

Executive Engineer (R and B) v. Gokul Chandra Kanungo (Dead)

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8990 OF 2017

EXECUTIVE ENGINEER (R AND B)
AND OTHERS ...APPELLANT(S)

VERSUS
GOKUL CHANDRA KANUNGO (DEAD)
THR. HIS LRS. ...RESPONDENT(S)

JUDGMENT
B.R. GAVAI, J.

1. The appellants have challenged the judgment dated 18th April 2012 passed by the learned Single Judge of the High Court of Orissa in Arbitration Appeal No. 25 of 2007, thereby dismissing the appeal filed by the appellants.

2. The facts in brief giving rise to the present appeal are as under:

The respondent was awarded the contract for construction of 3 kilometers missing link on NH6 from Kanjipani to Kuntala on 16th December 1971. The work was to be completed within one year that is before 15 th December 1972. The contract amount was Rs.4,59,330/. However, the work could not be completed by the stipulated date and it was completed only on 30th August 1977, by which date, the respondent was already paid an amount of Rs.3,36,465/.

3. The respondent, on 25th July 1989, issued a notice to the appellant regarding his claim. The said notice was replied to by the appellant on 10 th August 1989 stating therein that, as against the claim of Rs.3,34,744/, the respondent had been paid an amount of Rs.3,36,465/. The respondent thereafter filed a suit being O.S. No. 206 of 1989 before the Court of Civil Judge (Senior Division), Bhubaneswar

(hereinafter referred to as the “trial court”) under Section 20 of the Arbitration Act, 1940 (for short, “the 1940 Act”) seeking reference of the dispute to arbitration. By order of the trial court dated 14th February 1990, the suit was decreed in favour of the respondent and he was directed to file the original F2 agreement in the court for referring the dispute to arbitration. However, the respondent did not file the original F2 agreement as directed. In the meantime, the 1940 Act was repealed and the Arbitration and Conciliation Act, 1996 (for short, “the 1996 Act”) came into force.

4. The respondent thereafter filed an application in the disposed of suit before the trial court, praying for appointment of an arbitrator under the provisions of the 1996 Act. The same was rejected by the trial court vide order dated 4th February 2000 for lack of jurisdiction. The respondent thereafter moved an application being MJC No. 36 of 2000 under Section 11 of the 1996 Act before the High Court for appointment of an arbitrator. The learned Single Judge of the High Court, vide order dated 15th October 2001, allowed the said application and appointed Shri S.K. Mohanty, former Judge of the same High Court as the Arbitrator.

5. On 15th March 2002, the respondent filed his claim of Rs.1,45,28,198/- under 15 heads of claim and demanded 19.5% interest from 1st April 1976 to 15th March 2002. The learned Arbitrator, vide award dated 24th August 2004, awarded a sum of Rs.9,20,650/- in respect of head Nos. 1 to

14. The learned Arbitrator also awarded interest pendente lite with effect from 1st April 1976 to the date of the award at the rate of 18% per annum which came to Rs. 46,90,000/-. The learned Arbitrator further directed the future interest to be paid at the rate of 18% per annum on the total of the aforesaid two amounts till actual payment. Being aggrieved thereby, the appellants filed a petition being Arbitration Petition No. 153 of 2004 before the Court of District Judge, Cuttack under Section 34 of the 1996 Act for setting aside the award. The same was rejected by an order dated 25th July 2007. Being aggrieved thereby, the appellants filed an appeal under Section 37 of the 1996 Act before the High Court. The same was also dismissed vide the impugned judgment. Being aggrieved thereby, the present appeal.

6. We have heard Shri Sibbo Sankar Mishra, learned counsel appearing on behalf of the appellants and Shri Ashok Panigrahi, learned counsel appearing on behalf of the respondents.

7. Shri Mishra submitted that the learned Arbitrator has grossly erred in awarding interest for the period from 1977 to 1989 inasmuch as the respondent was in deep slumber for a period of twelve years and did not take any step for raising his claim. It is further submitted that the learned Arbitrator has also erred in awarding interest for the period from the year 1990 to 2000 inasmuch as, though vide decree dated 14th February 1990, the respondent was directed to file the original F2 agreement for referring the dispute to arbitration, the respondent did nothing in that regard. It is further submitted that the interest awarded at the rate of 18% per annum is totally unreasonable. It is submitted that the interest amount of Rs.46,90,000/- is almost five times that of the main award amount of Rs.9,20,650/-. He

relies on the judgment of this Court in the cases of *Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and Others*¹, *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy and Another*² and *Mcdermott International Inc. v. Burn Standard Co. Ltd. and Others*³ in support of the proposition that the exorbitant amount of interest awarded by the Arbitrator and upheld by the learned Single Judge of the High Court would be contrary to the interest of justice.

