

L.M. Das Vs. State of West Bengal

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Court : Kolkata

Decided On : Jun-27-1960

Reported in : AIR1961Cal456

Judge : P.C. Mallick, J.

Acts : [Arbitration Act, 1940](#) - Section 30

Appeal No. : Aw. No. 115-A of 1957

Appellant : L.M. Das

Respondent : State of West Bengal

Advocate for Def. : B. Das and ;N.G. Das, Advs.

Advocate for Pet/Ap. : J.P. Das and ;A.C. Bhabra, Advs.

Judgement :

P.C. Mallick, J.

1. Two applications have been made in respect to the same award dated 19th/20th November 1958 made by Mr. H. Banerjee, I. C. S. Mr. Banerjee was appointed arbitrator to adjudicate the disputes in respect to a contractor's claim for construction of roads. One application is by the contractor L. M. Das for an order to remit the award for adjudication of some of the claims which have not been

adjudicated. The learned arbitrator has left out these claims on the ground that in his opinion he had no jurisdiction to deal with the said claims. The other application is by the Government to set aside the award in respect to other claims allowed by the learned arbitrator or in the alternative for correction or modification of the award. Both the applications though heard separately one after the other are being disposed of by this judgment.

2. There were three contracts as evidenced by acceptance by the Government of West Bengal of three tenders submitted by the contractor being Tenders Nos. 30 and 31 of 1952/53 and Tender No. 81 of 1952/53. The contracts were for the construction of two roads (i) Hooghly-Saptagram Road, in two Sections (ii) Memari-Manteswar-Katwa Road. Tenders Nos. 30 and 31 relate to the Hooghly-Saptagram Road and Tender No. 81 relates to Memari-Manteswar Road. All the contracts contained the usual arbitration clause in the standard form whereby the Superintending Engineer was to act arbitrator. In the instant case the parties agreed that instead of the Superintending Engineer, Mr. H. Banerjee, I. C. S., one of the Secretaries to the Government of West Bengal would act as the arbitrator. Pursuant to the agreement Mr. H. Banerjee did so act. The parties were required to file and they did file their State of Facts, Counter State of Facts and Replies. Issues were framed, evidence led and ultimately on November 19th/20th 1958 the award was made by the learned arbitrator.

3. The case of the contractor is that in executing the contract he was required by the Government engineers and/or overseers to do various works. The nature of the works has been set out in paragraph 14 of the petition. The said works done by the contractor were neither measured nor paid for initially. Subsequently, however, some of the claims in respect to the works were allowed departmentally. The contractor on being called upon by a letter dated November 19, 1954 to submit his bills with necessary details submitted his bills on December 10, 1954, in respect to the Hooghly-Septagram Road (Tenders Nos. 30 and 31) and on December 15, 1954 in respect to the Memari-Manteswar Road (Tender No. 8D, Long thereafter, in 1956 there was negotiation between the contractor and the Government which ultimately resulted in the appointment of Mr. H. Banerjee, I. C. S., as arbitrator. The negotiation is evidenced by the correspondence and the

order of appointment. These letters and order of appointment will have to be considered later as they have considerable bearing on the present controversy before me.

4. Before the learned arbitrator the contractor submitted the same claims as made by him in the bills annexure to the letter dated December 10th and 15th 1954.

5. The claim of the contractor has been made in three Schedules A, B and C. Schedule A sets out the claims rejected by the Government as being works outside the contract. Schedule B contains claims rejected in respect to works under the contract. The disputes in respect to these items are as to measurements or as to excess recovery. Schedule C contains compensation claimed against the Government for failure to perform their obligations under the contract. The contract involved reciprocal obligations, for instance, the contractor to supply labour and undertake the construction and the Government to supply materials, rollers etc. The allegations are that the Government did not supply materials at the proper time and place, the rollers were also not supplied at the proper time, the men in charge of the rollers were directed not to work pursuant to orders to the overseer. Breaches of this nature were alleged to have been committed by the Government employees and the contractor claimed loss resulting therefrom. The claim for compensation are indicated in Schedule C. The arbitrator made no award on the claims in Schedules A and C but confined himself to the claims in Schedule B only. The reason for such exclusion given in the award reads as follows :

'A preliminary objection was raised on behalf of the opposite party that on the basis of the arbitration agreement I am not competent to give any award in respect of Schedules A and C for the reason that items claimed under these two Schedules are admittedly not covered by the contract.'

