(1988) 04 KL CK 0015

High Court Of Kerala

Case No: C.R.P. No''s. 288, 289 and 290 of 1988

Fertilisers and Chemicals Travancore Ltd.		APPELLANT
	Vs	
Industry Side Pvt. Ltd. and Others		RESPONDENT

Date of Decision: April 6, 1988

Acts Referred:

- Arbitration Act, 1940 - Section 11, 12, 28, 28(1), 8
- Limitation Act, 1963 - Article 137

Hon'ble Judges: K.T. Thomas, J

Bench: Single Bench

Advocate: P.K. Kurian and K.A. Nayar, for the Appellant; M.A. George, for the Respondent

Final Decision: Dismissed

Judgement

K.T. Thomas, J.

The challenge in these refvisions is against enlargement of time granted by the court below for making awards in three arbitration proceedings. In Original Petitions filed in the Sub Court for removal of arbitrators, learned Sub Judge enlarged time for making the awards by exercising power u/s 28 of the Arbitration Act, 1940 (for short ''the Act''). One of the parties to the arbitration agreements has filed these revision petitions.

2. The disputes relate to three contracts entered into between Fertilisers and Chemicals Travancore Ltd., (F.A.C.T.) and a Calcutta based Company (the first Respondent). As per the contracts, the first Respondent was to carry out certain items of work such as fabrication and delivery of M.S. Stacks and Foot vessel. The different types of work involved in the contracts were not completed, but disputes arose between parties thereto. The agreements between parties provided for arbitration in the event of disputes arising between them. First Respondent

appointed the second Respondent as arbitrator and F.A.C.T. (Petitioner herein) appointed the third Respondent as arbitrator on their part. On 20th May 1976, the arbitrators entered on reference. Claim statements were filed by the first Respondent on 21st July 1976. Counter-statements were filed, by the Petitioner on 5th October 1977. Thereafter no progress was registered in the arbitration proceedings which remained torpid for more than six years. On 17th November 1983 the first Respondent filed three Original Petitions in the lower court claiming the relief of removal of the present arbitrators and appointment of a sole arbitrator in their place. Petitioner opposed the prayer contending, inter alia, that the petitions were barred by limitation under Article 137 of the Limitation Act, 1963. The other contention advanced is that since the first Respondent has abandoned the claim it elected not to persue the remedy through arbitration. The plea based on Article 137 of the Limitation Act was found favors with the lower court first and so the Original Petitions were dismissed. This Court in revision set aside the dismissal order. This Court permitted the first Respondent to file applications in the lower court u/s 28 of the Act for enlargement of time to make the awards. The Original Petitions were accordingly remitted to the lower court for disposal afresh in the light of certain observations made in the order. Pursuant thereto the first Respondent filed interlocutory applications praying for enlargement of time for making awards. The Original Petitions were disposed of by the learned Sub Judge by a common order granting enlargement of time by four months from the date of receipt of a copy of the said order. These revision petitions are in challenge of the said common order.

3. Sri P. K. Kurian learned Counsel for the Petitioner made a three pronged attack on the aforesaid order. He argued that the learned Sub Judge by passed the most important contention that the Original Petitions are barred by limitation. The only conclusin which could possibly have been arrived at, had the contention been considered, is affirmation of the plea of limitation, the inevitable consequence of which is dismissal of the Original Petitions, according to the learned Counsel. No enlargement of time is permissible in an action which is not maintainable in law, contended the counsel. The second line of argument is that the relief granted by the lower court is just the opposite of what is prayed for in the Original Petitions. The third is that the interlocutory applications for enlargement of time were also barred by limitation under the same Article. Over and above, the learned Counsel contended that the power of extension was not exercised judicially or judiciously. The counsel urged that the power is not exercisable merely for the asking for such exercise but the court should have considered whether the party has abandoned the remedy through the long delay in prosecuting the proceedings.

4. Certain factual positions cannot be overlooked. The following observations made by this Court in the earlier revisions are relevant in this context. (Order, dated 3rd April 1987 in C.R.P. 2018/84 and connected cases):

As held by the Supreme Court in Hari Sankar Lal''s cast the competency of the arbitrators to act arises out of the reference made by the parties and not dependent on the period during which they ought to make the award. The power vested in them to decide the dispute is not yet withdrawn. They continue to be competent to act on the reference in expectation that the period for making the award would be extended by the Court. The dispute is pending before them even now. In the interest of justice a decision on the merits of the case has to be rendered by the arbitrators. The power of enlargement of time has to be exercised after taking all the circumstances into consideration. The court has now found that the Petitioner cannot be made responsible for the delay in making the award and that the arbitrators had not become functus officio. This is a case where the parties appeared before the arbitrators even after the expiry of four months without any protest or objection. The disputes between the parties are not yet decided by any court or other authority. The power vested in the arbitrators to decide the disputes is not withdrawn so far. The lower court will take into consideration all such relevant circumstances of this case before considering the question whether time is to be extended or not.

The parties in these revisions cannot now go behind the findings contained in the order passed by this Court in C.R.P. 2018/84 and connected cases. Learned Counsel for the Petitioner argued that the portion of the judgment extracted in the impugned order from Hari Shankar Lal Vs. Shambhunath Prasad and Others, is not die majority judgment, but it forms part of only the dissenting judgment which adopted a different reasoning despite the uniformity in the conclusion. There is no necessity in the present revisions to consider the question whether the reasoning adopted by Raghubar Dayal, J. in the said decision is the law declared by the Supreme Court because this Court has already taken the view in this case itself that the Supreme Court has made the said reasoning in Hari Shankar Lal Vs. Shambhunath Prasad and Others, Parties in this case cannot now wriggle out of those findings.