8. Shri Panigrahi, on the contrary, submitted that there is no reason to interfere with the rate of interest awarded by the learned Arbitrator, which has been concurrently upheld by the District Judge as well as the High Court. He ¹ (2005) 6 SCC 678 ² (2007) 2 SCC 720 ³ (2006) 11 SCC 181 submitted that in view of the provisions of subsection (7) of Section 31 of the 1996 Act, which has been construed by a three Judges Bench of this Court in the case of *Hyder Consulting (UK) Limited v. Governor, State of Orissa Through Chief Engineer*⁴, no interference would be warranted in the present case.

9. Section 31(7)(a) of the 1996 Act reads as under:

“31. Form and contents of arbitral award.

..... (7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for the payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.”

10. The provisions of Section 31(7)(a) of the 1996 Act fell for consideration before this Court in many cases including in the cases of *Hyder Consulting (UK) Limited (supra)* and *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation*⁵. A perusal of clause (a) of sub section (7) of Section 31 of the 1996 Act would reveal that, no ⁴ (2015) 2 SCC 189 ⁵ 2022 SCC OnLine SC 549 doubt, a discretion is vested in the arbitral tribunal to include in the sum for which the award is made interest, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made. However, it would reveal that the section itself requires interest to be at such rate as the arbitral tribunal deems reasonable. When a discretion is vested to an arbitral tribunal to award interest at a rate which it deems reasonable, then a duty would be cast upon the arbitral tribunal to give reasons as to how it deems the rate of interest to be reasonable. It could further be seen that the arbitral tribunal has also a discretion to award interest on the whole or any part of the money or for the whole or any part of the period between the date of cause of action and the date on which the award is made. When the arbitral tribunal is empowered with such a discretion, the arbitral tribunal would be required to apply its mind to the facts of the case and decide as to whether the interest is payable on whole or any part of the money and also as to whether it is to be awarded to the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

11. A perusal of the award as also the judgment and order of the District Judge as well as the High Court would reveal that no such exercise has been done. The learned Arbitrator, without assigning any reasons, has awarded the interest at the rate of 18% per annum for the period during which the proceedings were pending and also at the same rate after the award was made till the actual payment.

12. The undisputed position is that though final measurement was done on 30st August 1977, for a period of twelve years, i.e., till 25th July 1989, the respondent did not take any step to raise his claim. It is only on that date, i.e., 25th July 1989, the respondent issued a notice to the appellants regarding his claim. As such, the very conduct of the respondent for remaining silent for such a long period would disentitle him for the interest during the said period.

13. Similarly, though a decree was passed on 14 th February 1990 and the respondent was directed to file the original agreement, he took no step till 4 th February 2000. In the meantime, the 1996 Act came into force. Thereafter, the respondent filed an application in the disposed of suit which came to be dismissed on 4th February 2000. Thereafter, he moved an application being MJC No. 36 of 2000 before the High Court for appointment of arbitrator under Section 11 of the 1996 Act which came to be allowed on 15 th October 2001. It could thus be seen that for a period of almost ten years, the respondent was again in silent mode. Had he filed the original agreement immediately after the decree was passed on 14th February 1990, the arbitration proceedings would have commenced and concluded immediately thereafter. As such, the learned Arbitrator was not justified in awarding interest for the period from 14 th February 1990 to 4th February 2000. A party cannot be permitted to derive benefits from its own lapses.

14. It is further to be noted that, though after the commencement of the 1996 Act, the respondent could not have moved an application in the disposed suit, he chose to do so and only after dismissal of the said application on the ground of lack of jurisdiction, did he move an application for appointment of an arbitrator under Section 11 of the 1996 Act before the High Court, which was allowed on 15 th October 2001. We therefore find that the respondent would not be entitled for interest for the period from 14 th February 1990 to 15th October 2001.

15. That leaves us with the rate of interest awarded by the learned Arbitrator which has been upheld by the District Judge and the High Court. It will be apposite to refer to the following observations of this Court in the case of Rajendra Construction Co. (supra):

“30. The question then remains as to interest. The appellant had claimed interest in the suits. The arbitrator awarded interest at the rate of 18 per cent per annum on the principal amount from the date of the suits to the date of awards and also from the date of the awards to the date of payment or up to

the date of decrees, “whichever is earlier”. This Court has dealt with the power of the arbitrator to award interest for (i) preresidence period (Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj [(2001) 2 SCC 721]);

(ii) pendente lite (Secy., Irrigation Deptt., Govt. of Orissa v. G.C. Roy [(1992) 1 SCC 508]); and

(iii) postaward period (Hindustan Construction Co. Ltd. v. State of J&K [(1992) 4 SCC 217]). In Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd. [(2005) 6 SCC 462 : AIR 2005 SC 2071 : JT (2005) 4 SC 73] , one of us (C.K. Thakker, J.) had an occasion to consider the relevant decisions on the power of the arbitrator to award interest at all the three stages. It was held that the arbitrator had power to award interest. Keeping in view the facts and circumstances of the present case that the contract was entered into in 1987, the work was completed in 1990 after extension granted by MHADA and the arbitrator passed awards in 1995, it would be proper, equitable and in the interest of justice if we reduce the rate of interest to 10 per cent per annum.”

