

THE STATE OF KERALA ETC. ETC. A
v.
M/S. ARYA REFRIGERATION & A/C CO. ETC. ETC.

AUGUST 3, 2004

[S.N. VARIAVA AND ARIJIT PASAYAT, JJ.] B

Arbitration Act, 1940; Section 9/Interest on Delayed Payments to Small Scale and Industrial Undertakings Act, 1993; Ss. 3, 5 and 6 :

Agreement with State Government for supply and erection of a storage plant—Plant could not be installed due to non-construction of building by the State—Dispute referred to Arbitrators—Award—Cancellation of contract by the State—Challenged by the party by referring the matter to arbitration—State neither nominated arbitrator nor participated in the proceeding—Award—Trial Court made the award rule of the Court—Correctness questioned by the State—Award set aside by the High Court—Supreme Court referred the matter afresh to arbitrator appointed by it and, as an interim measure, directed the State to deposit the sum as awarded by the Arbitrator and permitted the party to withdraw the amount with stipulation to return the amount with interest @ 15% if appeal allowed—Award filed—Challenged by the party—Held : Award is well-reasoned and detailed one—Terms of the contract not disregarded—Findings not perverse/unreasonable—Since payment of interest @ 15% on the amount received by the claimant was conditional and condition not fulfilled, claimant not liable to pay interest @ 15% but could pay @ 9% only—Award modified—Code of Civil Procedure, 1908; Section 115. C D E F

Respondent had entered into an agreement with appellant-State for supply and erection of an ice-cum-cold storage plan. Respondent could not install the plant as building to house it was not constructed by the State Government. Thus dispute arose which was referred for Arbitration. Arbitrator gave award in favour of the respondent. Later, State Government cancelled the contract. Respondent referred the matter also to Arbitration by nominating an Arbitrator, The State, however, did not nominate any Arbitrator, nor did it participate in the arbitration proceedings. The Arbitrator made award in favour of the respondent. Award was made rule of the Court. State challenged it H

A before the High Court. Division Bench of the High Court set aside the award. Hence the appeal and the cross appeal.

B This Court appointed an Arbitrator and referred the matters for arbitration. In the meantime, it directed the appellant-State to deposit the amount as awarded by the Arbitrator in earlier arbitration proceedings and allowed the respondent to withdraw the amount subject to the condition that it should return the same along with interest @ 15% if the appeal is allowed. The Arbitrator appointed by this Court has filed the award for making it rule of the Court.

C It was contended by the respondent that the award was liable to be vacated on grounds that the Arbitrator exceeded his jurisdiction, disregarded the terms of the contract in making the award; that the liability to interest ought to be in terms of provisions of the Delayed Payment of Small Scale Industrial Undertakings Act; and that the
D Arbitrator failed to take notice of certain adjustment of amount received by the respondent and payment though ordered but not received by it.

E It was submitted for the State that nothing has been shown by the respondent in support of its submission that the Arbitrator overlooked any relevant material or the award suffered from any patent illegality.

Disposing of the appeals by modifying the award, the Court

F HELD : 1.1. The Arbitrator has given a very well reasoned and detailed award. It could not be shown as to in what way the fundamental terms of the contract were disregarded. The Arbitrator has referred to various clauses of the contract and the effect thereof. The findings are in no way perverse or unreasonable. There is no substance in the plea of the claimant that the award suffered from any infirmity. So far
G as applicability of the Interest as per Delayed Payments Act is concerned, it appears that before the Arbitrator no claim in that regard was made. In order to attract the provisions of the said Act, the factual aspect like prevailing bank rate of interest etc. were to be brought on record. This has not been done. So the plea in that regard
H is also without any substance. [297-B-C]

1.2. There is nothing on record to show that the respondent had withdrawn the amount which was deposited with the Subordinate Court. Similarly, a sum of Rs. 47,000 has been adjusted more than once. Necessary adjustment in this regard has to be made. So far as the plea relating to 15% rate of interest on the amount deposited by the State is concerned, it has to be noted that this Court had directed that in case appeal is allowed, State would be entitled to interest @ 15% on the amount; such a situation has not come. It would be proper to apply 9% rate of interest on the said amount. With these modifications and computation, the award is made rule of the Court. [297-D, E, F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2078 of 1984.

WITH

I.A. No. 6 and Civil Appeal No. 362 of 1988.

