SUPREME COURT OF INDIA

Assam State Electricity Board

Vs.

Buildworth Pvt. Ltd.

C.A.No.484 of 2008

(Jagdish Singh Khehar,CJI., Dr.D.Y.Chandrachud and Sanjay Kishan Kaul,JJ.,)

04.07.2017

JUDGMENT

Dr D.Y.Chandrachud, J.,

SLP(Civil)No.6428-6429 of 2008

1. An arbitral award was rendered on 31 December 1998 by a sole arbitrator under the Arbitration Act, 1940. By the award an amount of Rs 30,73,916/- was awarded to Buildworth Pvt Ltd - the claimant in the proceedings together with future interest at 18 per cent per annum.

2. The arbitrator filed his award. Assam State Electricity Board, against whom the claim was awarded, filed its objections. On 22 December 2000 the Civil Judge, Senior Division, Kamrup made the award a Rule of the Court pursuant to the legislative regime which prevailed at the material time. An appeal was filed against the judgment of the Civil Judge. A Division Bench of the Gauhati High Court by its judgment dated 21 November 2006 upheld the award except for the award of interest by the arbitrator between 7 March 1986 and 31 December 1997. The High Court found no ground to interfere with the merits of the award on the claim for idling charges and escalation. However, the Division Bench opined that Section 29 of the Arbitration Act, 1940 did not confer jurisdiction on the arbitrator to award interest prior to the date of the reference.

3. Assam State Electricity Board as well as Buildworth Pvt Ltd are before this Court. The former seeks to impugn the correctness of the judgment of the Division Bench which found no reason to interfere with the award on merits. The latter has challenged that part of the order of the High Court by which the award of interest has been set aside. Leave was granted in the proceedings initiated by the Board under Article 136 on 15 January 2008. We grant leave in the Special Leave Petitions filed by the claimant and proceed to dispose of both sets of appeals.

4. For convenience of reference, Assam State Electricity Board would be referred to as 'the Board' while the Buildworth Pvt Ltd would be referred to as 'the claimant' in this judgment.

5. Pursuant to a purchase order dated 6 September 1982 an agreement was entered into between the Board and the claimant for the supply and installation of a circulating Water Piping System for the Bongaigaon Thermal Power Station. The purchase order contains provisions inter alia for the consideration payable, delivery, escalation, period for commissioning, penalty, disputes, terms of payment and arbitration. The total value of the contract was determined at Rs 86.82 lacs and the period for completion was 12 months from 25 June 1983, the date of the issue of the indent. The date for the completion of the work was subsequently extended until 6 September 1983. The actual work was completed on 28 May 1985 while one portion of the work of TG-IV was completed on 31 January 1986.

6. During the course of the arbitration the claimant raised several claims amounting to Rs 77.16 lacs including those on account of (i) price variation; (ii) idling charges of supervisory staff and labour; (iii) idling charges for machines, tools and tackles; (iv) compensation for extended stay for civil work; (v) interest from 7 March 1986 (i.e. the date of submission of bills) to 31 December 1997 at 18 per cent; (vi) escalation on account of gas; (vii) price variation of electrodes; (viii) legal expenses; and (ix) future interest at 18 per cent.

7. The sole arbitrator awarded a sum of Rs 10,73,969/- on account of idling charges of labour and machinery and towards price escalation. In addition, a lumpsum of Rs 20 lacs as interest was awarded between 7 March 1986 and 31 December 1997. Future interest was awarded at the rate of 18 per cent per annum on the sum awarded, after a period of three months from the date of the award.

8. The award was made a Rule of the Court on 22 December 2000 by the Civil Judge, Senior Division. The High Court partially allowed the appeal filed by the Board by setting aside the award of interest of Rs 20 lacs by the arbitrator.

9. We will initially consider the submissions which have been urged on behalf of the Board to challenge the arbitral award. Two submissions have been urged by learned senior counsel. Firstly, it has been urged that the arbitrator committed an error in awarding the claim for price escalation because Clause 2.3(a)(i) of the purchase order had specifically fixed a ceiling of Rs 9,16,825/- under this head. This amount, it was urged, had been paid to the claimant and hence no further amount could have been awarded by the arbitrator in the teeth of a contractual provision. Secondly, it was urged that the arbitrator erred in allowing the claim for idling charges of labour and machinery once a finding of fact was recorded by the arbitrator that the claimant had also contributed to the delay in the completion of the project.