5. The contention that enlargement of time should not have been granted in an action which is barred by law of limitation (as the petition for removal of arbitrators should have been filed within three years from the date when the right to apply had accrued) has only academic importance now because removal of the arbitrators is not the only relief claimed in the Original Petitions. u/s 11 of the Act the court has the power to remove an arbitrator who fails to use all reasonable despatch in entering on and proceed with the reference and making an award. But the said power can be invoked only on application filed in that behalf by any party to a reference. Such an application, no doubt, is governed by Article 137 of the Limitation Act. There was no serious dispute on that point. But the Original Petitions could not be dismissed on the mere finding that the prayer for removal of the arbitrators cannot be granted in view of the bar of limitation. The first Respondent has also prayed for the grant of such other relief as are prayed for and deemed fit to be

granted in the circumstances of the case". This last prayer made in the Original Petitions though couched in general terms, cannot be completely sidelined or ignored, especially when circumstances justify the grant of other relief than those specifically prayed for. Those are the alternative relief which sometimes a court would be inclined to grant in the interest of justice, when law does not permit the grant of the main relief prayed for. The prayer made by the first Respondent for enlargement of time has to be treated as one such incidental relief claimed in the Original Petitions.

6. In this context it is necessary to consider the other contention that the application for enlargement of time is also barred u/s 137 of the Limitation Act. Section 28(1) of the Act deals with the power of the court to enlarge time. The Sub-section is extracted below:

The court may, if it thinks fit, whether the lime for making the award has expired or not and whether the award has been made or not, enlarge from time to time, the time for making the award.

It is significant to note that the Sub-section does not envisage making an application for enlargement of time. As stated earlier the power to remove the arbitrators can be invoked only on application filed by any party to a reference. It is so provided in Section 11 of the Act. The power of the court to appoint arbitrator or umpire u/s 8 of the Act could also be invoked only through an application. The appointment of person who fills the vacancy caused by removal of an umpire can be made by a court only on application made by a party to the arbitration agreement (vide Section 12 of the Act). Chapter III of the Act provides for filing application by any of the parties to arbitration agreement for making reference to the arbitrator. When the aforesaid provisions specifically envisage filing of applications for invocation of powers therein, Section 28 does not require any such application for the exercise of its power.

7. It is useful to know the outline and amplitude of Section 28 of the Act for the purpose of examining whether an application filed for exercise of powers under the said provision is subject to Article 137 of the Limitation Act. Section 12 of the Arbitration Act 1899 (old Act) which corresponds to Section 28 of the Act was worded like this:

The time for making an award may, from time to time, be enlarged by order of the court whether the time for making the award has expired or not.

Section 28(1) of the Act is worded in a wider language than the corresponding provision of the old Act. The Bombay High Court has held that time could be extended under the old Act even on oral prayer made in that behalf, vide Sakalchand Moti v. Ambaram AIR 1924 Bom 300. The Madras High Court had also held in Madura Mills Co. Ltd. Vs. N.M.S. Krishna Ayyar, that Section 12 of the Arbitration Act, 1899 enables the court to exercise the power even without a party

asking for it.

Section 12 enables the court to enlarge the time for making an award, whether the time for making the award has expired or not and there is nothing in the section to suggest that the court should not exsercise this power unless it has been expressly asked by a party to do so.

If that was the position u/s 12 of the old Act, the position u/s 28 of the Act cannot become worse at any rate. In Narsing Das Hiralal Ltd. and Another Vs. Bisandayal Satyanarain Firm, the scope of Section 28 of the Act was considered after making a survey of the earlier decisions on the point and also by making a comparison with Section 12 of the old Act. It was held that Section 28(1) is very wide and confers full discretion on the court to enlarge time for making award at any time. Prahallad Rai Agarwala Vs. Food Corporation of India, is a typical case where the power u/s 28 was exercised by the court and time was enlarged on the strength of a letter sent by some one who was neither a party to the arbitration proceedings nor a member of the panel of arbitrators. The following observation in the said decision is pertinent in this context:

There is absolutely no restriction in this section as to on whose application the said extension would be granted. There is no prescription or specification in this section about the person or party on whose application the court can grant extension of time. So there is no limitation on the court to grant extension of time suo motu or on the application or move of any party or person, in a fit case, but that can be done only after giving an opportunity of hearing to all the parties concerned with that matter". Though not exactly in the same context, Sukumaran, J. has observed in Abdullah v. Director, Forest Research Institute 1982 KLT 631 that "even from very early times, courts have always favoured enlargement of time for making the award even when one of the parties to the arbitration expressed disinclination or even opposition to such extension, where the party seeking such extension had not been guilty of condemnable delay or contumacious conduct.

8. The position emerges out of the above discussion is this: No application as such is necessary for the court to exercise the power u/s 28 of the Act. If any application is filed, it is only to be treated as a reminder of the courts power and if circumstances would justify enlargement of time it should be granted in appropriate cases. If the power is exercisable without any formal application, there is no question of Article 137 of the Limitation Act coming into play when a court proposes to enlarge time. If that be the position, exercise of such powers cannot be refused merely because it is requested for through an application. Nor could any such application be dismissed as barred by limitation.

9. It cannot be said that the learned Sub Judge has not considered the question of extension of time judicially or judiciously. As pointed out earlier, the Sub Judge cannot go behind the findings made by this Court in C.R.P. 2018/84. Those apart, the

mere fact that the first Respondent did not move the court for over six years after 5th October 1977 cannot be regarded as conclusive proof of his abandoning the remedy through arbitration proceedings nor giving up his claims. Long delay may sometimes be evidence of abandonment of a claim, but the delay alone is not presumptive, much less conclusive proof of such abandonment.

There is no reason to interfere with the orders under attack. The Civil Revision Petitions are accordingly, dismissed. No costs.