16. This Court, after referring to the earlier decisions on the power of the Arbitrator to award interest at all the three stages that is preresidence period, pendente lite and post award period, found that, in the facts and circumstances of the said case, it would be proper, equitable and in the interest of justice to reduce the rate of interest to 10% from 18% per annum.

17. This Court, in the case of McDermott International Inc., has observed thus:

“154. The power of the arbitrator to award interest for preaward period, interest pendente lite and interest postaward period is not in dispute. Section 31(7)(a) provides that the Arbitral Tribunal may award interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which award is made i.e. preaward period.

This, however, is subject to the agreement as regards the rate of interest on unpaid sums between the parties. The question as to whether interest would be paid on the whole or part of the amount or whether it should be awarded in the preaward period would depend upon the facts and circumstances of each case. The Arbitral Tribunal in this behalf will have to exercise its discretion as regards (i) at what rate interest should be awarded; (ii) whether interest should be awarded on the whole or part of the award money; and (iii) whether interest should be awarded for the whole or any part of the preaward period.

155. The 1996 Act provides for award of 18% interest. The arbitrator in his wisdom has granted 10% interest both for the principal amount as also for the interim. By reason of the award, interest was awarded on the principal amount. An interest thereon was up to the date of award as also the future interest at the rate of 18% per annum.

156. However, in some cases, this Court has resorted to exercise of its jurisdiction under Article 142 in order to do complete justice between the parties.

157. In *Pure Helium India (P) Ltd.* [(2003) 8 SCC 593] this Court upheld the arbitration award for payment of money with interest at the rate of 18% p.a. by the respondent to the appellant. However, having regard to the long lapse of time, if award is satisfied in entirety, the respondent would have to pay a huge amount by way of interest. With a view to do complete justice to the parties, in exercise of jurisdiction under Article 142 of the Constitution of India, it was directed that the award shall carry interest at the rate of 6% p.a. instead and in place of 18% p.a.

158. Similarly in *Mukand Ltd. v. Hindustan Petroleum Corpn. Ltd.* [(2006) 9 SCC 383 : (2006) 4 Scale 453], while this Court confirmed the decision of the Division Bench upholding ¶ the modified award made by the learned Single Judge, the Court reduced the interest awarded by the learned Single Judge subsequent to the decree from 11% per annum to 7½ % per annum observing that 7½ % per annum would be the reasonable rate of interest that could be directed to be paid by the appellant to the respondent for the period subsequent to the decree.

159. In this case, given the long lapse of time, it will be in furtherance of justice to reduce the rate of interest to 7½ %.”

18. It could thus be seen that while exercising the jurisdiction under Article 142 of the Constitution of India, this Court has reduced the rate of interest to 7.5% per annum.

19. Again, in the case of *Krishna Bhagya Jala Nigam Ltd.* (supra), this Court, while reducing the rate of interest, observed thus:

“11. On the merits of the claims made by the contractor we find from the impugned award dated 25/6/2000 that it contains several heads. The arbitrator has meticulously examined the claims of the contractor under each separate head. We do not see any reason to interfere except on the rates of interest and on the quantum awarded for letting machines of the contractor remaining idle for the periods mentioned in the award. Here also we may add that we do not wish to interfere with the award except to say that after economic reforms in ¶ our country the interest regime has changed and the rates have substantially reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre arbitration period, for the pendente lite period and future interest be reduced to 9%.”

20. Noticing the similarity between the aforesaid cases and the present case, we find that the present case is also a fit case wherein this Court needs to exercise its powers under Article 142 of the Constitution of India to reduce the rate of interest. As already discussed hereinabove, taking into consideration the conduct of the respondent in delaying the proceedings at every stage which led to a

long pendency of the dispute, we are of the view that, though it will not be in the interest of justice to interfere with the principal award, this is a fit case wherein the interest at all the three stages, that is pre reference period, pendente lite and postaward period, requires to be reduced.

21. In the result, we partly allow the appeal and pass the following order:

(i) The respondent would not be entitled to any interest for the period between 30 th August 1977 and 25th July 1989 and for the period between 14 th February 2000 and 15th October 2001;

¶ (ii) In respect of the remaining period at all the three stages, that is prreference period, pendente lite and postaward period, the respondent would be entitled to interest at the rate of 9% per annum.

22. We are informed that the execution proceedings are still pending. The parties shall submit their calculation before the Executing Court in accordance with what has been held by us hereinabove within a period of one month from the date of this judgment. The Executing Court would quantify the amount in accordance with the aforesaid directions within a period of one month thereafter. The appellants shall make the payment of the amount as determined by the Executing Court within a period of one month thereafter.

23. Pending application(s), if any, shall stand disposed of in the above terms. No order as to costs.

.....J.

[B.R. GAVAI]J.

[B.V. NAGARATHNA] NEW DELHI;

SEPTEMBER 30, 2022.

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