10. The first submission is based on the provisions of clause 2.3(a)(i) of the purchase order which is extracted below :

"PRICES: 2.3.
a) Escalation.
1. The increase in price of steel labour valve, expansion joints, electrodes etc., shall be to Boards accounts, with the overall ceiling of Rs.9,16,825/- on submission of documentary evidence."

11. The contention of the claimant was that clause 2.3(a)(i) applied only for the specific period mentioned in the purchase order and not for the extended period of the contract. According to the Board, a cap of Rs 9.16 lacs was imposed under the above provision and no price escalation was permissible beyond it. The arbitrator entered the following finding:

> "...The contract is silent as to what will happen if the work agreed to be completed by 6.9.83 cannot be completed within 6.9.83. It has not been disputed by the respondent that the Project Work was completed much beyond the extended date i.e. by 6.9.83. It is pertinent to point out here that the extension of time upto 6.9.83 was formally granted by the respondent by a letter dated 27.3.85. There is no formal extension of time beyond 6.9.83 by the Purchaser, but the claimant was allowed to carry out the work beyond 6.9.83. From the records it is found that during the period from 6.9.83 to 27.3.85, there is no objection as to delay nor any formal extension. Nor was the penalty clause (2.6.7) invoked. As a matter of fact, the work was carried out by the claimant with active co-operation of the respondent till 31.1.86 when the work on TG-IV was completed and necessary payment was made to the claimant. It appears, therefore, that though there is no formal extension of time beyond 6.9.83, the claimant was given informal extension of time upto 21.1.86 when the work was finally completed."

Besides this, the arbitrator noted, that by a letter dated 5 June, 1983 the claimant had specifically intimated to the Board that the escalation provision contained in clause 2.3(a)(i) would not be applicable for the extended period. No objection was raised on behalf of the Board to the above letter and, on the contrary, the claimant was allowed to carry on the work beyond 6 September 1983 which was the extended date, without any objection upto 31 August, 1986. The ultimate conclusion which was arrived at by the arbitrator was as follows

> "As discussed above, the clause of price being firm cannot be extended to cover the period beyond the formal extended date i.e. 6.9.83. Price escalation is a process which does not naturally confine itself between the date of purchase order and the extended date i.e. 6.9.83. On the contrary, generally market tendency is that it goes on increasing with every passing days. Therefore, it would be naive to presume that there was no price escalation between the period 6.9.83 to 31.1.86.
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> In view of the above, the respondent Board cannot deny the claimant the charge on account of price escalation taking shelter under clause 2.23(a) of the purchase order and clause 31 of the specification. Provision of both the clauses is applicable only upto the formal extension date 6.9.83 and not beyond. Having allowed the claimant to

carry out the work much Beyond the formal extended date i.e. from 6.9.83 up to 31.1.86, the respondent cannot now take the stand that the claimant is not entitled to escalation price for the period he worked even though there is no formal extension of time but for intents and purposes there was an extension of time upto 31.1.86."

12. The arbitrator has taken the view that the provision for price escalation would not bind the claimant beyond the scheduled date of completion. This view of the arbitrator is based on a construction of the provisions of the contract, the correspondence between the parties and the conduct of the Board in allowing the completion of the contract even beyond the formal extended date of 6 September 1983 up to 31 January 1986. Matters relating to the construction of a contract lie within the province of the arbitral tribunal. Moreover, in the present case the view which has been adopted by the arbitrator is based on evidentiary material which was relevant to the decision. There is no error apparent on the face of the record which could have warranted the interference of the court within the parameters available under the Arbitration Act, 1940. The arbitrator has neither misconducted himself in the proceedings nor is the award otherwise invalid.

13. The view which has been adopted by the arbitrator is in fact in accord with the principles enunciated in the judgments of this Court. In *P.M.Paul Vs. Union of India*[1], a Bench of two learned Judges of this Court has held that:

"... escalation is a normal incident arising out of gap of time in this inflationary age in performing any contract. The arbitrator has held that there was delay, and he has further referred to this aspect in his award After discussing the evidence and the submission the arbitrator found that it was evident that there was escalation and, therefore, he came to the conclusion that it was reasonable to allow 20 per cent of the compensation under claim no.1, he has accordingly allowed the same. This was a matter which was within the jurisdiction of the arbitrator and, hence, the arbitrator had not misconducted himself in awarding the amount as he has done. This Court held that the contractor was justified in seeking price escalation on account of an extension of time for the completion of work. Once the arbitrator was held to have the jurisdiction to determine whether there was a delay in the execution of the contract due to the respondent, the latter was liable for the consequence of the delay, namely, an increase in price."