After setting out the argument of the contractors and the other parties the learned arbitrator goes on as follows :

'I appreciate all these arguments, but it is one thing that there is good justification for a claim and another thing that it comes within the scope of the present award. The things are apart. Sound claim may be the basis for separate cause of action.

But to qualify for coming within the scope of my award it should fulfil the condition laid down in Clause 25 of the contract. I therefore accept the contention of the opposite party that claims under Schedules A and C fall outside the scope of my arbitration. I do not, therefore, propose to give my award on these. I shall limit myself to claims under Schedule B only in respect of the two roads.'

6. This decision of the arbitrator has been challenged by Mr. Bhabra appearing for the contractor. It is contended that the arbitrator had jurisdiction to decide the claims in Schedules A and C and the arbitrator was wrong in not deciding them. It is contended that the arbitrator had jurisdiction to deal with the matter on the following three grounds:

1. It is covered by the arbitration clause in the contract, namely, Clause 25 of the conditions of the contract.
2. The claim of the contractor including the claim in Schedules A and C have been specifically referred to the arbitration of H. Banerjee and even if it is outside the arbitration clause or the contract he had nevertheless jurisdiction to deal with them.
3. The Government is estopped from questioning the jurisdiction of Mr. Banerjee to arbitrate and deal with the matter and give an award.

The arbitration clause in the contract is Clause 25 of the conditions of the contract. It is in the standard form and is to be found in a printed book of the Government. It reads as follows :

'Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions, hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, Orders or these conditions or otherwise concerning the works, or the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment

thereof shall be referred to the arbitration of the Superintending Engineer of the Circle for the time being in the manner provided by law relating to arbitration for the time being in force who after such investigation as he may think proper shall deliver his award which shall be final, conclusive and binding on all parties to this contract.'

The arbitration clause as stated above is in very wide terms. It covers all questions and disputes relating to the meaning of the specifications, etc. It also covers disputes relating to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs etc. or otherwise concerning the works or the execution or to failure to execute the same etc,

7. 'Work' has been defined in Clause 29 of the contract to mean works by or by virtue of the contract contracted to be executed whether temporary or permanent and whether original, altered, substituted or additional.

8. The opening clause in Clause 25 is 'Except where otherwise Provided in the contract.' If there is any other provision in the contract whereby any dispute is to be adjusted, it is taken out of this arbitration Clause 25.

9. Clauses 12 and 12A of the Conditions of the contract contemplate certain disputes to be otherwise adjusted. Clause 12 empowers the Engineer-in-charge to effect alteration in the specification and design i.e. omission from, addition to or substitution for the original specification and give instructions as may be necessary and the contractor shall carry out the instructions. Such instructions are to be in writing and signed by the Engineer-in-charge. Such additional or substituted or additional work shall be carried out on the same conditions as in all respects he agreed to do the main work and at the same rate as specified in the tender. If additional or substituted works contain 'works for which no rates are provided in the Schedule, then how the rates are to be determined are provided for, namely, it would be district rate and if there is no district rate, the rate agreed to normally before the work is undertaken. If any work done or expenditure incurred before such an agreement is effected, the contractor will be paid at such rate as determined by the Engineer-in-charge. The clause concludes in the following terms :

"In the event of any dispute, the decision of the Superintending Engineer of the Circle shall be final.'

Clause 12A deals with cases where the market rate of materials rises and in such a case the Engineer-in-Charge is authorised to effect a revision of rates. In case of dispute, the decision of the Superintending Engineer of the Circle shall be final and the contract shall be construed as if the said revised rates for the additional works had been incorporated in the contract as being applicable to such case.

10-23. To determine whether the claims made under Schedules A and C are covered by the arbitration clause, it is necessary to understand the nature of the claim. (His Lordship after going through the contentions of the parties and the relevant clauses in the contract, held that claims under Schedules A and C were not covered by the arbitration clause. His Lordship, however, held, upon the construction of the correspondence between the contractor and the Government, whereby the dispute was referred to the arbitration of Mr. H. Banerjee, that it was a fresh reference, not under the arbitration clause in the contract and that the claims under Schedules A and C were covered by the reference. In this connection his Lordship distinguished the case of Union of India v. Nalini Ranjan Guha, 57 Cal WN 304, cited by Mr. Bonamali Das. His Lordship decided to remit the award to the arbitrator for consideration of the claims in Schedules A and C. On the question whether the arbitrator had power to award interest his Lordship proceeded :)

