

State of Punjab

Vs

Hardyal

Civil Appeal No. 1980 of 1970

(O. Chinnappa Reddy, R. B. Misra JJ)

10.04.1985

JUDGMENT

R. B. MISRA, J. -

1. Hardyal, the respondent, entered into a contract with the State of Punjab, Public Works Department (Buildings and Roads Branch) for the construction of certain bridges and culverts on the Mukerian-Naushehra Road. The agreement between the parties was evidenced by a writing. The written agreement contained an arbitration clause which provided that dispute, if any, between the parties would be referred to the Superintending Engineer, Public Works Department (Buildings and Roads), Jullundur Circle. It appears that no period was fixed in the agreement of reference for giving the award and therefore period of four months as prescribed in Clause 3 of the First Schedule attached to the Arbitration Act would be the statutory period for giving the award.

2. Some dispute did arise between the parties. The respondent, therefore, sent a notice on January 7, 1960 to the Superintending Engineer requesting him to accept his claim to the tune of Rs. 7568 and give his award accordingly. The respondent claimed this amount of compensation broadly on two counts : (1) that the Sub-Divisional Officer had got certain bridges demolished which according to the respondent had been constructed strictly in terms of the agreement, and (2) that the respondent has also been directed to stop the work.

3. The arbitrator gave his award against the respondent on April 28, 1961, but after the expiry of the prescribed period. It is, however, admitted by the respondent that he participated in the proceedings before the arbitrator even after the expiry of the statutory period. The respondent challenged the award by filing an objection under Section 30 of the Arbitration Act on a number of grounds. On the pleas taken by the respondent the Senior Sub-Judge framed the following four issues : (1) whether the objections were premature, (2) whether the arbitrator had misconducted himself or the proceedings, (3) whether the award was against natural justice, and (4) whether the award was made after inordinate delay.

4. The learned Judge overruled all the objections and upheld the award. Issue No. 1 was not pressed before him. The contention of the respondent that reasonable opportunity had not been afforded to him to adduce evidence, by the arbitrator, was also repelled by the learned Judge. He observed :

One of the grounds taken up for setting aside the award as stated in the application was that the petitioner was not afforded a reasonable opportunity to adduce evidence. But the record of the proceedings dated April 24, 1961 shows that the parties did not want to say anything further and the hearing of the case was, therefore, closed under

such circumstances.

The plea regarding misconduct on the part of the arbitrator was also overruled and dealing with this point the learned Judge observed :

Nothing has been pointed out to me in the court during the course of the arguments as to how the arbitrator has misconducted himself and the proceedings.

The plea regarding delay in giving the award was rejected on the ground that the respondent had been participating in the proceedings before the arbitrator even after the expiry of the prescribed period of limitation.

5. The respondent took the matter in appeal to the High Court. When the matter came up before a learned Single Judge he referred the following two points for decision by a Division Bench on account of the importance of the question involved in the case and also on account of conflict of judicial opinion on the point :

1. Whether the award given after the expiry of the prescribed period without extension of time by the court was invalid ?

2. Whether the rejection of the objection regarding delay in giving the award on the ground that the objector had participated in the arbitration proceedings even after the expiry of the period of limitation prescribed would by necessary implication amount to extending the time under Section 28 of the Arbitration Act by the Court ?

6. The Division Bench allowed the objection of the respondent regarding delay in giving the award holding that a party to an arbitration agreement is not estopped from challenging the award on the ground of delay merely because it has participated in the arbitration proceedings even after the expiry of the prescribed period without any demur. On the second point the High Court held that more dismissal of the objection regarding delay in the award does not amount to extension of time by the court under Section 28(1) of the Arbitration Act and indeed time can be extended by the court by the exercise of sound judicial discretion. Accordingly the appeal was allowed, the order of the Senior Sub-Judge was set aside and the case was sent back to the trial court for deciding afresh whether it was a fit case for condoning the delay in giving the award by the arbitrator after affording opportunity to the parties to adduce evidence.

7. The State has come up in appeal on a certificate granted by the High Court under Article 133(1)(c) of the Constitution, as it then stood.

8. The same points have been reiterated before this Court. Before dealing with the points involved it will be convenient to refer to the relevant provisions of the Arbitration Act. Section 3 reads :

3. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions act out in the First Schedule insofar as they are applicable to the reference.

Section 28 reads :

28. (1) The court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time, the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

Clause 3 of First Schedule provides :

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow.

9. A perusal of these provisions indicates that it is open to the parties to an arbitration agreement to fix the time within which the arbitrator must give award, but it has to be so stated in the agreement itself. If perchance no time has been specified by the parties in the arbitration agreement, then by virtue of operation of Section 3 read with Clause 3 of the First Schedule the award must be given within four months of the arbitrator entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the court may allow.

10. Sub-section (1) of Section 28 is very wide and confers full discretion on the court to enlarge time for making the award at any time. The discretion under sub-section (1) of Section 28 should, however be exercised judiciously. Sub-section (2) of Section 28 also makes it evident that the court alone has the power to extend time. It further provides that a clause in the arbitration agreement giving the arbitrator power to enlarge time shall be void and of no effect except when all the parties consent to such enlargement. It is not open to arbitrators at their own pleasure without consent of the parties to the agreement to enlarge time for making the award.

