

State of Gujarat and anr. Vs. Aarcee Construction Co.

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Court : Gujarat

Decided On : Aug-04-1995

Reported in : AIR1996Guj125

Judge : R.A. Mehta and; S.K. Keshote, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 28

Appeal No. : First Appeal No. 2616 of 1995

Appellant : State of Gujarat and anr.

Respondent : Aarcee Construction Co.

Advocate for Def. : K.G. Sukhwani, Adv.

Advocate for Pet/Ap. : A.J. Desai, AGP

Disposition : Appeals allowed

Judgement :

Mehta, J.

1. In these appeals, the common question arise. Hence they are heard and decided together. The trial Court has passed a decree in terms of the award and allowed interest on the amounts of award at 11% from 1-7-1987 to 12-5-1990 and at the rate of 18% from 15-8-1991 till realisation. The particulars regarding

different awards passed in different civil suits are as follows:--

F.A. No.Civil Suit No.Amount awarded (Rs.)2616 of 1995251 of 19876,7?,060/-
2615 of 1995249 of 19873,95,000/-2614 of 1995250 of 19874,74,762/-2524 of
1994252 of 19871,56,935/-

2. The learned Assistant Government Pleader submits that the award has been made admittedly beyond the time limit to. make the award which expired on 31-3-1991 and the award came to be passed on 15-7-1991.

3. By a Court order dated 11-8-1989, a retired Chief Engineer was appointed the arbitrator to decide the dispute and was further directed to submit his award within four months or within such time as may be extended by the Court. It appears that by a letter of 12-3-1991, the Court had informed the arbitrator that the matter was old and the award was required to be made and the arbitrator was directed to make the award on or before 1-4-1991. It appears that the arbitrator had written a letter in reply to the Court letter that the time be extended by a further period of one month from 1-4-1991. However, on that application, no order was passed.

4. Contending that the arbitrator had become functus officio and had no jurisdiction to hold the hearing on 18-6-1991, the Government through the Executive Engineer made an application Ex. 30 on 17-6-1991 and prayed for stay of further proceedings pending before the arbitrator on the ground that the time for making the award had already expired and the Arbitrator had no jurisdiction to hold and continue the arbitration proceedings and to pass any award and submitted that the insistence of the arbitrator to hold the proceedings was a misconduct of the arbitrator.

5. On that application, the Court had passed an order of serving the copy to the arbitrator and fixing hearing on 31-7-1991. On the next day i.e. 18-7-1991, the proceeding was held before the arbitrator. The Government advocate did not remain present, but it appears that the Executive Engineer who had remained present had on his own agreed to the extension of period for submission of the award of the arbitrator up to 31-7-1991 and the Arbitrator made the final award on 15-7-1991.

The question is whether the State Government is said to have consented to the extension of time by the arbitrator. The application Ex. 30 and the objections raised by the State Government were yet to be heard and decided by the trial Court. In Para. 2 of the judgment, the trial Court has narrated the objections and it is seen that the arbitrator was appointed by the Court and the time was extended to file the award up to 31-3-1991 and arbitrator wrote a letter on 23-3-1991 and prayed for extension of time by one month i.e. up to 1-4-1991. The Court had recorded that report and in spite of this knowledge, the arbitrator held the meeting at Ahmedabad on 17-6-1991. It is also submitted that prior thereto, he had wrote a letter to the party on 10-2-1991 to get the time extended and also wanted consent of the parties for passing interim award to which the Government had raised its objections. It is further stated that the arbitrator had become functus officio and he had filed the award after the expiry of the time and it was a misconduct on the part of the arbitrator.

6. This contention is dealt with by the learned trial Judge in para. 15 of the judgment by referring to the judgment of the Andhra Pradesh High Court in the case of Superintending Engineer Somasila Project v. R. Ramana Reddy, (1990) 2 Arbi LR 183 : (AIR 1990 AP 283). In para. 8 of the judgment, it is observed that it is with the consent of both the learned Counsel that the arbitrator had extended the time for filing the award. 7. In the present case also, the contention of the opponents is that the Executive Engineer had so consented by giving a joint pursis.

In the present case, the so-called consent of the Executive Engineer on 18-6-1995 requires to be seen in the light of the attendant and prevailing circumstances. Only a day previous to such consent, the Executive Engineer had under his own signature filed strong objection to the arbitrator taking up any further proceedings and had stated that the time had already expired and the arbitrator was committing misconduct by holding and conducting further arbitration proceedings after having become functus officio and had in fact prayed for stay of further proceedings before the arbitrator.

