

(2010) 10 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : CMP No. 24 of 2001 In A.A. No. 4 of 2001 and CMP No. 30 of 2001 In A.A. No. 5 of 2001

Ved Parkash Rathore and Co.

APPELLANT

Vs

State and Another

RESPONDENT

Date of Decision : 15-10-2010

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (2011) 1 JKJ 222

Hon'ble Judges : Gh. Hasnain Massodi, J

Bench : Single Bench

Judgement

Gh. Hasnain Massodi, Judge

1. Shri Ved Prakash Rathore (hereinafter referred to as ""non-applicant"") way back in 1972, entered into a contract with Superintending Engineer,

Electric Construction Circle No. I for supply of skilled and unskilled labour in connection with construction of Upper Sindh Hydel Project at

Sumbal (Kashmir). The arrangement was extended from time to time and the contract for the extended period continued to be governed by the

terms and conditions incorporated in the initial contract. Clause 18 of the Agreement read as under:

Normally the labour to be supplied has to work for 8 (eight) hours every day. However sometimes the labour will have to work overtime in excess

of normal 8 hours either during day time or at night in which case the contractor shall have to supply the labour for such overtime working. The

contractor shall be entitled to 50% extra wages for such labour supplied by him. A separate record of labour normally employed as well as the

same engaged over time shall be kept properly by the Officer Incharge of the

work and signed by both the parties.

2. The non-applicant, after payment for labourers supplied was received, raised two claims against the Superintending Engineer, Electric

Construction Circle-I. Claim-I, pertained to an amount of Rs. 33,139.75 claimed to be payable to the non-applicant on account of overtime

wages for the period from June 1973 to August 1974 and nonpayment of bills amounting to Rs. 30,000/- on account of expenses for travelling,

lodging and boarding. Claim-II was for an amount of Rs. 1,45,260.44 claimed to be payable to the non-applicant on account of unpaid bills,

unauthorized rebates and non-payment of overtime wages for the period from March 1976 to August 1976. Both the claims were rejected by the

Superintending Engineer, Electric Construction Circle No. I, prompting non-applicant to file two applications for reference of disputes to arbitrator,

u/s 20 J&K Arbitration Act 1940 (hereinafter referred to as "the Act"). The applications were filed on 23.4.1982, and registered as AA No.

73/1982 and 74/1982. The applications were allowed and the disputes referred to Arbitrator vide order dated 16.05.1984. The Arbitrator failed

to take the matter to its logical end. The Court vide Order dated 06.03.1997 referred the matter to another Arbitrator and finally vide order dated

02.07.1998, the disputes were referred to third Arbitrator, who entered upon the reference on 16-8-1998 and handed down awards on

22.01.2001.

3. The Arbitrator allowed the Claim No. I partially and awarded an amount of Rs. 33,139.75 with interest thereon @ 12% per annum with effect

from April 1976 till the date of award and future interest @ 12% per annum on the awarded amount together with the interest accruing thereon, till

the date of final realization of award amount. The claim for an amount of Rs. 30,000/- on account of travelling, boarding, lodging etc. was,

however, disallowed.

4. The Arbitrator awarded an amount of Rs. 1,09,598.00 on account of Claim No. II with interest @ 12% per annum on item (a) i.e., unpaid bills

with effect from January 1978; on item No. (b) i.e., rebate deducted unauthorizedly with effect from April 1980; and with effect from January

1977 on item (c) i.e., overtime work, till date of award and future interest @ 12% per annum on the awarded amount together with interest

accruing thereon from the date of award till the final payment of award amount.

5. The Awards dated 22.01.2001 are questioned by the State and Executive Engineer (herein after referred to as applicants) u/s 30/33 J&K

Arbitration Act 1946 on the grounds that the Arbitrator misconducted the proceedings by making Award contrary to the terms and conditions of

the agreement. It is pleaded that for the contractor to succeed in his claim, it was necessary to establish with reference to the record, the details of

the overtime labour supplied with the dates, particulars of individuals and other such details. The contractor is said to have failed to place any

record relating to overtime wages, unpaid bills, etc., muchless prove any such record before the Arbitrator. The arbitrator is thus said to have

made the award without any evidence having been brought on the file by the contractor. The award for the said reason is assailed as outcome of

legal misconduct on the part of the Arbitrator. The applicants also dispute competence of the Arbitrator to award interest on the award amount

inasmuch as such interest is not payable under the terms of the agreement nor is Interest Act applicable to the State of J&K. The award, according

to the applicants, is not reasoned. The Arbitrator is said to have failed to settle the issues and denied opportunity to the applicants to lead evidence

in support of their stand. It is further averred that the non-applicant, having accepted the final payment, was not competent to lay the claim for

overtime labour eight years after the final payment was accepted.

