

Balbir Singh, Contractor Vs. State of U.P. and ors.

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Court : Allahabad

Decided On : Nov-27-2001

Reported in : 2002(2)AWC1070

Judge : Sudhir Narain and ;R.B. Misra, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 14, 17 and 30

Appeal No. : F.A.F.O. No. 985 of 1998

Appellant : Balbir Singh, Contractor

Respondent : State of U.P. and ors.

Advocate for Def. : Vikash Tripathi, Adv.

Advocate for Pet/Ap. : Arjun Singhal, Adv.

Disposition : Appeal allowed

Judgement :

Sudhir Narain, J.

1. This appeal is directed against the order dated 14.7.1998 passed by the Civil Judge (Senior Division), Bijnor, whereby he allowed the objections filed by the State of U. P. and set aside the award dated 14.9.1996.

2. The factual matrix of the case is that the appellant entered into a contract for construction of 2.70 meter fall on Chandak Escape Channel at Km. 0.475 in district Bijnor with the Executive Engineer, Irrigation Division. Bijnor. After completion of the work, he claimed the amount of constructions made by him from respondent No. 1. The amount as claimed by him was not paid. He gave notice to the respondents on 15.11.1992 to pay the amount. The matter was finally referred to the Arbitrator and the arbitral proceedings commenced on 14.2.1994.

3. The Arbitrator after giving opportunity to the parties to lead evidence gave award dated 14.9.1996 directing the respondents to pay a sum of Rs. 4,96,173 to the appellant. The appellant filed an application under Section 14 read with Section 17 of the [Arbitration Act, 1940](#), for making the award rule of the court. It was registered as Misc. Case No. 178 of 1996. The respondents filed an application to set aside the award under Section 30 of the [Arbitration Act, 1940](#), which was registered as Misc. Case No. 181 of 1996. The court below rejected all the objections raised on behalf of the respondents except one objection, i.e., the Arbitrator had no jurisdiction to give award for the period prior to the date of making reference. The application of the appellant to make award was rejected solely on the ground that the Arbitrator had no jurisdiction to give award for pre-reference period. The core question is as to for which period an arbitrator is entitled to award interest on the amount adjudged payable to the claimants. The claim for interest before the arbitrator may be divided in three periods :

I. The period prior to the date of making reference.

II. The period the matter remained pending before the arbitrator.

III. The period from the date of award to the date of decree or date of realisation whichever is earlier.

I. The period prior to the date of making reference

4. The period prior to the date of making reference can be termed as pre-reference period. The question as to whether an arbitrator has power to award interest for the period between the making of the reference to him and on his entering upon

the reference (pre-reference period) came up for consideration before the Apex Court in *Executive Engineer (Irrigation) v. Abhaduta Jena*, AIR 1988 SC 1520, wherein it was held :

'Out of the remaining cases, we find that in all cases except two (Civil Appeal Nos. 6019-22 of 1983 and Civil Appeal No. 2257 of 1984), the reference to arbitration were made prior to the commencement of the new Act which was on 19.8.1981. In the cases to which the Interest Act, 1978, applies, it was argued by Dr. Chitale, learned counsel for the respondents, that the amount claimed was a certain sum payable at a certain time by virtue of a written instrument and, therefore, interest was payable under the Interest Act for the period before the commencement of the proceedings. In support of his contention that the amount claimed was a certain sum payable at a certain time by virtue of a written instrument, the learned counsel relied upon the decision of this Court in *State of Rajasthan v. Raghubir Singh*. The case certainly supports him and in the cases to which the 1978 Interest Act applies, the award of the interest prior to the proceeding is not open to question.'

5. The Court further held that after the enforcement of the Interest Act, 1978, the arbitrator has power to award interest under the provisions of (he said Act, but it had no such power under the Interest Act, 1839, for the reason that under the Interest Act, 1839, the arbitrator was not defined as a Court. Section 2(a) of the Interest Act, 1978, defines the Court which includes a Tribunal and an Arbitrator. Section 3 of the 1978 Act empowers the Court to allow interest as provided under the said Act. The Court made the following observations :

'Coming to the cases before us, we find that in Civil Appeal Nos. 120 and 121 of 1981 before the arbitrator, there was no answer to the claim for interest and we see no justification for us at this stage to go into the question whether interest was rightly awarded or not. Out of the remaining cases we find that in all cases except two (Civil Appeal Nos. 6019-22 of 1983 and Civil Appeal No. 2257 of 1984), the references to arbitration were made prior to the commencement of the new Act which was on August 19, 1981. In the cases to which the Interest Act, 1978, applies, it was argued by Dr. Chitale, learned counsel for the respondents, that the amount claimed was a certain sum payable at a certain time by virtue of a written

instrument and, therefore, interest was payable under the Interest Act for the period before the commencement of the proceedings. In support of his contention that the amount claimed was a certain sum payable at a certain time by virtue of a written instrument, the learned counsel relied upon the decision of this Court in *State of Rajasthan v. Raghubir Singh*, (1979) 3 SCR 6 : AIR 1979 SC 852. The case certainly supports him and in the cases to which the 1978 Interest Act applies the award of interest prior to the proceeding is not open to question. 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 same 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 provision 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. We do not want to

enter into a discussion on the legality or propriety of a non-speaking award, as we understand the question is now awaiting the decision of a seven Judge Bench, in the light of what we have said above, Civil Appeal Nos. 120 and 121 of 1981 are dismissed, Civil Appeal Nos. 6019-22 of 1983 and Civil Appeal No. 2257 of 1984 are allowed to this extent that Interest during the pendency of the arbitration proceedings is disallowed and the rest of the civil appeals are allowed to the extent that both interest prior to the proceedings and interest during the pendency of the proceedings are disallowed. There will be no order as to costs. S.L.P. 8640 of 1981 is disposed of on the same lines.'