14. A similar principle finds expression in another judgment of two learned Judges of this Court in *Food Corporation of India Vs. A.M.Ahmed & Co. and Another*[2]*:*

"32.Escalation, in our view, is normal and routine incident arising out of gap of time in this inflationary age in performing any contract of any type. In this case, the arbitrator has found that there was escalation by way of statutory wage revision and, therefore, he came to the conclusion that it was reasonable to allow escalation under the claim. Once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of FCI, the Corporation was

liable for the consequences of the delay, namely, increase in statutory wages. Therefore, the arbitrator, in our opinion, had jurisdiction to go into this question. He has gone into that question and has awarded as he did. The arbitrator by awarding wage revision has not misconducted himself. The award was, therefore, made rule of the High Court, rightly so in our opinion."

In *K.N.Sathyapalan (Dead) by LRs Vs. State of Kerala and Another*[3], this Court has held that :

"32. Ordinarily, the parties would be bound by the terms agreed upon in the contract, but in the event one of the parties to the contract is unable to fulfil its obligations under the contract which has a direct bearing on the work to be executed by the other party, the arbitrator is vested with the authority to compensate the second party for the extra costs incurred by him as a result of the failure of the first party to live up to its obligations. That is the distinguishing feature of cases of this nature and Alopi Parshad case [(1960) 2 SCR 793 : AIR 1960 SC 588] and also Patel Engg. case[(2004) 10 SCC 566] . As was pointed out by Mr Dave, the said principle was recognised by this Court in P.M. Paul [1989 Supp (1) SCC 368] where a reference was made to a retired Judge of this Court to fix responsibility for the delay in construction of the building and the repercussions of such delay. Based on the findings of the learned Judge, this Court gave its approval to the excess amount awarded by the arbitrator on account of increase in price of materials and costs of labour and transport during the extended period of the contract, even in the absence of any escalation clause. The said principle was reiterated by this Court in T.P. George case [(2001) 2 SCC 758]. "

15. The award comports with principles of law governing price escalation firmly established by decisions of this Court. For these reasons, we find merit in the contention of learned counsel appearing on behalf of the claimant that the award does not suffer from any error apparent on the face of the record insofar as the aspect of price escalation is concerned.

16. The High Court has also adverted to the decision of this Court in *General Manager, Northern Railway Vs. Sarvesh Chopra*[4] in support of the principle that if a party to a contract does not rescind it by invoking Sections 55 and 56 of the Contract Act, 1872 and accepts the belated performance of reciprocal obligations, the other party would be entitled to make a claim for damages.

17. On the aspect of idling charges for machinery and labour, the arbitrator noted that three additional items of work were required to be carried out by the claimant which did not form part of the original work. These items of work required the mobilization of labour and machinery separately from that which had already been mobilized. The finding which the arbitrator rendered was as follows:

"....It is natural that for carrying out separate works involving different technology, separate machineries and labour with separate expertise are required to be engaged. In

absence of any evidence that these 3 additional works were not separate requiring separate machineries and labour, it is reasonable to presume that the claimant mobilized separate machineries and labour for these 3 additional works. Therefore, the claimant cannot be denied the charges for these additional labour and machineries."

18. The arbitrator held that to some extent, the claimant contributed to the delay in the execution of the work and referred in that connection to the letters addressed by the Board to the claimant. The arbitrator also observed that the inability of the claimant to place the required number of supervisors at the site also contributed to the delay in the completion of the work. The point of the matter is that the arbitrator has duly borne in mind the circumstance that "the claimant also contributed to a certain extent and must share responsibility for causing delay in completion of the project". The award does indicate that the contributory delay on the part of the claimant was present to the mind of the arbitrator and has been duly taken into consideration in computing the extent of the claim under the award. This is not a case where the arbitrator has failed to take into account a relevant consideration or has taken into account extraneous material or consideration. Once the aspect of contributory delay was present to the mind of the arbitrator, as is reflected in the reasons in the award, and this has been taken into consideration in the assessment of damages, the award does not fall for interference. While noticing this, the High Court rejected the contention that the claimant had failed to produce evidence that its men and machinery remained idle at the work site. The finding of the High Court was as follows:

