of supplementary agreement we find that such issue was taken care of in the earlier proceedings and the same was not available for further adjudication and as such is rejected.

10. The appeal succeeds in part. The judgment and order of the learned Single Judge to the extent where His Lordship allowed claim Nos. 6 and 7 is set aside. The award is modified accordingly.

11. The appeal is disposed of without any order as to costs.

12. Urgent xerox certified copy would be given to the parties, if applied for.

Tapas Kumar Giri, J.

I agree.