

CASE NO.:
Appeal (civil) 2078 of 1984

PETITIONER:
The State of Kerala etc. etc.

RESPONDENT:
M/s. Arya Refrigeration & A/C Co. etc. etc.

DATE OF JUDGMENT: 03/08/2004

BENCH:
S.N. VARIAVA & ARIJIT PASAYAT

JUDGMENT:
J U D G M E N T

WITH

IA No. 6 AND CIVIL APPEAL NO. 362/1988

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 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. 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 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 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 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 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. 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 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 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.

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.

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

(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.

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.

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.

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.

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/-.

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.

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