6. The non-applicant, in his objections to the application, insists that the payment was received by the non-applicant on account of the labour

supplied, related to the normal working hours per day and not the overtime work rendered by the labour supplied. The non-applicant insists that

the claim is within four corners of the agreement executed by the parties and that all the record pertaining to the over time labour was duly signed

by the parties and was lying with the applicant. The non-applicant disputes the stand that the Arbitrator mis-conducted the proceedings or indulged

in any misconduct and insists that the award was made on the basis of the material placed before the Arbitrator. It is pleaded that the applicants,

though given sufficient opportunity, failed to adduce any evidence before the Arbitrator and that the applicants cannot be now heard saying that

there was no evidence before the Arbitrator to make the award. It is disputed

that the Arbitrator was under a legal obligation to make a reasoned award. The application u/s s 30/33 is assailed as time barred, having been filed more than two months after the award was made and its copy supplied to the applicants.

7. On 21.12.2001, upon perusal of pleadings, following issues were settled:

(1) Has the Arbitrator mis-conducted himself or the proceedings ? o.p. on State

(2) Is the award otherwise invalid ? o.p. on State

(3) Relief.

8. The parties were asked to adduce evidence in the form of affidavits in support of their respective stands. The applicants filed affidavits of S/Shri

N.D. Baqal, Chief Engineer, Generation PDC, Bemina, Srinagar, Ghulam Rasool Bhat, Superintending Engineer and Ghulam Rasool Bhat,

Executive Engineer, Generation, Division 1st Sumbal Kangan (Kashmir).

9. The contents of all the three affidavits, though sworn individually by three officers of Power Development Corporation, are identical.

10. The arbitrator is said have virtually re-written Clause-14 of the agreement by concluding that work rendered after scheduled working hours,

comes within ambit of overtime. It is stated, that the Arbitrator failed to appreciate that the applicants executed construction work in three shifts

and labourers who worked in second or third shift i.e. during night hours were not to be taken to have rendered any over time labour. The

overtime labour, it is stated is the labour/work beyond eight hours. It is insisted, that none of the labourers supplied by the non-applicant was made

to work beyond eight hours and in case some of the labourers supplied by the non-applicant were asked to work in second or third shift, that

would not entitle the non-applicant to lay claim for overtime wages. However, it is admitted that the claimant (applicant) was paid overtime wages

from time to time, where a separate record was maintained and authenticated by Assistant Electric Engineer, Incharge of the Work and the

representative of the contractor or the contractor himself. It is further stated that as the contractor accepted the last and final payment in 1976

without any reservation or objection, the non-applicant could not after a gap of six years i.e. in the year 1982 raise dispute regarding the non-

payment of overtime charges.

11. The non-applicant has not adduced any evidence in the shape of affidavits or otherwise to rebut the evidence adduced in shape of affidavits filed by the applicant, or to substantiate his stand.

12. Heard and considered.

13. The Court approached by a party with an application u/s 30 read with Section 33 of the J&K Arbitration Act, 1940, may feel persuaded to

set aside the award in case one or more grounds spelt out in Section 30 of the Act, are made out. The award can be successfully challenged in

case the party who challenges the award succeeds in bringing his case within the ambit of Section 30 of the Act. In other words, the party

questioning the award is to convince the Court that the arbitrator or the Umpire has mis-conducted himself or the proceedings, or that the award

has been made after issue of an order superseding arbitration or after arbitration proceedings have become invalid u/s 35 or that the award has

been improperly procured or is other wise invalid.

14. The applicants in the present case rest their challenge to the award primarily on the ground that the award is non-speaking or without reasons.

It is also pleaded that the award suffers from mis appreciation of evidence and is based on no evidence. The arbitrator is said to have travelled

beyond the agreement between the parties and made the award oblivious to the terms and conditions of the agreement between the parties. The

applicants are also sour that the arbitrator has awarded interest on the claim when the agreement did not provide for any interest on the amount

payable under the agreement to the non-applicant.

15. Before dealing with the grounds urged in the application, a brief comment on role of the Court dealing with application u/s 30 read with Section

33 of the Act, is warranted.

16. The court while dealing with an application u/s 30 read with Section 33 of the Act, is neither expected nor required to assume role of an

Appellate Court, make re-appraisal of evidence adduced before the Arbitrator or to hand down any opinion on the conclusions drawn by the

Arbitrator. The Court can not travel beyond the role delineated in Section 30 of the Act. The role to be played by the Court while dealing with a

non-speaking award"" is further restricted. For, in case of a ""non-speaking award"", the material that weighed with the Arbitrator and the reasons

that persuaded the Arbitrator to accept or reject the claims put forth by the parties is/are not available or known to the Court. In *Puri Construction*

Pvt. Ltd. Vs. Union of India (UOI), . It has been held:

When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as

expressly indicated in the Arbitration Act, and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits with

reference to the materials produced before the arbitrator. The court cannot sit in appeal over the views of the arbitrator by re-examining and re-

assessing the materials." Having said so, let us shift focus to the controversy projected before the Court.