24. The arbitrator has awarded a refund of the security deposit with interest. The amounts of refund directed are:

In Tender Nos. 30 and 31

Rs. 31,633/-

In Tender No.81

Rs. 15,224/8/-

Total

Rs. 46,857/8/-

This includes not merely the security deposit but interest as well. It is indicated in the award itself 'that if in the meantime there is a refund of whole or part of the deposit the award shall stand reduced to that extent.' It is alleged in the petition that a substantial portion of the security deposit in respect to all the above tenders have been refunded and the award should be corrected accordingly and made definite. The fact of refund of a substantial amount of deposit has not been denied by the contractor. If that is so, it is proper that the exact amount outstanding should be stated in the award itself.

25. The other dispute with respect to the security deposit is interest. The total interest allowed is Rs. 4,513/8/-, not a very large sum considering the amount claimed by the contractor. Clause 17 of the contract relates to security deposit. It lays down that after the expiry of six months from the date of completion of work the deposit should be refunded after deduction on account of damages to work or imperfections detected. In respect no asphalt work, the period is extended to one year. The contractor claimed interest on the ground that the amount of security deposit was wrongfully detained beyond the period and hence he was entitled not only to the refund of the security deposit but also to interest at the rate of 9 Per cent. In the instant case there was no claim against the contractor for damages. The learned arbitrator has held that there is no justification for withholding refund after expiry of six months and the learned arbitrator was entitled to come to that finding on the materials before him. This finding has not been challenged. The contractor claimed interest at the rate of 9 per cent per annum but the arbitrator awarded 4 1/2 per cent instead. It has been contended by Bonamali Das on behalf of the Government that this award of interest on security deposit is an error of law on the face of the award. His argument is that interest can only be awarded under the Interest Act and the instant case is not covered by the Interest Act, firstly, because the conditions laid down in the Act have not been fulfilled and secondly, because it is only payable by the Court and the Arbitrator is not a Court. If interest is paid as and by way of damages it is not permissible in law. Mr. Das has cited a number of authorities in support of his argument. Mr. Bhabra has contended that the security deposit in the instant case was being held by the Government in a

fiduciary capacity and the rules of equity and the practice of the Equity Court is attracted in respect to the claim for interest for wrongful detention of security money.

26. The claim for interest, in order to be upheld in any Court of law or private tribunal, must have some basis either in law or in equity. Ordinarily the claim for interest is based on a contract -- the obvious example being money lent on interest. But there are cases when the claim is not based on contract. In order to sustain the claim the claimant must put his finger to some statute or to some rules of equity. There are some statutes that provide for payment of interest though not provided in the contract, for example, the Negotiable Instruments Act, Sale of Goods Act. There are also provisions for the payment of interest by the Court in Our Code of Civil Procedure as also in the Interest Act. The Code enables the Courts to pay interest. So also the Interest Act enables the Court to pay interest on pre-suit debts under certain circumstances. These provisions for payment of interest by Court has been contended by some to be restricted to Court so as not to enable any tribunal other than 'a Court' to direct payment of interest on debt adjudged to be due. In other words, these provisions do not give any right to the parties to get interest on fulfilment of conditions stated therein. It is only permissible for a Court to allow interest and not a private tribunal. Again there is the question very keenly debated whether interest can be claimed and/or paid by way of damages under Section 73 of the Contract Act when the payment of a just debt (liquidated claim) is wrongfully withheld. If the claim for interest cannot be sustained on contract or statute as indicated above, the claim may also be sustained on equitable ground as well. These are grounds on which a Court of Equity would grant interest against a trustee or anybody holding fiduciary position for wrongfully withholding money payable to the beneficiaries of the trust. If that is so, the claim for interest can be sustained on equitable ground apart from any statute. It is to be considered whether such a claim can be made to a tribunal other than a Court and whether such tribunal has jurisdiction to grant interest on equitable ground. Let me now consider the case law. In the case of *B. N. Rly. v. Ruttanji Ramji* decided by a Division Bench of this Court and reported in : AIR1935 Cal347, the question arose whether the Court has power to grant interim interest i.e. interest of the period between the date of presentation Of the plaint and date of

