(1988) 02 KL CK 0038

High Court Of Kerala

Case No: M.F.A. No. 303 of 1982

Government of Kerala and Another		APPELLANT
	Vs	
P.A. Kunhamoo		RESPONDENT

Date of Decision: Feb. 8, 1988

Acts Referred:

- Arbitration Act, 1940 - Section 14, 16, 30
- Limitation Act, 1963 - Section 5

Hon'ble Judges: Sivaraman Nair, J; Shamsuddin, J

Bench: Division Bench

Advocate: Government Pleader, for the Appellant; K.P.V.B. Ejman, for the Respondent

Judgement

Shamsuddin, J.
This appeal has been directed against the order of the Court of Subordinate Judge, Trivandrum in O.P. (Arbitration) No. 160 of 1981.

2. The facts leading to the filing of the above O.P. may be summarised as follows:

The Respondent herein who is a P.W.D. Contractor entered into a contract with the 2nd Appellant acting for and on behalf of the Government of Kerala. The contract was a schedule rate percentage contract and schedule contained 11 items of work. The Respondent agreed to execute the work at 35.77 per cent below the estimate rate. The work was stipulated to be completed within four months from handing over site for work by the Department to the Respondent. The site was handed over on 1st December 1977 and according to the agreement the work had to be completed by 31st March 1978. Certain disputes arose between the Appellants and the Respondent and these disputes were referred to the Arbitrator named in the agreement.

3. Apart from the contention on merits the Appellants herein raised a preliminary objection that according to Condition No. 57 of the special conditions attached to the agreement, the Respondent had no right to refer a dispute to the Arbitrator after the expiry of six months from the completion of work and in this case since the work was completed on 13th August 1979 (it is now seen that the work was completed on 17th August 1979 and not on 13th August 1979) and the Respondent received the final payment without protest on 21st December 1979 in full settlement of the claim, the Arbitrator had no jurisdiction to entertain the application.

4. Condition No. 57 attached to the agreement reads as follows:

57. Provided also that any dispute or difference arising out of this contract can be referred to the Arbitrator within a period of six months from the date of completion of the work, the contractor shall have no right to refer a dispute or difference to the Arbitrator after the expiry of six months from the date of completion of the work.

It was requested that this issue may be decided by the Arbitrator as a preliminary issue. The proceedings of the Arbitrator go to show that there were several postings for the purpose of determining the preliminary issue raised by the Appellants, presumably these facts were not brought to the notice of the successor arbitrator and the Arbitrator without considering the preliminary issue passed a non- speaking award allowing an amount calculated at 15 per cent of the total value of work done after 31st March 1978 (excluding cost of departmental materials) in satisfaction of claims 1, 2 and 3 and rejecting the claim No. 4 relating to interest and costs and also the counter-claim for costs of the Appellants herein.

5. The award was filed in the Court of the Subordinate Judge, Trivandrum u/s 14 of the Arbitration Act. The Respondent herein who is the claimant filed a petition to pass a decree in accordance with the award. The Appellants filed objections contending that there is error apparent on the face of the award and that there is legal misconduct on the part of the Arbitrator as he failed to decide the preliminary issue raised by the Appellants and praying to set aside or remit the award to the Arbitrator for fresh disposal.

6. The learned Subordinate Judge however rejected the objection raised by the Appellants and held that in an application to set aside an award the scope of enquiry was limited and the Court had to approach the award with a desire to support it if that was reasonably possible and that the silence of award as regards a particular contention must be construed as rejection of the same. The learned Subordinate Judge also held that Limitation Act is applicable to arbitration proceedings and that therefore the Arbitrator is competent to condone the delay. He also held that having participated in the subsequent proceedings it was not open to the Appellants to contend that the question of limitation remained unanswered. In this view of the matter the learned Subordinate Judge made the award a rule of Court and the Appellants were given three months time to pay the amount. There is also a further

direction that in case of default, the claimant will be entitled to get interest at 6 per cent per annum on the amount awarded.

7. Aggrieved by the order of the learned Subordinate Judge the Appellants have preferred this appeal.

8. In this appeal, the learned Government Pleader strenuously contended that the Arbitrator has misdirected himself in not deciding the preliminary issue of limitation raised on the basis of Condition No. 57 after posting the case for hearing on this preliminary issue to 27th January 1981 and entering on the reference. According to the learned Counsel, for that reason the award is vitiated by error apparent on the face of the award. It was also contended that the claim for enhanced rate is not admissible as per the agreement and Clause (5) of the work order dated 8th September 1977 issued to the contractor. It is also contended that under the agreement the Arbitrator had no Jurisdiction to entertain a reference made by the Contractor six months after the completion of work and in such a case, no question of acquiescence can arise. It was also contended that the Arbitrator had no power to condone the delay.

9. No doubt, the award is not a speaking one and the Court''s power to set aside such an award is very limited. The question that has to be considered in the instant case is whether the Appellants have succeeded in making out any ground which has been considered as valid ground for setting aside the award or for remitting the matter to the Arbitrator for fresh consideration and disposal.

