SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Singhal Engineering Co. Vs. State of U.P. and ors.

Singhal Engineering Co. Vs. State of U.P. and ors.

SooperKanoon Citation : sooperkanoon.com/470442

Court : Allahabad

Decided On : Apr-25-1980

Reported in : AIR1980All365

Judge : M.N. Shukla and ;N.N. Mithal, JJ.

Acts : Arbitration Act, 1940 - Sections 11 and 12(2)

Appeal No. : F.A.F.O. No. 154 of 1974

Appellant : Singhal Engineering Co.

Respondent : State of U.P. and ors.

Advocate for Def. : Standing Counsel

Advocate for Pet/Ap. : Krishna Prasad, Adv.

Disposition : Appeal allowed

Judgement :

M.N. Shukla, J.

1. This is an appeal under Section 39(1) of the Arbitration Act in which interpretation of Section 12 of the Arbitration Act (hereinafter referred to as the Act) is involved. Briefly, the facts are that the dispute between the plaintiff-appellant and the opposite parties was referred by virtue of an arbitration

agreement to two arbitrators, one of whom was nominated by the appellant contractor and this arbitrator was Lt. Col. D.K. Ghosh and the second arbitrator was Sri D.D. Sanyal, Engineer, who was nominated by the State of U.P. The former accepted the appointment on 15-10-1972, while the latter accepted the appointment on 24-10-1972. The sitting of the arbitrators could not actually commence before 22-1-1973. It appears that on account of these circumstances the time of one month during which the umpire ought to have been appointed was lost and the arbitrators failed to appoint an umpire as required by paragraph 2 of the first schedule of the Arbitration Act, 1940. The proceedings were rather protracted andas many as 25 hearings took place. Ultimately, however, the arbitrators having failed to agree with each other, no award was given. The arbitrators returned the papers to the court with the prayer that in these circumstances either an umpire or a sole arbitrator may be appointed by the court. Apart from this, the plaintiff moved an application dated 9-2-1974 under Sections 8 and 12 of the Act, praying that the arbitrators be removed and the court may appoint a sole arbitrator to enter on arbitration of the matter agreed to be referred by the original agreement. The Additional Civil Judge, Jhansi by his order dismissed the plaintiff's application and held that the arbitration agreement shall cease to have effect.

2. The main point urged on behalf of the appellant was that the aforesaid order was arbitrary and illegal and the proper order for the court on the facts of the case should have been to remove the two arbitrators and appoint a sole arbitrator in the case. It was vehemently submitted that the order superseding the arbitration agreement was wholly unjust and contrary to law. Sri Rajaram Agarwal, appearing for the appellant submitted that the plaintiff's application dated Feb. 9, 1974 should have been construed as an application under Sections 11 and 12 of the Act and the relevant claim of the plaintiff came fully within the ambit of Section 12(2)(a) of the Act. On the other hand, Sri S. N. Upadhyaya, the learned Chief Standing Counsel contended that the preliminary requirements of Section 12 were not satisfied and consequently the plaintiff's prayer , regarding the appointment of a sole arbitrator in the circumstances of the instant case was untenable and that the impugned order was fully justified on facts and law.

3. The power to remove arbitrators is contained in Section 11, which is so far as relevant for the purposes of this case, provides that 'the Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.'

4. Section 12 deals with the eventuality where the arbitrator or arbitrators are removed and the order which the court is competent to pass in such situation. Section 12 reads:--

'12 (1) Where the Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators) the court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

(2) Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the court, or where the court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the court may, on the application of any party to the arbitration agreement, either-

(a) appoint a person to act as sole arbitrator in the place of the persons displaced, or

(b) order that the arbitration agreement shall cease to have effect with respect to the , difference referred.'

5. The above two sections read together unfold the scheme of the Arbitration Act in so far as the removal of arbitrators is concerned and the appropriate orders which the Court may pass in order to avoid miscarriage of justice. It is contemplated by Section 11 that on the application of any party to a reference the Court may remove an arbitrator and the grounds envisaged by the section are failure of the arbitrator or arbitrators to use all reasonable dispatch in entering on and proceeding with the reference and making an award. This implies that failure to use all reasonable dispatch can occur at three stages, namely, in the initial entering, on the reference, in making the award. It is on the existence of these