From the Judgment and Order dated 18.8.1983 of the Kerala High Court in C.R.P. 2660 of 1982-A.

Ramesh Babu and M.R. for the Appellants.

R. Sathish for the Respondent.

The Judgment of the Court was delivered by

ARIJIT PASAYAT, J. : These two appeals are interlinked and, therefore, taken up together for disposal. Civil appeal no. 2078 of 1984 is by the State of Kerala questioning correctness of the decision rendered by learned Single Judge of the Kerala High Court directing deposit for Rs. 5,75,500 in Court, upholding the directions of deposit given by Sub Court, Trivandrum in E.P. No. 109 of 1981 in O.P. (Arbitration) No. 4 of 1979. Learned Single Judge held that there was nothing wrong with the direction to warrant interference under Section 115 of the Code of Civil Procedure 1908 (in short the 'Code'). Civil appeal no. 362 of 1988 has been filed by M/s Arya Refrigeration and Air Conditioning Co. Ltd. (hereinafter referred to as the 'claimant') questioning correctness of the judgment rendered by the Division Bench of the Kerala High Court setting aside the

A decree in terms of the award given by the two arbitrators appointed by the Court.

Though the case has a chequered history, it is not necessary to deal with the factual position in detail, as the same is almost undisputed.

B Claimant entered into an agreement with the State of Kerala on 18.1.1965 for supply and erection of a 100 tonne ice-cum-cold storage plant at Willington Island Cochin. The agreed amount was Rs. 9,40,000. Though some plants and machines were supplied, they could not be installed because of non-construction of the building to house them. As time passed, dispute arose between the parties and the matter was referred to arbitrators

C in terms of clause 15 of the agreement. There were two arbitrators who passed an award on 2.11.1978. The amount awarded by the arbitrators was Rs. 5,05,500. Soon after the award was passed, the State Government cancelled the contract and the same was terminated w.e.f. 17.11.1978. Claimant questioned the cancellation and raised the claims. In view of the

D cancellation of the contract the claimant referred the matters to arbitration and nominated the arbitrator under Section 9 of the Arbitration Act 1940 (in short the 'Act'). Notice was served on the State but it did not nominate any arbitrator. Arbitration proceedings continued, State did not participate before the sole arbitrator and finally the award was passed on 17.5.1982

E awarding Rs. 22,72,500 to the claimant. The State questioned correctness of the award. But the trial Court overruled objections of the State and made the award given by the Arbitrator rule of the Court. The State questioned the correctness of the decree passed by the Subordinate Court in terms of the award. By the impugned judgment dated 10.11.1986, a Division Bench

F of the High Court, as noted above, set aside the award. Before this Court also the matter was taken up. Parties finally agreed to settle the dispute out of the Court, but later on requested for appointment of an arbitrator by this Court to adjudicate the dispute. By order dated 13.12.1999 Mr. Justice B.M. Thulsidas, a retired Judge of the Kerala High Court was appointed as an Arbitrator, though initially another Arbitrator was appointed.

G As an interim measure, by order dated 16.4.1984 in civil appeal no. 2078 of 1984, it was directed that the appellant-State should deposit Rs. 5,75,500 as awarded by the Arbitrator with the registry of this Court. The claimant was permitted to withdraw the amount with the stipulation that the claimant shall return the amount together with interest @ 15% p.a. in case the appeal

H is allowed. Mr. Justice Thulsidas has filed the award before this Court.

In the award the Arbitrator has held, after consideration of the claimant's claim and counter-claim of the State, that claimant is liable to pay to the State a sum of Rs. 28,12,554 with interest @ 15% from the date of award i.e. 11.12.2002 till payment or deposit. The claimant was also directed to pay Rs.25,666 by way of Arbitrators' remuneration. The Arbitrator has held that out of the agreed amount of consideration stipulated in the contract i.e. Rs. 9,40,000, claimant had received for the material supplied Rs. 6,75,780 as 80% of the value and sales tax. The cost of material that was actually supplied was Rs. 8,40,730 leaving balance of Rs. 99,270 which form cost of labour, service and profit element. It was held that claimant was entitled to receive Rs. 2,83,000 being the balance amount with interest for 8 years i.e. 1966 to 1974. After adjustment of the sum of Rs. 47,000 which was deposited as security deposit and has been refunded in 1974, the claimant was finally held to be entitled Rs. 2,36,714 with interest on the said amount @ 9%. It was further held that the claimant was entitled to Rs. 25,000 as expenses with interest @ 9% from January 1978 when the first award was given.