In view of the main challenge to the award, it becomes necessary to see whether the arbitrator was duty bound to make a speaking or reasoned

award.

17. It needs to be pointed out that reference to the arbitrator in the instant case was made way back in the year 1984 when J&K Arbitration Act,

1940 held the field. The matter is thus, to be dealt with against on the anvil of the Act of 1940 Act. Whether the arbitrator under the provision of

the Act, is required to give a speaking award and spell out reasons in support of the award, is no more an open question. The Supreme Court in

AIR 1990 1426 (SC) has laid down law on the subject. It has been held: -"The arbitrator or umpire is under no obligation to give reasons in

support of the decision reached by him unless under the arbitration agreement or in the deed of submission he is required to give such reasons, and

if the arbitrator or umpire chooses to give reasons in support of his decision it is open to the Court to set aside the award if it finds that an error of

law has been committed by the arbitrator or umpire on the face of the record on going through such reasons.

The arbitrator or umpire shall have to give reasons also where the Court has directed in any order such as the one made u/s 20 or Section 21 or

Section 34 of the Act that reasons should be given or where the statute which governs an arbitration requires him to do so.

18. In the present case, the arbitration clause did not require the arbitrator to give a speaking or reasoned award nor was any direction given to the

arbitrator by the Court to give a reasoned award. The arbitrator in the

circumstances was not under obligation to give speaking or reasoned award. The present case does not fall within any of the conditions under which the arbitrator is required to give a speaking or reasoned award. So viewed, the award cannot be questioned on the ground of "insufficiency of evidence" or "no evidence."

It has been held in *Natwarlal Shamaddas and Company v. The Mineral and Metals Trading Corporation of the India Ltd.* AIR 1982 Del 44 that

the non-speaking awards can not be assailed on the grounds of no evidence. Of the quality and sufficiency of evidence the Arbitrator is the sole

judge. The Court can not be a judge. It is for the Arbitrator to weigh the evidence adduced by the parties. He has not to give any reason why he

has accepted the claim of a party, if an award is a non speaking award the Court can not say that the Arbitrators decision is based on good

evidence or insufficient evidence or no evidence at all". The principle of law also finds expression in *Rajendra Construction Company Vs.*

Maharashtra Housing and Area Development Authority and Others, , where Supreme Court quoted with approval following passage from

handbook of arbitration practice by Ronald Berstein:

The absence of reasons does not invalidate an award. In many arbitrations the parties want a speedy decision from a Tribunal whose standing and

integrity they respect, and they are content to have an answer yes or No; or a figure of X. Such an award is wholly effective; indeed, in that it can

not be appealed as being wrong in law it may be said to be more effective than a reasoned award.

19. The ground urged in the application that as the arbitrator was not in terms of the agreement authorized to award interest, the award of interest

by the arbitrator casts cloud on the validity of the award and makes it liable to be set aside, is for the reasons discussed below bereft of any merit

and to be rejected.

20. The non applicant expressly laid claim for interest on the amount withheld/not paid and the claim for interest was duly reflected in claim laid

down by the non-applicant. It is not a case where no claim for interest was made by the non-applicant and the arbitrator unmindful of the omission

on part of the non-applicant to lay a claim for interest, played a pro active role and went out of way to award interest.

21. In the present case as stated a specific plea/claim as regards interest was made and the arbitrator found the non-applicant entitled to interest @ 12% from the date.

22. It is well settled law that the arbitrator has power to award pendente lite interest and even where the agreement is silent as to grant of interest, it is to be presumed as implied term of contract. It needs no emphasis that interest in a way represents damages for delay in payment and may be allowed even in absence of an agreement unless of course, agreement expressly prohibits grant of interest.

In *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy*, , the Constitution Bench of the Supreme Court held that the

arbitrator is empowered to award interest pendente lite in case the agreement between the parties does not prohibit the grant of the same. Their

Lordships sum up the law on the subject as under:

Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (alongwith the claim

for principal amount or independently) is rejected to the arbitrator, he shall have the power to award interest pendente lite. This is for the reason

that in such a case it must be presumed that interest was an implied term of the agreement between the parties refer all their disputes - or refer the

dispute as to interest as such - to the arbitrator, he shall have the power to award interest. This does not mean that in every case the arbitrator

should necessarily award interest pendente lite. It is a matter within the discretion to be exercised in the light of all the facts and Circumstances of

the case, keeping the ends of justice in view." In *Smt. Manjit Johl Vs. Dewan Modern Breweries Ltd.*, , the High Court, rejecting the argument that

in absence of Interest Act the arbitrator lacked jurisdiction to award interest for pre-reference period, held: "... The argument was that since the

Interest Act does not apply to the State of Jammu and Kashmir, the arbitrator had no jurisdiction to award interest for the period anterior to the

reference. We find no merit in this submission of Mr. Gupta either. The entitlement of a party to claim interest depends upon either the availability

of a statutory provision like the Interest Act or the existence of an agreement to pay the same or the existence of a trade usage. Interest prior to the

reference cannot be said to be payable only if the Interest Act is applicable, it

can be claimed even in a case where no statutory provision like the Interest Act is applicable, but the parties have entered into an agreement, which envisages the making of such payment. It may also be payable

where the party claiming interest proves the existence of a trade usage of paying interest on the outstanding amounts.