"..In the present case, the above amount was awarded on the basis of admitted facts. We reiterate that initially the period for execution of work was fixed for one year, which was expired on 25.06.1983 and the work could be completed only in the month of February 1985. Not only this, some part of the work related to TG-IV was completed on 31.1.1986. During this period the respondent informed the A.S.E.B. vide letter dated 5.6.1983 that work front was not handed over to them and as such, escalation clause order 2:6:4 would not be applicable to them. Identical remainders were given vide letters dated 07.06.1983; 16.11.1983 and 03.06.1984 and so on. Not only this, the officers of the A.S.E.B. also admitted the position about non-release of work front clearly in their letter dated 08.03.1984. However, at no point of time the A.S.E.B. refuted the contractor's objection nor refuted the claim of idle charges etc. At the same time the bills of the contractor on account of idle charges and escalation prices etc. were put up for consideration in a meeting held on 28.01.1986. This act of the A.S.E.B. clearly indicates that they had impliedly admitted substance and justification in the claim of the contractor."

The view of the High Court does not warrant interference.

19. The next aspect of the matter relates to the award of interest for the period from 7 March 1986 to 31 December 1997. The arbitrator awarded a lumpsum of Rs 20 lacs for a period of 11 years. The High Court set aside the award of interest on the ground that Section 29 of the

Arbitration Act, 1940 contemplates the award of interest only from the date of the decree. The issue as to whether interest could be awarded for the pre-reference period and pendente lite under the Act of 1940 is not res integra. In *Secretary, Irrigation Department, Government of Orissa and Others Vs. G.C.Roy*[5], a Constitution Bench of this Court held that:

> "44 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."

In another judgment, the Constitution Bench in Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa and Others Vs. N.C.Budharaj (Deceased) by LRs and Others , affirmed the power of the arbitrator to award interest on sums found due and payable for the pre-reference period, in the absence of a specific stipulation or prohibition in the contract to claim or grant such interest .

20. The basis on which the High Court set aside the award of interest is hence contrary to the decisions of the Constitution Bench.

21. Learned counsel appearing on behalf of the Board, however, submitted that a claim for damages gets quantified upon an adjudication by the arbitrator. Hence, it was submitted that no interest could be awarded prior to the date of the award. Even this aspect of the matter is, in our view, no longer res integra. The arbitrator has power to grant interest on damages under Section 3(1)(b) of the Interest Act, 1978, from the date mentioned in this regard in a written notice claiming such interest. The position which prevailed prior to the Interest Act, 1978 (to the effect that interest on damages would be payable only after ascertainment of damages) has undergone a change after the enactment of the Act. Interest on damages could be claimed from the date of the written notice as contemplated in the law. This aspect of the matter has been set at rest in a decision of this Court in *State of Rajasthan Vs. Ferro Concrete Construction Pvt. Ltd*[8]. The appellant in that case raised a similar contention that in regard to claims in the nature of damages (as contrasted with ascertained sums due) interest would become payable only on quantification and hence the award of interest prior to the date of the arbitral award was contrary to law. Answering this submission, this Court held as follows:

> "62. It is no doubt true that the position of law earlier was that in regard to award of damages, interest was not payable before quantification by a court. This was on the assumption that insofar as damages are concerned, there is no liability till

determination of the quantum of damages. We may refer to a decision of the Bombay High Court in Iron & Hardware (India) Co. v. FirmShamlal & Bros. [AIR 1954 Bom 423] , where Chagla, C.J., speaking for the Bench, stated the principle thus: (AIR pp. 425-26, para 7)

"7. ... In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party. As already stated, the only right which he has is the right to go to a court of law and recover damages. Now, damages are the compensation which a court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the court. Therefore, no pecuniary liability arises till the court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant."

63. The legal position, however, underwent a change after the enactment of the Interest Act, 1978. Sub-section (1) of Section 3 of the said Act provided that a court (as also an arbitrator) can in any proceedings for recovery of any debt or damages, if it thinks fit, allow interest to the person entitled to the debt or damages at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say, "3. (1)(a) if the proceedings relate to a debt payable by virtue of a written instrument at a certain time, then, from the date when the debt is payable to the date of institution of the proceedings;

(b) if the proceedings do not relate to any such debt, then, from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings:"

64. Sub-section (3) of Section 3 made it clear that nothing in that section shall apply to any debt or damages upon which interest is payable as of right, by virtue of any agreement; or to any debt or damages upon which payment of interest is barred, by virtue of an express agreement. The said sub-section also made it clear that nothing in that section shall empower the court to award interest upon interest. Section 5 of the said Act provides that nothing in the said Act shall affect the provisions of Section 34 of the Code of Civil Procedure, 1908.