decree. The Court held that the Court had power to grant interest by way of damages in such cases under Section 73 of the Contract Act. The claim was for works done i.e. not a claim for ascertained amount. The case went up in appeal to the Judicial Committee. The Judicial Committee expressly set aside this decision of this Court and held that Illustration (n). of Section 73 of the Contract Act does not entitle a party to such interest. The observation of the Privy Council is to be found in *B. N. Ry. Co. v. Ruttanji Ramji*, 65 Ind App 66 : (AIR 1938 PC 67):... The learned Judges of the High Court have allowed interest by way of damages caused to the plaintiffs for the wrongful detention of their money by the railway, but the question is whether this view can be sustained. There is a considerable divergence of judicial opinion in India on the question of whether interest can be recovered as damages under Section 73 of the Indian Contract Act (IX of 1872), where it is not recoverable under the Interest Act. Now, Section 73 of the Indian Contract Act gives a statutory recognition to the general rule that in the event of a breach of contract, the party who suffers by such breach is entitled to recover from the party breaking the contract compensation for any loss or damage thereby caused to him. On behalf of the plaintiffs, reliance is placed upon illustration (n) to that section. The illustration, however, does not deal with the right of a creditor to recover interest from his debtor on a loan advanced to the latter by the former. It only shows that if any person breaks his contract to pay to another person a sum of money on a specific date, and in consequence of that breach the latter is unable to pay his debts and is ruined, the former is not liable to make good to the latter anything except the principal sum which he promised to pay, together with interest up to the date of payment. He is not liable to pay damages of a remote character. The illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such interest under any provision of the law. Nor can an illustration have the effect of modifying the language of the section which alone forms the enactment.

As observed in *Jamal v. Moolla Dawood Sons and Co.*, AIR 1915 PC 48. Section 73 is merely declaratory of the common law as to damages, and it has been held by the House of Lords in *London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.*, 1893 AC 429 that interest cannot be allowed at common law by way of damages for wrongful detention of debt'.

This is a direct authority for the proposition that interest by way of damages for wrongful detention of debt cannot be paid under sec. 73 of the Contract Act. For such a claim for interest in law the parties have to fall back on Interest Act or any other statute like Negotiable Instruments Act and the Sale of Goods Act. This decision is however also an authority for the proposition that apart from law interest can be given on equitable consideration. I do not think that this decision lays down that only a Court of Equity and no tribunal other than the Court have jurisdiction to grant interest on equitable consideration. Following the decision of the Judicial Committee as stated above a Division Bench of this Court consisting of R. C. Mitter and Edgley JJ. made the following observation in the case of *Nirupama v. Anath Bandhu* at page 620 in AIR 1938 Cal. The case begins at page 618 :

'In their Lordships of the Judicial Committee laid down that such interest cannot be paid, unless there is either express stipulation to pay interest or if a promise to pay interest can be implied or if the case comes within the provisions of the Interest Act of 1839. It can also be paid in cases where the subject matter could be brought within the jurisdiction of Courts of Equity on the principles and conditions in which the Courts of Equity in England assume jurisdiction'.

27. Following the decision of the Judicial Committee, the Supreme Court held in the case of *Thawardas v. Union of India* reported in : [1955]2SCR48 : The Interest Act applies where interest is not otherwise payable by law. All the conditions laid down in the Interest Act must be fulfilled before interest can be awarded under the Act. Where not one of these elements is present, the Court cannot allow interest simply because it thought the demand, was reasonable.

28. In the case of *Mussamat Kishwar Jahan Begum v. Zafar Md. Khan* decided by the Allahabad High Court and reported in : AIR1933 All186 , it was held that :

'where a Mutwalli fails to discharge his obligation under the Wakf the persons who ought to have been benefited can claim interest from the Mutwalli on equitable ground'.

It appears from the report that the Court consisted of Mukherjee, Acting Chief Justice and Benett, J., two very experienced Judges of the Allahabad High Court and the counsel who appears are Mr. Katju and Md. Hossain on one side and Dr. S. N. Sen and Mr. Muktr. Ahmed on the other. After reviewing the cases including some of the decisions of the Judicial Committee their Lordships came to record their views in the following terms at pp. 187-188 of AIR :

'Where a case in England would fall in the common law jurisdiction no equitable principles are to be applied in awarding or withholding interest but where a case falls within the equitable jurisdiction exercised by a Court of Chancery equitable consideration might induce the Court to allow interest'.

29. Mr. Bonamali Das contended that this case was decided before laid down the law. I find however that the law as stated above is not different from what is laid down in .

