Gujarat Water Supply and Sewerage Board

Vs

Unique Erectors (Gujarat) (P) Ltd. and Another

Civil Appeals Nos. 418-19 of 1989

(S. Ranganathan, Sabyasachi Mukharji JJ)

24.01.1989

JUDGMENT

SABYASACHI MUKHARJI, J. –

1. This is an application for leave to appeal under Article 136 of the Constitution from the judgment and order of the High Court of Gujarat dated April 29, 1988.

2. To appreciate the questions involved herein, few facts have to be emphasized. In 1978, the State Government of Gujarat undertook a scheme known as 'Bhavnagar City Water Supply Scheme'. The Scheme was divided into two parts : (i) Raising Main; and (ii) Gravity Main. Raising Main was divided into two sections, namely 10. 1 kms. and 7.4 kms. steel welded pipeline. On or about December 15/16, 1978, the State Government issued letter of approval to the bargain between the parties on certain terms.

3. On January 12, 1979, two contracts were awarded to respondent 1 for Rs. 1,29,39,691 and Rs. 94,30,435 which provided the dates of completion as February 1979 and the third week of September, 1980 respectively. On March 29, 1981 respondent 1 filed the Civil Suit No. 588 of 1981 in the City Civil Court with regard to measurements recorded by the Deputy Engineer and alleged under-payments. On June 4, 1981, respondent 1 gave notice to the State Government and the petitioner Board requesting for reference of the alleged disputes to the arbitrator under Clause 30 of the agreement. On or about July 8, 1981 respondent 1 gave notice under Section 8 of the Arbitration Act, 1940 (hereinafter called 'the Act') calling upon the petitioner to concur in the appointment of one Shri G. G. Vaidhya. On July 12, 1981, he withdrew the Civil Suit No. 588 of 1981. On August 6, 1981, respondent 1 filed a Civil Miscellaneous Application No. 231 of 1981 in the Court of Civil Judge, (SD), Ahmedabad for appointment of the said Shri G. G. Vaidhya as the sole arbitrator. On November 7, 1981, the petitioner filed reply contesting the arbitrability of the various claims made in the application and inter alia contending that the application was not maintainable. On or about December 15, 1981 the learned Civil Judge appointed Shri G. G. Vaidhya as the sole arbitrator with a direction that he should first decide as to which disputes fell within the purview of Clause 30 of the agreement. On May 5, 1982, Shri Vaidhya gave an interim award holding that the claims at S. Nos. 10(g) and 10(l) only were not arbitrable and further that the other claims were arbitrable. A petition was filed in the High Court which was dismissed and then there was an application to this Court under Article 136 of the Constitution which was disposed of by consent on November 30, 1983. The said order inter alia provided that the parties had agreed to settle the matter amicably and one Shri Mohanbhai D. Patel, Retired Secretary, Public Works Department, Gujarat and at that time Sitting Member of the petitioner Board was appointed as the sole arbitrator in place of Shri Vaidhya to decide all disputes between the parties relating to the following works :

(i) providing, fabricating, laying and jointing 1000 mm dia. 10,000 M long steel welded pipe line under Bhavnagar Emergency Water Supply Scheme based on Shetrunji Dam - Agreement No. 5/2-1 of 1978-79.

(ii) providing, fabricating, laying and jointing 1000 mm dia. 7400 M long steel welded pipe line under Bhavnagar Emergency Water Supply Scheme based on Shetrunji Dam Agreement No. 6-2/2 of 1978-79.

4. It was further provided that all disputes concerning the said two works in question should be referred to the sole arbitrator and the Board could also be entitled to put counter-claims before him.

The consent terms also provided the following terms :

That the arbitration proceedings shall be started de novo meaning thereby that the earlier appointment and proceedings before the sole arbitrator Shri G. G. Vaidhya shall be inoperative and void.

That the Board shall have a right to agitate all points both in fact and in law before the sole arbitrator as per the terms and conditions of the contract including the question of arbitrability within the meaning of Clause 30 of the contract.

Both parties shall have a right to be represented by an advocate and/or their representatives.