23. Whether the Arbitrator has power to grant interest for pre-reference period fell for consideration of the Apex Court in *Executive Engineer*

Dhenkanal Minor Irrigation Division v. N. C. Budharaj (2001) 2 SCC 721. The Court held:

By agreeing to settle all the disputes and claims arising out of or relating to the contract between the parties through arbitration instead of having

recourse to civil court to vindicate their rights the party concerned cannot be considered to have frittered away and given up any claim which

otherwise it could have successfully asserted before courts and obtained relief. By Agreeing to have settlement of disputes through arbitration, the

party concerned must be understood to have only opted for a different forum of adjudication with less cumbersome procedure, delay and expense

and not to abandon all or any of its substantive rights under the various laws in force, according to which only even the arbitrator is obliged to

adjudicate the claims referred to him. As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the arbitrator to entertain

a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the

contract, the jurisdiction of the arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act,

1940 and that too the powers of the court thereunder, has to be upheld. The submission that the arbitrator cannot have jurisdiction to award

interest for the period prior to the date of his appointment or entering into reference which alone confers upon him power, is too stale and technical

to be countenanced in our hands, for the simple reason that in every case the appointment of an arbitrator or even resort to court to vindicate rights

could be only after disputes have cropped up between the parties and continue to subsist unresolved, and that if the arbitrator has the power to

deal with and decide disputes which cropped up at a point of time and for the period prior to the appointment of an arbitrator, it is beyond

comprehension as to why and for what reason and with what justification the arbitrator should be denied only the power to award interest for the pre-reference period when such interest becomes payable and has to be awarded as an necessary or incidental to the sum awarded as due and payable, taking into account the deprivation of the use of such sum to the person lawfully entitled to the same.

In *Rajendra Construction Company's Case* (supra), the Supreme Court was once again called upon to examine powers of the arbitrator to award

interest for pre-reference period, pendente lite and post award period. It was held that the arbitrator had jurisdiction to award interest at all the

three stages. The court observed that: -

The question then remains as to interest. The Appellant had claimed interest in the suits. The arbitrator awarded interest at the rate of 18 per cent

per annum on the principal amount from the date of the suits to the date of awards and also from the date of the awards to the date of payment or

up to the date of decrees, "whichever is earlier". This Court has dealt with the power of the arbitrator to award interest for (i) pre-reference period

(*Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj*); (ii) pendente lite (*Secy., Irrigation Deptt, Govt, of Orissa V. G. C.*

Roy); and (iii) post-award period (*Hindustan Construction Co. Ltd v. State of J&K*). In *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.*, one of

us power of the arbitrator to award interest at all the three stages. It was held that the arbitrator had power to award interest. Keeping in view the

facts and circumstances of the present case that the contract was entered into in 1987, the work was completed in 1990 after extension granted by

MHADA and the arbitrator passed awards in 1995, it would be proper, equitable and in the interest of justice if we reduce the rate of interest to

10 per cent per annum.

24. In the present case, the agreement between the parties, does not expressly prohibit grant of interest pendente lite or otherwise. So viewed, the

Arbitrator acted within his powers when he allowed interest on the claimed amount pre-reference, pendente lite and future. For the reasons

discussed, none of the grounds urged for setting aside the award, is established. The applicants have failed to prove that the Arbitrator has mis-

conducted himself or the proceedings issues 1 and 2 are accordingly decided in

favour of non-applicant and against the applicants. So viewed, applications CMP No. 24/2001 and CMP No. 30/2001 for setting aside the award, are dismissed. Resultantly, the award is made rule of the court. However, the rate of interest as also the direction that post award interest would be payable on the claimed amount along with the interest accumulated on the claimed amount pendente lite, warrant a second look. It would in the facts find circumstances of the case, be in the interest of justice to reduce the rate of interest at all the three stages from 12% per annum to 9% per annum. Further future interest i.e. post award interest at the rate of 9% per annum would be restricted to the claim amount i.e. Rs. 33,139.75 in the case of Claim -1, and Rs. 1,09,598.00 in the case of Claim ? II only. Decree sheet be drawn up. Disposed of.