11. In *H. K. Wattal v. V. N. Pandya* ((1974) 1 SCR 259 : (1973) 2 SCC 510) dealing with Section 28 (1) of the Arbitration Act this Court observed : (SCC p. 512, paras 10 and 11)

There is no doubt that the arbitrator is expected to make his award within four months of his entering on the reference or on his being called upon to act or within such time as the Court may allow. Reading Clause 3 of the along with Section 28 one finds that the power to enlarge the time is vested in the Court one finds that the power to enlarge the time is vested in the Court and not in the arbitrator. Clause 3 and Section 28 (1) exclude by necessary implication the power of the arbitrator to enlarge the time. This is emphasised by Section 28(2) which provides that even when such a provision giving the arbitrator power to enlarge the time is contained in the agreement, that provision shall be void and of no effect. The headnote of Section 28 brings out the force of this position in law by providing that the power is of the Court only to enlarge time for making the award.

Sub-section (2) of Section 28, however, indicates one exception to the above rule that the arbitrator cannot enlarge the time, and that is when the parties agree to such enlargement. The occasion for the arbitrator to enlarge the time occurs only after he is called upon to proceed with the arbitration or he enters upon the reference. Hence, it is clear that if the parties agree to the enlargement of time after the arbitrator has entered on the reference, the arbitrator has the power to enlarge it in accordance with the mutual agreement or consent of the parties. That such a consent must be a post reference consent, is also clear from Section 28(2) which renders null and void a provision in the original agreement to that effect. In a sense where a provision is made in the original agreement that the arbitrator may enlarge the time, such a provision always implies mutual consent for enlargement but

such mutual consent initially expressed in the original agreement does not save the provision from being void. It is, therefore, clear that the arbitrator gets the jurisdiction to enlarge the time for making the award only in a case where after entering on the arbitration the parties to the arbitration agreement consent to such enlargement of time.

12. The next question that crops up for consideration is what will be the effect if a party to the arbitration took part in the proceeding before the arbitrator even after the expiry of four months, that is, the period prescribed for giving the award. Some High Courts have taken the view that in such a situation the condition of four months' period will be deemed to have been waived. Such a view has been taken by the Allahabad High Court in *Shambhu Nath v. Surja Devi* (AIR 1961 All 180). A learned Single Judge of that High Court observed :

A party to an arbitration agreement who voluntarily takes part in the arbitration proceedings after the expiry of the period of four months will be deemed to have waived the implied conditions as to time.

A similar view has been taken by the Madhya Pradesh High Court in *Shivlal v. Union of India* (AIR 1975 MP 40 : 1974 MPLJ 795). In *Ganesh Chandra v. Artatrana* (AIR 1965 Ori 17 : ILR (1964) Cut 685) a Single Judge of the Orissa High Court observed :

If the parties, after the expiry of the four months, submit themselves to the jurisdiction of the arbitrators and take part in the proceeding enabling them to pass an award, it cannot be said that the arbitrators acted without jurisdiction. In such a contingency, the principle of waiver and estoppel would have full application.

13. Once we hold that the law precludes parties from extending time after the matter has been referred to the arbitrator, it will be contradiction in terms to hold that the same result can be brought about by the conduct of the parties. The age-long established principle is that there can be no estoppel against a statute. It is true that the time to be fixed for making the award was initially one of agreement between the parties but it does not follow that in the face of a clear prohibition by law that the time fixed under Clause 3 of the Schedule can only be extended by the court and not by the parties at any stage, it still remains a matter of agreement and the rule of estoppel operates. It need be hardly emphasized that the Act has enjoined the arbitrator to give an award within the prescribed period of four months unless the same is extended by the court. The arbitrator has no jurisdiction to make an award after the fixed time. If the award made beyond the time is invalid the parties are not estopped by their conduct from challenging the award on the ground that it was made that it was made beyond time merely because of their having participated in the proceedings before the arbitrator after the expiry of the prescribed period.

14. The policy of law seems to be that the arbitration proceedings should not be unduly prolonged. The arbitrator therefore has to give the award within the time prescribed or such extended time as the court concerned may in its discretion extend and the court alone has been given the power to extend time for giving the award. As observed earlier, the court has got the power to extend time even after the award has been given or after the expiry of the period prescribed for the award. But the court has to exercise its discretion in a judicial manner. The High Court in our opinion was justified in taking the view that it did. This power, however can be exercised even by the appellate court. The present appeal has remained pending in this Court since 1970. No useful purpose will be served in remanding the case to the trial court for deciding whether the time should be enlarged in the circumstances of this case. In view of the policy of law that the arbitration proceedings should

not be prolonged and in view of the fact that the parties have been taking willing part in the proceedings before the arbitrator without a will be a fit case, in our opinion, for the extension of time. We accordingly extend the time for giving the award and the award was be deemed to have been given in time.

15. The other questions involved in the case, however have not been dealt with by the High Court and it rest content by making a bald observation that there is no other point to be decided in this appeal. The objector-respondent had raised a number of pleas to challenge award giving rise to four issues. It was, therefore, obligatory for consider those points unless they had been given respondent. There is nothing on the record to suggest that the respondent had given up those grounds. The case will, therefore, have to be sent back to the High Court for deciding issues involved in this case.

16. We accordingly allow the appeal in part and set aside that of the order by which the High Court remanded the case to trim court for deciding whether time should be extended. The sent back to the High Court for deciding other issues involved. In the circumstances of the case the parties shall bear their own costs.

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