

(1986) 12 KL CK 0031

High Court Of Kerala

Case No: C.R.P. No. 376 of 1986

P. K. Varkey

APPELLANT

Vs

State of Kerala and 2 Others

RESPONDENT

Date of Decision: Dec. 4, 1986

Acts Referred:

- Arbitration Act, 1940 - Section 28, 5
- Civil Procedure Code, 1908 (CPC) - Section 115

Citation: (1988) 1 KLJ 10

Hon'ble Judges: K. John Mathew, J

Bench: Single Bench

Advocate: M. A. George, for the Appellant; K. Thankappan Government Pleader, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

K. John Mathew J.

1. The petitioner in O. P. (Arbitration) No. 16 of 1984 before the Sub Court, Parur is the revision petitioner. That was a petition filed u/s 28 of the Arbitration Act praying for enlarging the time for making the award. The dispute between the petitioner and the respondents was referred to arbitration on 19-5-1975. The Arbitrator entered upon the reference on 23-6-1975. The Arbitrator held some enquiry on different dates. On 15-1-1976 the matter was adjourned without fixing any date since the officer who was the Government Arbitrator was to retire in February 1976-Subsequently his successor issued notice on the arbitration proceedings to the parties fixing the hearing to 15-3-1976. He also sought for concurrence of the petitioner for extension of time for making and publishing the award. The C.R.P. No. 376 of 1986 Decided on 4-12-1986 petitioner declined to agree to the extension of time, although the respondents agreed for extension of time. The petitioner also filed O. P. No. 17 of 1976 before the lower court praying for an order restraining the

2nd Arbitrator from acting as the Arbitrator- The lower court passed an in term order restraining him from proceeding further in the arbitration matter. Subsequently that" officer retired from service oh 30-9-1979. Thereupon the petitioner filed a memo stating that he is not pressing O.P. No. 17 of 1976, without prejudice to his right to continue the arbitration proceedings before the successor - in - office. Accordingly the O. P. was dismissed on 6-10-1979. The petitioner thereafter approached the successor-in-office and requested him to continue the arbitration proceedings, by letter dated 18-9-1980. He sent a similar letter on 8-6-1981. The successor-in-office (the 3rd respondent) by letter dated 17-6-1981 informed the petitioner that respondents 1 and 2 have not expressed consent for enlargement of time and therefore he was unable to proceed with the matter. It was on these averments than the petitioner filed O. P. (Arbitration) No. 16 of 1984. Respondents 1 and 2 opposed the petition. In their objection it was contended that when the first Arbitrator relinquished his office in February, 1976, his successor was duly appointed by the Government and as per the agreement between the parties he was also duly authorized to act as the Arbitrator in this dispute. The Petitioner had no power or right to decline to appear before him. The contention that he had no authority to arbitrate was absolutely without merit. He could act only if the time for passing the award-was extended, since the time for passing the award expired on 22-2-1976 Instead of agreeing for extending the time, the petitioner filed O. P. No. 17 of 1976 before the Sub Court, Parur, to restrain him from acting as. Arbitrator. Ultimately that O. P. was dismissed as not pressed The second Arbitrator had done whatever possible for passing the award. By declining to agree for the extension of time, the petitioner lost his right of arbitration. By the act of the petitioner himself the award cannot be passed now. Therefore it was played that the petition may be dismissed.

2. When the petitioner requested the third Arbitrator (3rd respondent) to continue the arbitration proceedings, he informed him by letter dated 17-6-1981 that respondents 1 and 2 did not agree for extension of time and so he was unable to proceed with the arbitration. Even in spite of that, the present Arbitration O. P. No. 16 of 1984 was filed only on 16-6-1984 namely about 3 years thereafter. In the petition the petitioner has not mentioned any reason for this delay.

3. In paragraphs 5 and 6 of the petition the petitioner has mentioned the grounds on which he objected to the second Arbitrator. Those statements are as follows:

5. Thereafter one Sri T. K. Hussain Kunhi, with the designation Chief Engineer (Arbitration) assumed the role of the Arbitrator. As Sri T. K. Hussain Kunhi had neither been appointed by the parties nor was the authority of the appointed Arbitrator revoked u/s 5of the Arbitration Act the petitioner declined to accept him as the Arbitiator.

6. However the said Sri Hussain Kunhi purporting to act as the Arbitrator in the reference posted the final hearing of the Arbitration Case to 15-3-1976 with due

intimation thereof to the parties vide his letter dated 14-2-1976.

4. The statements in paragraph 10 of the petition show that the petitioner was willing to accept the 3rd respondent (the third arbitrator). That itself shows that the objection to the second arbitrator had no merit. It may also be noticed that the petitioner was able to avoid a decision on merits in O. P. No. 17 of 1976 by the Sub Court, Parur, by filing a memo stating that he is not pressing that O. P. Thus he cleverly managed to avoid the officer, who was not acceptable to him.