The expenses of arbitration shall be borne by both the parties as per rules of government in this behalf.

That both parties shall agree to extend time as and when necessary for completion of arbitration proceedings.

That a formal agreement for arbitration shall be executed between the parties defining the scope of arbitration.

That the provisions of the Indian Arbitration Act, 1940 shall apply to the proceedings before this sole arbitrator.

5. On March 31, 1984, Shri M. D. Patel was appointed as the sole arbitrator jointly by the parties, and on April 2, 1984 he accepted his appointment and directed the parties to file their claim statements within 15 days. Thereafter, respondent 1 filed claim to the tune of Rs. 4,92,20,683 and a counter-claim to the extent of Rs. 26,87,217.40. On August 22, 1984 the parties appeared before the arbitrator after filing of claims and counter-claims.

6. On October 1, 1984 the petitioner filed an application before the arbitrator praying that preliminary issues be raised and decided first as to which of the disputes were arbitrable under Clause 30 of the agreement. On July 8, 1985, a lump sum award was made by the arbitrator, and on July 19, 1985 the parties were informed about the signing of the award. On the same day the award filed by respondent 1's advocate which was dated July 8, 1985 was registered as Civil Miscellaneous Application No. 144 of 1985. Thereafter, notice was issued on the same day and served on the petitioner also on the same day. The petitioner filed objections to the award and the objection petition was registered as Civil Miscellaneous Application No. 158 of 1985. Reply to the objections was filed by respondent 1. On July 17, 1986, however, the learned Civil Judge directed that decree

be passed in terms of the award. Two appeals were filed by the petitioner. On April 29, 1988 the High Court by a judgment dismissed the petition challenging the award and upheld the award. Aggrieved thereby, the petitioner has moved this Court as mentioned hereinbefore.

7. Various grounds were urged in support of this application. It was contended, firstly, that there was an error apparent on the face of the award and that the award was bad. It was submitted that the arbitrator had committed an error of law in not deciding or disclosing his mind about the arbitrability of claims or counter-claims, more so when the Board's application for deciding the same, was pending before the arbitrator. Before the learned trial Judge the Board had submitted an application to the arbitrator seeking to raise a preliminary issue regarding arbitrability of the claims. As noted by the learned trial Judge, it appears that the third meeting specifically mentioned that the claims were placed before the arbitrator and their contentions about the arbitrability were considered. So, these issues were gone into and it appears that the parties had agreed and proceeded on the basis that the claims may be examined and it was not necessary to decide pre-issue of arbitrability and it was agreed that all the claims be decided claimwise. So, it cannot be said that the arbitrator had acted arbitrarily in discussing all the questions raised before him without first deciding the question of arbitrability or non-arbitrability of an issue as such.

8. The court in its judgment has discussed the conduct of the parties. It appears that the court found that the parties themselves had agreed that the arbitrator should decide claimwise and on merit. The court so found, and in our opinion, rightly. The arbitrator so proceeded. There was no error committed by the arbitrator in so conducting himself. It was, secondly, contended that out of the numerous claims before the arbitrator, some of which, according to the petitioner, were ex facie not arbitrable and some were withdrawn including the claims for interest of Rs. 54,61,073 and compound interest of Rs. 82,26,039 and in the award no basis or indication was given as to which claim was rejected and further of the amount which was awarded as claim and what amount towards element of interest. It was, thirdly, contended that there was an error apparent on the face of the award inasmuch as the basis on which interest has been awarded has not been disclosed and whether the interest has been awarded from the date of the institution of the proceedings. It was, fourthly, contended that granting of interest pendente lite was contrary to the decision of this Court. It was, lastly, contended that non-speaking award had resulted in great prejudice inasmuch as against the claim of Rs. 1 lakh, Rs. 57 lakhs have been awarded.