Arbitrator was of the view that it was no fault of the claimant and, therefore, it was entitled to balance amount of Rs. 99,270 together with interest @ 9% in 1966 till 10.1.1973 when the claimant gave notice to the State that departmental works of erection would not be taken up. The Arbitrator worked out the entitlement at Rs. 1,66,010. On the above basis total claim of the claimant came to Rs. 5,25,774.

Taking note of the amounts of claimed to have been paid to the claimant, the Arbitrator noted as follows:

- (1) A sum of Rs. 2,68,550 was paid on 17.7.1979.
- (2) As per order dated 26.2.1982 a sum of Rs. 2,00,000 was deposited on 23.11.1982.
- (3) A sum of Rs. 5,00,000 was paid as per order dated 1.12.1983 in MFA No. 515/83.
- (4) In terms of order dated 12.3.85 of this Court, an amount of Rs. 5,75,000 was paid.

Thus altogether Rs. 15,43,550 was received by the claimant in course

A of the proceedings. On this the interest payable was fixed at 9%. Together with interest, the amount was fixed at Rs. 21,29,350 and with interest @ 15%, it was held that the State was entitled to receive Rs. 28,12,554 from the claimant. 15% interest was also stipulated keeping in view the order passed by this Court.

B Learned counsel appearing for the claimant submitted that the award of the arbitrator is liable to be vacated on the following grounds:

(1) Arbitrator disregarded fundamental terms of contract and exceeded his jurisdiction.

C (2) Arbitrator misdirected himself in law in the sense that he neglected to look into the terms of contract.

D (3) Interest which was to be paid to the claimant was to be fixed on the basis of "The Interest On Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993". The liability for interest was to be fixed in terms of Sections 3, 5 and 6 of the said Act which has not been taken note of.

E It was further pointed out that the arbitrator has failed to notice that there was no payment of Rs. 2,00,000 as held. Only material which was adduced before the arbitrator was to show that there was a deposit but there was no withdrawal of the amount. The sum of Rs. 47,000 has been adjusted more than once. The arbitrator did not notice that there were certain special conditions which govern the agreement, which were not taken note of. 15% interest on Rs. 5,75,000 is included wrongly because it is nowhere directed that 15% was to be paid by the claimant. It was only observed that in case appeal is allowed, the State would be entitled to 15%. In essence, the award was characterized to be outcome of misconduct.

G In response, learned counsel for the State submitted that award given by the arbitrator is a reasoned award and the scope for interference with the reasoned award is extremely limited. Nothing has been shown to show that the arbitrator overlooked any relevant piece of material or that the award suffered from any patent illegality.

H Though there was some dispute about the applicability of the Act

in view of the accepted position at all stages that the Act applied to the proceedings, such challenge is without any foundation. A

It has to be noticed that the arbitrator has given a very well reasoned and detailed award. It could not be shown as to in what way the fundamental terms of the contract were disregarded. The arbitrator has referred to various clauses of the contract and the effect thereof. The findings are in no way perverse or unreasonable. We do not find substance in the plea of learned counsel for the claimant that the award suffered from any infirmity. So far as applicability of the Interest On Delayed Payments Act is concerned, it appears that before the arbitrator no claim in that regard was made. In order to attract the provisions of the said Act, the factual aspect like the prevailing bank rate of interest were to be brought on record. This has not been done. So the plea in that regard is also without any substance. We, however, find substance in the plea relating to computation of the amounts receivable by the claimant. As rightly submitted, there was nothing on record to show that the claimant had withdrawn the amount which was deposited with the Subordinate Court, Trivandrum. Similarly, a sum of Rs. 47,000 has been adjusted more than once. Necessary adjustment in this regard has to be made. So far as the plea relating to 15% rate of interest is concerned, it has to be noted that this Court directed that in case appeal is allowed, State would be entitled to interest @ 15%. That situation has not come. It would, therefore, be proper to apply 9% rate of interest on the sum of Rs. 5,75,000. B C D E

With the above modifications and computation award of the arbitrator is made rule of the Court and entire respective amounts be worked out and decree drawn up accordingly. F

The appeals are disposed of on the above terms leaving the parties to bear their respective costs.

S.K.S.

Appeals disposed of.