30. A decision of Digby J. of the Nagpur High Court in the case of Sheikh Mehtab v. Dharm Rao reported in AIR 1944 Nag 330 has been cited by Mr. Bhabra. It was a case of security deposit for due performance of work and the claim was for interest on the same wrongfully withheld. The last paragraph is interesting and reads as follows:

'..... But in the present case I think that although the refund of the deposit was governed by contract to return it, nevertheless when the deposit which the defendant had to pay became recoverable, the obligation to repay the money did not merely arise from the terms of the contract but also arise from the fact that the defendant was bound to return the money and would indeed be guilty of breach of an implied trust if he made away with it. The matter is by no means easy to decide. The money had been credited into the treasury as a condition of the plaintiff's obtaining the contract by way of security, and it may well be that a fiduciary relationship came into existence as opposed to a mere obligation to pay a debt. But I have not been able to find any case in which a Court of Equity has granted interest in such circumstances, and although Judges are expected to know the law it is also the duty of counsel who wish to reverse a decision of the lower court to satisfy the Court of Appeal that the decision of the Court below is wrong. This type

of deposit is quite different from a deposit paid in pursuance of a contract of sale which is broken and I cannot but feel that if Courts of Equity allow interest on deposits of this nature when they are demanded, cases would be easily traceable in works on the Contract Act, I have failed to find anything to help me in Chitty on Contracts or Addison or Leake on Contract or in Works on Interest, and I am not satisfied that a Court of Equity granted interest in a case of this kind'.

31. In the instant case, there is no provision for payment of interest in the contract. Nor can any statute be relied on in support of the claim for interest. It seems to me that the conditions laid down in the Interest Act have not all been complied with. No interest therefore can be paid either under the Interest Act or under sec. 73 of the Contract Act or under any other statute. If at all, interest is payable only on equitable grounds on which a Court of Equity in England would direct payment of interest. Though security deposit is made under a contract, yet there is a fiduciary relationship between the depositor and the depositor. By reason of this fact the rules of equity may be attracted in the instant case and interest can be paid on equitable consideration. It cannot be said therefore that award of interest made by the learned Arbitrator is necessarily bad in law. If the learned arbitrator was of opinion that in the instant case there were facts to invoke the equitable principle which entitles a Court of Equity to grant interest, this award of interest cannot be held to be illegal. I am definitely of opinion that an arbitrator is not debarred from granting interest on equitable ground. An arbitrator is required to give his award according to law and equity. He is therefore as much entitled as a Court of law to award interest on equitable grounds. I am not therefore prepared to hold that there is a mistake of law apparent on the face of the award in as much as the award directs payment of interest on security deposit. As however the award is being remitted to the learned arbitrator for reconsideration on many points I would like to remit this award on interest as well for consideration of the arbitrator. The point does not appear to have been argued before him in the manner it was argued before me. In the instant case the learned arbitrator is an experienced judicial officer and it is right that he should be given an opportunity to consider the propositions so fully argued by the learned counsel before me and set out above and arrive at his own conclusion. I have indicated my view that an arbitrator is competent in law to award interest on equitable principles. When a dispute is

referred to a tribunal for adjudication that tribunal is required to adjudicate the dispute. In so adjudicating the dispute the tribunal must not only apply the rules of law but also apply the rules of equity as well. It is his duty to do so. The arbitrator has, therefore, jurisdiction to apply the rules formulated by the Court of Equity and grant interest if he finds that the rules or equity are attracted by the facts and such rules direct payment of interest. None of the authorities cited before me lays down that the arbitrator has no power to grant interest on equitable consideration.

32. Before I conclude this judgment I would only remind the learned arbitrator that he is not bound to give his reasons for the award.

33. The order that I propose to pass and do pass in these two applications is that the claims of the contractor in Schedules A and C which are the subject matter of the contractor's application are wholly remitted to the learned arbitrator for reconsideration. I am also remitting for his re' consideration the following items of the contractor's claim in Schedule 'B' viz., items 4, 7, 11 and 13 of Schedule B of Tender Nos. 30 and 31 and items 4, 7, 12 and 11 of Schedule B, Tender No. 81. The rest of the award is confirmed. The arbitrator is to make his award within four months from the date of the records. Let all the records be sent back to the arbitrator forthwith.

34. The contractor will get the costs in his own application and the Government will get the costs in their own application.

35. Let a certified copy of this judgment be furnished to Mr. Mitter the Solicitor of L. M. Das forthwith.