8. In these circumstances, the sudden change of stand by the Executive Engineer before the arbitrator in the absence of the Government Pleader and in absence of any instructions from the Government is very perplexing and it would be difficult to hold that this consent was the consent of the Government and of the parties to the arbitration dispute.

9. If the contesting parties have really and bona fide consented to the extension of the period, any irregularity or technical deficiency could have been condoned and even the extension would have been granted in exercise of the judicial discretion and treating the award as having been made within such extended time. Such judicial discretion can also be exercised by the appellate Court in a proper case where there might be only a technical breach coupled with substantial compliance and real consent of the contesting party.

10. In the present case, the proceedings before the arbitrator show that the claimant was also pressing for interim relief and the interim award. On behalf of the Government, passing of the interim award was resisted. Ultimately, when further proceedings were to be held on 18-6-1991, the Government had made the application Ex. 30 pointing out that the time granted to the arbitrator had expired and the arbitrator had become functus officio and the arbitrator should not hold any proceedings any further. It is, thus, clear that the Government had strongly opposed to any extension of time and for holding any further proceedings and for making of any award.

11. In these circumstances, the sudden change of stand by the Executive Engineer himself without any instructions from the Government and in the absence of the Government Pleader cannot be said to be consent by the Government and cannot be said to be a bona fide consent at all. Nothing prevented the parties or the arbitrator to move the Court for extension of time if there was a proper case for extension of time. The undue and unholy haste shown by the arbitrator and the Executive Engineer in proceeding with the arbitration in these circumstances militates against exercising any judicial discretion for extension of time. The arbitrator was aware of the expiry of the time as well as the need for extension of time by the Court. Not only that, on 18-6-1991, the arbitrator was also given a copy

of the application made to the Court for stay of the proceedings and against holding of any further arbitration proceedings and it was also pointed out therein that if the arbitrator proceeds with the arbitration despite this fact, it would be misconduct on his part. In these circumstances, any responsible arbitrator would have asked the Executive Engineer not only to withdraw that application from the Court by obtaining appropriate orders for withdrawal, but also obtain appropriate orders for extension of time for proceedings before the arbitrator. However, without adopting any such reasonable procedure, the arbitration proceedings were concluded on the same day even in absence of the Government Pleader as if his participation in the proceedings was not considered necessary and desirable by the Executive Engineer. Mere presence of a clerk of the Government Pleader in the proceedings of the arbitration is of no consequence. The so-called consent given by the Executive Engineer is no consent in the eye of law on behalf of the Government and on the basis of such consent, no judicial discretion can be exercised for extension of time. The file also shows that the Govt. Pleader had written strong letters protesting against the conduct of the Executive Engineer who failed to give any valid explanation.

12. In the case of *State of Punjab v. Hardyal*, AIR 1985 SC 920, the Supreme Court has held that power to extend time for making the award can be exercised even by the appellate Court and in a fit case, it can be exercised even by the Supreme Court. In the present case, we do not find that this is a fit case where time is required to be extended. In view of the circumstances in which the award came to be made, the so-called consent came to be given by the Executive Engineer in spite of the application made to the Court a day earlier, and the arbitrator also with full knowledge of such application, proceeded with the arbitration; this unholy and undue haste compels us not to grant such extension.

13. In the case of *Nagar Palika, Mirzapur v. Mirzapur Elect. Supply Co. Ltd.*, AIR 1990 SC 2273, it was observed that the conduct of the party was a major factor on the question of extension of time to be given by the Court. In the present case, the Government had, by an application, objected to the arbitrator holding the arbitration proceeding after the expiry of the period and suddenly on the next day, the Executive Engineer had continued such extension without any instructions

from the Government and in absence of the Government Pleader. The arbitrator had also conducted the proceedings in highly improper manner and with undue haste. It was open to all of them to obtain the orders of the Court, but they chose not to do so. For this conduct, we are not given any explanation or reason which might prevent us from drawing adverse inference and, therefore, this conduct of the parties of which the claimants are the beneficiaries, cannot be approved.

14. In view of the aforesaid discussion, it is clear that the award made by the arbitrator is beyond the time fixed and extended by the Court. The so-called consent given by the Executive Engineer for extension of time by the arbitrator is no consent of the Government in the eye of law and on such consent, the time would not stand extended and we refuse to exercise judicial discretion in favour of extension of time. Hence, the award of the arbitrator is without jurisdiction and no order in terms of award could have been passed and the objection raised by the Government is sustained.

In the result, these appeals are allowed and the judgment and decree of the trial Court in each of these four appeals is quashed and set aside.

15. On Civil Applications, no orders.

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