65. The position regarding award of interest after the Interest Act, 1978 came into force, can be stated thus:

(a) Where a provision has been made in any contract, for interest on any debt or damages, interest shall be paid in accordance with such contract.

(b) Where payment of interest on any debt or damages is expressly barred by the contract, no interest shall be awarded.

(c) Where there is no express bar in the contract and where there is also no provision for payment of interest then the principles of Section 3 of the Interest Act will apply in regard to the pre-suit or pre-reference period and consequently interest will be payable:

(i) where the proceedings relate to a debt (ascertained sum) payable by virtue of a written instrument at a certain time, then from the date when the debt is payable to the date of institution of the proceedings;

(ii) where the proceedings is for recovery of damages or for recovery of a debt which is not payable at a certain time, then from the date mentioned in a written notice given by the person making a claim to the person liable for the claim that interest will be claimed, to date of institution of proceedings.

(d) Payment of interest pendente lite (date of institution of proceedings to date of decree) and future interest (from the date of decree to date of payment) shall not be governed by the provisions of the Interest Act, 1978 but by the provisions of Section 34 of the Code of Civil Procedure, 1908 or the provisions of the law governing arbitration as the case may be.

66. Therefore, even in regard to the claims for damages, interest can be awarded for a (sic period) prior to the date of ascertainment or quantification thereof if (a) the contract specifically provides for such payment from the date provided in the contract; or (b) a written demand had been made for payment of interest on the amount claimed as damages before initiation of action, from the date mentioned in the notice of demand (that is from the date of demand or any future date mentioned therein). In regard to claims for ascertained sums due, interest will be due from the date when they became due. In the present case, interest has been awarded only from 3-9-1990, the date of the petition under Section 20 of the Act for appointment of arbitrator. We find no reason to alter the date of commencement of interest."

22. The judgments on the point have been considered in a decision of three Judges of this Court in *Union of India Vs. Ambica Construction* [9] in the context of a bar of jurisdiction to award interest for the period of the pendency of the arbitration under the 1940 Act if there is

an express bar under the contract. The decision notes and affirms the powers of the arbitrator to award interest in the absence of a specific power or prohibition contained in the contract.

23. The contract in the present case contains no bar or prohibition against the award of interest. However, it has been submitted on behalf of the Board that the claimant was paid a sum of Rs 9,16,825/- towards escalation, which was the amount contemplated under Clause 2.3.1 of the Contract. However, as we have noted, this provision in the contract was correctly held by the arbitrator to apply only during the scheduled term of the contract and not in respect of the extended period. The respondent in its initial demands dated 7 March 1986 and 23 April 1986 made claims on account of price escalation and submitted a consolidated bill on 9 June 1986. On 20 April 1987 the claimant addressed a legal notice, claiming a sum of Rs 10,73,416/- together with interest at the rate of 18 per cent per annum. In the circumstances upon the issuance of the above notice, the claimant was clearly entitled to claim interest with effect from 20 April 1987. The High Court was hence in error in setting aside the award of interest.

24. In our view, having regard to what is stated above, claimant is entitled to interest on the sum awarded from 20 April 1987 to 31 December 1997 and thereafter from the date of the decree of the trial Court until payment or realisation. The rate of interest is, however, modified to 12 per cent per annum, in respect of both the above periods.

25. The appeal filed by the claimant shall accordingly stand allowed in the above terms. The appeal filed by the Board shall stand dismissed.

26. However, there shall be no order as to costs.

Judgment Referred.

[1]*(1989) Supp. 1 SCC 0368*
[2]*(2006) 13 SCC 0779*
[3]*(2007) 13 SCC 0043*
[4]*(2002) 4 SCC 0045*
[5]*(1992) 1 SCC 0508*
[6]*(2001) 2 SCC 0721*
[7] *26. For all the reasons stated above, we answer the reference by holding that the arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest.*
[8]*(2009) 12 SCC 0001*
[9]*(2016) 6 SCC 0036*