9. The scope and extent of examination by the court of the award made by an arbitrator has been laid down in various decisions. It has to be noted that there is a trend in modern times that reasons should be stated in the award though the question whether the reasons are necessary in ordinary arbitration awards between the parties is pending adjudication by the Constitution Bench of this Court. Even, however, if it be held that it is obligatory for the arbitrator to state reasons, it is not obligatory to give any detailed judgment. An award of an arbitrator should be read reasonably as a whole to find out the implication and the meaning thereof. Short intelligible indications of the grounds should be discernible to find out the mind of the arbitrator for his action even if it be enjoined that in all cases of award by any arbitrator reasons have to be stated. The reasons should not only be intelligible but should also deal either expressly or impliedly with the substantial points that have been raised. Even in a case where the arbitrator has to state reasons, the sufficiency of the reasons depends upon the facts and the circumstances of the case. The court, however, does not sit in appeal over the award and review the reasons. The court can set aside the award only if it is apparent from the award that there is no evidence to support the conclusion or if the award is based upon any legal proposition which is erroneous. See the observations of this Court in Indian Oil Corporation Ltd. v. Indian Carbon Ltd. ((1988) 3 SCC 36).

10. In the instant case, the arbitrator by virtue of the terms mentioned in the order of this Court had to decide which of the disputes were arbitrable and which were not. It is true that the arbitrator has not specifically stated in the award that he had to decide the question of arbitrability. The arbitrator has rested by stating that he had heard the parties on the point of arbitrability of the claim and the counter-claim. He has further stated that after 'considering all the above aspects' and 'the question of arbitrability or non-arbitrability' he had made the award on certain aspects. Reading the award along with the preamble, it appears clear that the arbitrator had decided the arbitrability and the amount he has awarded was on the points which were arbitrable. The contention that the arbitrator had not decided the question of arbitrability as a preliminary issue cannot also be sustained. A reference to the arbitrator's proceedings which were discussed in detail by the High Court in the judgment under appeal reveal that the procedure adopted by the arbitrator, i.e., that he will finally decide the matters, indicated that the parties had agreed to and the arbitrator had proceeded with the consent of the parties in deciding the issues before him and in not deciding the question of arbitrability as a separate, distinct and preliminary issue. The arbitrator has made his award bearing all the aspects including the question of arbitrability in mind. It was contended before us that the arbitrator has made a non-speaking award. It was obliged to make a speaking award, it was submitted by terms of the order of this Court. We cannot sustain this submission because it is not obligatory as yet for the arbitrator to give reasons in his decision. The arbitrator, however, has in this case indicted his mind. It appears to us that the point that the non-speaking award is per se bad was not agitated before the High Court. We come to that conclusion from the perusal of the judgment under appeal though, however, this point has not been taken in the appellant's appeal. It is one thing to say that an award is unintelligible and is another to say that the award was bad because it was a non-speaking award. The point taken was that the award was unintelligible and not that it was non-speaking. But there was nothing unintelligible about the award.

11. We were invited to refer the matter to the Constitution Bench and await the disposal of this point by the Constitution Bench. The contract in this case was entered into in 1978. The proceedings for initiation of arbitration started in 1981. The matter had come up to this Court before which resulted in the order dated November 30, 1983. Pursuant thereto, the award has been made and no grounds specifically were urged though they were taken in the appeal in the High Court in the arguments before the High Court about the award being bad because it is non-speaking. In those circumstances, it will not be in consonance with justice for us to refer the matter to the Constitution Bench or to await the disposal of the point by the Constitution Bench. It was further submitted before us that the award was unreasonable and that the arbitrator had awarded a large amount of money but the original claim was not so large and as such the award was disproportionate. This contention, as it is, it appears from the judgment of the High Court, was not urged and canvassed before the High Court. The claim and the counter-claim together in its totality, in our opinion, does not make the award amount disproportionate. Reasonableness as such of an award unless the award is per se preposterous or absurd is not a matter for the court to consider. Appraisement of evidence by the arbitrator is ordinarily not a matter for the court. It is difficult to give an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual and the times and the circumstances in which he thinks. The word 'reasonable' has in law prima facie meaning of reasonable in regard to those circumstances of which the actor, called upon to act reasonably, knows or ought to know. See the observations on this point in MCD v. Jagan Nath Ashok Kumar ((1987) 4 SCC 497). Judged by the aforesaid yardstick the award cannot be condemned as unreasonable.