5. Learned counsel for the petitioner submitted that the designation "Government Arbitrator for Engineering Works" was changed to "Chief Engineer (Arbitration)" and the petitioner was under a bona fide doubt whether the second arbitrator had jurisdiction to take up the arbitration matter. It may be noticed that the Government, who are to pay any amount due to the petitioner had agreed for the extension of time. That will only mean that they were not raising the question of lack of jurisdiction of the second Arbitrator. The disputes had to be referred to the Government Arbitrator for Engineering Contracts. That itself showed that the appointment was by designation and not of any specified officer. It was intended that whoever be the officer in that post from time to time, he will be the Arbitrator. The designation was the choice of the Government and it was open to the Government to change the designation without detriment to the duties and powers of the post. By G. O. MS 28/76/PW dated 4-2-1976 the Government predestinated the post as Chief Engineer (Arbitration), without any change in the status, function, duties and powers of the post. The petitioner could not have any legitimate grievance in this re-designation, if he was really interested to get the proceedings, concluded as expeditiously as possible". So the contention based on the change in the designation of the officer raised at the time of arguments in the C. R. P., is without merit.

6. Learned Counsel for the petitioner referred to various decisions in support of his contention that the lower court ought to have extended time. In *Abdulla v. The Director, Forest Research* (1982 K. L. J. 492) my learned brother. Sukumaran J., held as follows :

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 an extension had not been guilty of a condemnable delay or contumacious conduct. Power for enlargement of the time had been exercised even in cases where the motion had been made after the expiry of the period fixed for making the award. Such was held to be the law even under the Common Law Procedure Act, 1854, which was followed by the Arbitration Act of 1889 in England. Way back in 1868 Blackburn, J. construing Section 15 of the Common Law Procedure Act, 1854 said:

I feel no doubt that, under the clause in the section which says that it shall be lawful for the Court or a Judge for good cause, from time to time to enlarge the time for making the award, the Judge may at any time give such further time to the arbitrator to make his award as he shall think fit under the circumstances".

In the same case Lush, J. said:

No limit of time is given within which the judge may enlarge the time, and he is not limited to the time within which the arbitrator himself could enlarge it even although it be said in the submission that the arbitrator shall make his award on or before a certain day.

7. It may be noticed that as per the above decision it follows that where the party seeking an extension is guilty of "condemnable delay" or "contumacious conduct", court will not favour enlargement of time. Although the power of the court u/s 28 of the Arbitration Act is unlimited, it is well settled that the power must be exercised with judicial discretion. In *Lakshman. Union of India* (AIR 1957 Patna 633) it was held that an extension of time long after the expiration of the period of 4 months and after close of the arguments in the case was unjust and improper. The court will have to take into consideration all the circumstances of the case including the conduct of the parties. The court may refuse to extend time if there has been great delay (see *Firm Motharam Dowlattram v. Firm Mayadas Dowlattram* (AIR 1925 Sind 150)). In *J. W. Oliver v. Mian Dost Mohammad* (A I. R. 1935 Lahore 191 (2)) the Lahore High Court observed as follows:

The Arbitration Act prescribes a procedure for the expeditious and speedy settlement of disputes by private tribunals especially those arising in commercial transactions, and the Legislature has in the schedule fixed a period of three months for the delivery of awards in cases where no time is fixed in the reference. The Court has no doubt a discretion to extend time under S. 12, but it will do so only, if cogent reasons are forthcoming. " Obviously the discretion cannot be exercised in favour of a party who himself has been negligent and as in the present case, has been guilty of dilatory tactics. There is no ground for interference with the order of the lower court on the revision side.

See also *Hindustan Steel Ltd. v. sharma* (AIR 1971 Orissa 288) where the Orissa High Court held that the discretion will not be exercised in favour of a party who himself has been negligent and guilty of dilatory tactics.

8. As stated above, the petitioner has absolutely no explanation for the delay from 17-6-1981, when the 3rd respondent informed him that respondents 1 and 2 did not consent for enlargement of time and therefore he was unable to proceed with the matter, to 16-6-1984, when this petition was filed. This shows that the petitioner was negligent in filing this petition.

9. When the 2nd arbitrator issued notice to the petitioner- seeking for his consent for extending the time, he did not give consent. On the other hand he filed a petition before the Sub Court and obtained an interim order of injunction against the arbitrator. That petition was subsequently allowed to be dismissed as not pressed, after the retirement of the 2nd arbitrator. It was subsequent to this that he moved the 3rd arbitrator to continue the proceedings. His attempt was to stall the proceedings whenever he thought it necessary. Such dilatory tactics cannot be encouraged by any court. It was under these circumstances that the lower court refused to exercise its discretion in favour of the petitioner. I am of the view that there are no grounds to hold that the order of the lower court is in any way illegal. There is no jurisdictional error in the order of the lower court justifying interference u/s 115C. P. C. Accordingly the C. R. P. is dismissed. However, there will be no order as to costs.