6. In this decision, however, the Court was of the view that the interest for the period the proceedings remained pending before the arbitrator could not be awarded. This decision was overruled in *Secretary, Irrigation Department, Government of Orissa and others v. G. C. Roy*, AIR 1992 SC 732, in so far as the view taken in *Jena's case* (supra) that the Arbitrator has no power to award pendente lite interest is concerned. The Court, however, did not express any opinion as regards the correctness of the view taken in *Jena's case* (supra) that the arbitrator has power to award interest for pre-reference period. The matter came up for consideration in *Sudhir Brothers v. Delhi Development Authority and Anr.*, (1996) 1 SCC 32. and it was held that the arbitrator has power to award Interest for pre-reference period. Relying upon the decision in *Jena's case* (supra) this decision has again been considered in *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa etc. v. N. C. Budharaj (dead) by L.Rs. etc.*, JT 2001 (1) SC 436, re-affirming the view taken in the earlier decision that the arbitrator is entitled to award interest for the pre-reference period.

II. The period the matter remained pending before the arbitrator

7. In *Secretary, Irrigation Department, Government of Orissa and others v. G. C. Roy* (supra) the view taken in *Jena's case* (supra) that the arbitrator has no power to award pendente lite interest was overruled. The Court took the view that the principle of Section 34 of the Code of Civil Procedure is to be made applicable in regard to the proceedings pending before the arbitrator. The Court observed :

'Where the agreement between the parties does not prohibit grant of interest and where a party claims interest and that dispute (along with the claim for principal amount or independently) is referred 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 and therefore when 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 his discretion to be exercised in the light of all the facts and circumstances of the case, keeping the ends of justice in view.'

III. The period commencing from the date of the award to the date of decree or date of realisation whichever is earlier

8. In *Hindustan Construction Co. Ltd. v. State of Jammu and Kashmir*, AIR 1992 SC 2192, the question as to whether the arbitrator is competent to award interest for the period commencing from the date of the award to the date of decree or date of realisation, whichever is earlier, was considered and the Court relying on the principle of Section 29 of the Arbitration Act read with Section 34 of the Code of Civil Procedure held that the arbitrator has power to award interest for such period also. The Court held :

'It is sufficient to refer to the latest decision of a five-Judge Bench of this Court in *Secretary, Irrigation Department of Orissa v. G. C. Roy*, (1991) 6 JT 359 : AIR 1992 SC 732. Though the said decision deals with the power of the arbitrator to award interest pendente lite, the principle of the decision makes it clear that the arbitrator is competent to award Interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for. while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. Section 34 of Code of Civil Procedure provides both for awarding of Interest pendente lite as well as for the post-decree period and the principle of Section 34 has been held applicable to proceedings before the arbitrator, though the Section as such may not apply.'

9. Thus, the view of the court below that the Interest for pre-reference period could not be awarded is erroneous.

10. Shri Vikash Tripathi, learned counsel for the respondents, submitted that under Clause 3: 18.2 of the contract, it was provided that no claim for interest or damages could be entertained by the Government with respect to any money or balance which may be lying with the Government. The said clause is reproduced as under :

'No claim for interest or damages will be entertained by the Government with respect to any money or balance which may be lying with the Government owing to any disputes, difference or misunderstanding between the Engineer-cum-Incharge and contractor in making periodical or final payments or in any other respect whatsoever.'

This clause refers to certain amount which may be lying with the Government but the respondents have not shown that, in fact, the money was lying with the Government.

11. The next question, which calls for decision. Is as to what should be the rate of interest for this period. The learned counsel for the parties agreed that instead of remanding the matter to the court below to consider this aspect of the matter. Interest at the rate of 6% may be awarded for such period. As all other objections raised on behalf of the respondents have been rejected by the court below, the award is made rule of the Court. The appellant shall be entitled to interest for pre-reference period at the rate of 6%.

12. It may be noted that the court below committed manifest illegality by not making the award rule of the court in respect of other amounts, which are held liable to be paid by the respondents. It rejected the whole award simply on the ground that in its opinion the arbitrator had no power to award interest for pre-reference period.

13. The appeal is allowed. The order of the court below dated 14.7.1998 is hereby set aside. The objections of the respondents in Misc. Case No. 181 of 1996 are

rejected except to the extent that for the pre-reference period the Interest of 6% will be payable to the appellant. The award is hereby made rule of the court with the modification stated above. Considering the facts and circumstances of the case, the parties shall bear their own costs.

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