12. There is, however, one infirmity in the award which is apparent on the face of the award which in the interest of justice as the law now stands declared by this Court, we should correct, viz., the

question of interest pendente lite. The right to get interest without the intervention of the court and the powers of the court to grant interest on judgment have been examined by this Court in Executive Engineer (Irrigation), Balimela v. Abhaduta Jena ((1988) 1 SCC 418) which observations were also followed by this Court in State of Orissa v. Construction India (1987 Supp SCC 708). In accordance with the principles stated therein and the facts in this case, it appears that the principal amount awarded is Rs. 57,65,273. This is confirmed. In this case, April 2, 1984 is the date of the reference to arbitration, on August 22, 1984 the arbitrator entered upon the reference. July 8, 1985 is the date of the award and July 19, 1985, is the date of the publication of the award.

13. The interest awarded, in the instant case, covers three periods : (i) August 6, 1981 to August 21, 1984, prior to the commencement of the arbitration proceedings; (ii) August 22, 1984 to July 19, 1985 pendente lite; and (iii) July 19, 1985 to June 17, 1986 (date of award to date of decree).

14. Having regard to the position in law emerging from the decision of this Court in Executive Engineer (Irrigation), Balimela ((1988) 1 SCC 418) and Section 29 of the Arbitration Act, 1940 and Section 34 of the Code of Civil Procedure, we would modify the grant of interest in this case. The arbitrator has directed interest to be paid at 17 per cent per annum from August 6, 1981 up to the date of decree viz., June 17, 1986. Since in this case the reference to arbitration was made after the commencement of the Interest Act, 1978, the arbitrator under Section 3(1)(a) of the said Act was entitled to award interest from August 6, 1981 till August 21, 1984 in view of this Court's decision in Abhaduta Jena case ((1988) 1 SCC 418). In the light of the same decision, he could not have awarded interest for the period from August 22, 1984 till the date of the publication of the award viz. July 19, 1985. So far as interest for the period from the date of the award (July 19, 1985) till the date of the decree is concerned, the question was not specifically considered in Abhaduta Jena case ((1988) 1 SCC 418) but special leave had been refused against the order insofar as it allowed interest for this period. We think interest should be allowed for this period, on the principle that this Court can, once proceedings under Sections 15 to 17 are initiated, grant interest pending the litigation before it, i.e., from the date of the award to the date of the decree. It may be doubtful whether this can be done in cases arising before the Interest Act, 1978 in view of the restricted scope of Section 29 of the Arbitration Act. But there can be no doubt about the court's power to grant this interest in cases governed by the Interest Act, 1978 as Section 3(1)(a) which was applied by Abhaduta Jena ((1988) 1 SCC 418) to arbitrators will equally apply to enable this Court to do this in these proceedings.

15. In this connection, it is necessary to consider whether the date of commencement of the arbitration proceedings should be taken as the date of the reference or the date on which the arbitrator entered upon the reference as the date of the calculation of interest. In this case, the proceedings commenced on April 2, 1984 and the arbitrator entered upon the reference on August 22, 1984. Having regard to the facts and the circumstances of the case, it is necessary, in our opinion, to take August 22, 1984 as the date. It is also necessary to consider whether the date of award should be taken as the date of its making or its publication. The award was made on July 8, 1985 and it was published on July 19, 1985, and, therefore, the latter date would be taken as the date of the award.

16. We would, however, delete the interest awarded by the arbitrator for the period from August 22, 1984 till the date of the award and confine the interest on the principal sum of Rs. 57,65,273 to interest at 9 per cent from August 6, 1981 till August 21, 1984 (which has been worked out at Rs. 29,82,443). However, in exercise of our powers under Section 3 of the Interest Act, 1978 and Section 29 of the Arbitration Act, 1940, we direct that the above principal sum or the unpaid part

thereof should carry interest at the same rate from the date of the award (July 19, 1985) till the date of actual payment.

17. The appeals are disposed of in the above terms.

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