10. It is clear from Condition No. 57 attached to the agreement that the Contractor shall have no right to refer a dispute or difference to the Arbitrator after the expiry of six months from the date of completion of the work. The Appellant specifically raised this objection and wanted this issue to be decided as a preliminary issue and the predecessor of the Arbitrator who ultimately passed the order also posted the case for hearing of this preliminary issue on a few occasions, but the matter was not heard on the days to which the matter stood for hearing on the preliminary issue. The power of the Arbitrator to adjudicate the dispute by virtue of the arbitration clause was dependent upon the decision on this issue since Condition No. 57 clearly bars the Contractor to refer the dispute or difference to the Arbitrator after the expiry of six months from the date of completion of the work. Presumably by some inadvertance the Arbitrator did not consider the preliminary issue and record a finding thereon, but proceeded to decide the matter on merits and ultimately passed the impugned order. The Appellant contended before the lower Court that the award is bad as there is an error on the face of the award and there is legal misconduct on the part of the Arbitrator in that, the Arbitrator failed to consider the above preliminary issue raised by the Appellant which goes to the jurisdiction of the Arbitrator and proceeded to dispose of the matter on merits. This contention was negatived by the lower Court as stated above. The lower Court also held that the participation of the Appellants in the subsequent proceedings would indicate that

the finding that the preliminary objection was not tenable might have been reached by the Arbitrator and having participated in the subsequent proceedings, it was not open now to contend that the question of limitation remains unanswered.

11. The learned Counsel for the Appellant has challenged the findings of the lower Court. The learned Counsel argued that it is in terms of Condition No. 57 attached to the agreement that the parties are given right to refer any dispute or difference arising out of the contract to the Arbitrator within a period of six months from the date of completion of the work and in view of the specific bar contained in Condition No. 57 against reference at the instance of the contractor after the expiry of the period aforesaid, the Arbitrator has no jurisdiction or power to entertain the reference and if he so entertains the reference and passes an award it would amount to misconduct and the award so passed would be one vitiated by error apparent on the face of it. The learned Counsel also pointed out that the provisions of the Limitation Act are not applicable to the proceedings before the Arbitrator and the view taken by the learned Subordinate Judge that he has power to condone the delay is clearly erroneous in law. In Nityananda, M. Joshi and Others Vs. Life Insurance Corporation of India and Others, the Supreme Court has held that the provisions of the Limitation Act are applicable only to the Courts and not to the Tribunal. In the absence of a specific provision making the provisions of the Limitation Act applicable, a Tribunal will not be invested with any powers based on provisions of Limitation Act. No provision of law has been brought to our notice in this case, making Section 5 or any other provision of the Limitation Act applicable to the proceedings before the Arbitrator. In the circumstance the view taken by the learned Subordinate Judge that Section 5 of the Limitation Act is applicable and that it has to be assumed that the Arbitrator had condoned the delay is clearly wrong. As a matter of fact the Arbitrator has not applied his mind to the issue though a preliminary objection was raised as to the competency of the Arbitrator to adjudicate the matter after the expiry of six months from the date of completion of the work.

12. The learned Counsel for the Respondent brought to our notice a ruling of the Supreme Court in Smt. Santa Sila Devi and Another Vs. Dhirendra Nath Sen and Others, and drew our attention particularly to the observations in paragraph 10 of the judgment, which reads as follows:

Before dealing with this point it is necessary to emphasise certain basic positions. The first of them is that a Court should approach an award with a desire to support it, if that is reasonably possible, rather than to destroy it by calling it illegal [See Selby v. Whitbread and Co. (1917) 1 KB 736 at p. 748]. Besides it is obvious that unless the reference to arbitration specifically so requires the arbitrator is not bound to deal with each claim or matter separately, but can deliver a consolidated award. The legal position is clear that unless so specifically required an award need not formally express the decision of the arbitrator on each matter of difference.

We are of the view that the above decision is not helpful to the Petitioner. A preliminary issue was specifically raised in this case and the matter was posted for hearing of this preliminary issue though for some reason or other the Arbitrator could not take up the preliminary issue for hearing. It appears that when the new Arbitrator took charge he failed to take notice of the preliminary issue raised and what transpired before relating to the preliminary issue. It is not in dispute in this case that the Appellant wanted to decide the question of bar of limitation as a preliminary issue and specifically raised the issue but the Arbitrator failed to decide that issue. This Court in a recent decision in State of Kerala v. Ravindranatkan 1987 (1) KLT 604 has held that where the dispute goes to the root of the arbitrator''s jurisdiction, the arbitrator cannot finally determine his jurisdiction, however wide the arbitration clause may be and extrinsic evidence can be let in to establish the illegality. It was also held in the said decision that even when a question of law as to jurisdiction has been specifically referred to the Arbitrator, his decision on the point is only tentative and subject to review by the civil Court and that in such a case also evidence extrinsic to the award can be called in aid, despite the specific reference to prove that the error went to the root of the jurisdiction of the Arbitrator and his award is therefore a nullity and is liable to be set aside. Reference also may be made to the decision of the Supreme Court in Jivarajbhai Ujamshi Sheth and Others Vs. Chintamanrao Balaji and Others, where the Supreme Court held that if the parties set limits to action by the Arbitrator, then the Arbitrator has to follow the limits set for him, and the Court can find that he has exceeded his jurisdiction on proof of such action and the assumption of jurisdiction not possessed by the Arbitrator renders the award to the extent to which it is beyond the Arbitrator''s jurisdiction, invalid.

14. The foregoing discussion would show that the judgment of the lower Court is unsustainable and the award is liable to be set aside as being vitiated by error apparent on the face of it and legal misconduct of the Arbitrator. The Arbitrator has not spoken on the preliminary issue and normally we would have remitted the matter to the Arbitrator to decide that preliminary issue. But in the instant case, the pleadings and the documents clearly indicate that the work was completed on 17th August 1979 and the reference was beyond the period of six months, from the completion of work which was barred by Condition No. 57 attached to the agreement by which parties were governed. In the circumstances no purpose will be served by remitting the matter again to the Arbitrator.

In the result, the M.F.A. is allowed and the judgment of the lower Court and the award of the Arbitrator are set aside. There will be no order as to costs.