conditions that any party to a reference is entitled to ask for the removal of the arbitrator. It is manifest that an application for removal of the arbitrator would lie only under Section 11. However, the mere fact that the plaintiff's application dated February 9, 1974 did not purport to be under Section 11 is of no consequence. If the conditions necessary for attracting that provision are present in the case before us, the court should treat the application as one under the appropriate provisions of law. We have no hesitation in holding that on the facts of the present case the arbitrators had failed to use all reasonable dispatch at all the three stages of the proceedings contemplated by Section 11. We have already referred to the various dates from which it would be evident that owing to the exigencies of the situation one month'speriod within which the appointment of an umpire should have been made, elapsed and no such appointment was made. Thereafter also the actual commencement of the hearing before the arbitrators did not take place immediately. The proceedings continued for nearly one full year and it is not commendable that the arbitrators should have taken such an inordinately long time in realising the truth that they were not able to agree with each other. However, the facts which cannot be escaped are that for all their efforts to resolve their differences the arbitrators despaired of success in this direction and ultimately had to resort to the action of surrendering their papers to the Court and requesting it to take appropriate action in the matter. Without casting any aspersion on the bona fides of the arbitrators it must, however, be noticed that they failed to use all reasonable dispatch in conducting the proceedings and were ultimately unable to make an award because of the differences between them which proved irreconcilable. Thus, all the requirements of Section 11 were fully satisfied in the present case and the court would have been justified in exercising its powers under that section and removing the arbitrators. The court below, however, dismissed the application on the sole ground that the plaintiff omitted to avail of the right of asking for the removal of the arbitrators in good time and consequently in its opinion the plaintiff's application was liable to be dismissed. We are unable to endorse this view of the learned Judge. Unless there was some thing evidently disquieting the parties to the reference would have in the ordinary course looked forward to an award in which both arbitrators concurred. It is only when all efforts on the part of the arbitrators to sink their differences failed that it dawned on the

arbitrators as well as the parties that there was no way open except to move the court. It is in these peculiar circumstances that the application under Sections 8 and 12 was presented by the plaintiff. The plaintiff's conduct did not smack of negligence or want of bona fides in not claiming the removal of the arbitrators earlier in point of time. Hence, the dismissal of the application on the ground stated in the impugned order was altogether erroneous.

6. The other question, however, which has loomed large in the case is as to whether in these circumstances the courtshould have exercised its powers under Clauses (a) or (b) of Section 12(2) of the Act. The learned Chief Standing Counsel argued that the court acted rightly in holding that the arbitration agreement shall cease to have effect. On the other hand, the appellant's counsel submitted that in this case the provisions of Clause (a) were fully attracted and the appropriate orders which the court should have passed was to remove the arbitrators and appoint a sole arbitrator, as expressly prayed for in the plaintiff's application. We think there is considerable force in the plaintiff's contention. It is our considered opinion that an arbitration agreement should not be lightly superseded. Such drastic action may be resorted to only when there are compelling reasons. It cannot be disputed that an order under Clause (b) that the agreement shall cease to have effect is the same thing as superseding the arbitration. See AIR 1967 Bom 300 (M.H. Tejani v. Kulsumbai). In considering the exercise by the court of the power of supersession of an arbitration agreement it must not be forgotten that one of the very salient and salutary objects of seeking arbitration is to avoid delay which is an unfortunate accompaniment of regular legal proceedings. As observed in AIR 1966 SC 1036 (para 13) (Amarchand v. Ambica Jute Mills) 'parties not wishing the law's delays 'know, or ought to know, that in referring a dispute to arbitration they take arbitrator for better or worse, and that his decision is final both as to fact and law. In many cases the parties prefer arbitration for these reasons. In exercising its discretion cautiously and sparingly, the Court has no doubt these circumstances in view, and considers that the parties should not be relieved from a tribunal they have chosen............'

It is implicit in the above observations that an order superseding an arbitration agreement should be an exception rather than a rule and the attempt of the court

should be to enforce the agreement as far as possible. The parties should not be allowed to resile from their original agreement and no effort should be spared in adhering to the reference. In fact, from the scheme of the entire Act it becomes manifest that in most cases in spite of even misconduct of the arbitrators the Court has been left with a discretion to let the arbitration agreement survive. Thus, for example, the Act givespower to the arbitrator to correct in an award a clerical mistake or error arising from any accidental slip or omission. Further, Section 16 gives power to the court to remit the award to the arbitrator for reconsideration. Section 19 gives an option to the court not to supersede the reference and thus let the arbitration agreement remain effective, even when it sets aside the award. Likewise Sections 8, 10, 20(5) and 25 disclose that whether the arbitration is under Chapters II, III or IV discretion is left to the court to decide whether to supersede the reference or not even when it sets aside an award. See AIR 1962 SC 1123 (Juggilal v. General Fibre Dealers). We are of the opinion that while exercising this power under Section 12(2) of the Act the court should not be oblivious of the central scheme of the Act. Its discretion, in choosing one or the other of the options provided by Clauses (a) and (b) of Section 12(2) must be exercised judiciously and with full awareness of the drastic consequences inherent in an order passed under Clause (b). It needs to be emphasised that where the court makes an order that a person is appointed to act as the sole arbitrator in place of person or persons displaced, the arbitration agreement with respect to the dispute which was previously referred to the arbitrator or arbitrators, subsists and only the arbitrator or arbitrators appointed under the agreement stand removed. On the other hand, when the court passes an order that the arbitration agreement shall cease to have effect with reference to the difference referred, then there is no question of any other arbitrator being appointed in place of the previously appointed arbitrator. This is evidently a very harsh order which should be avoided as far as possible. In fact, the power under Clause (b) of Section 12(2) may be exercised only in exceptional circumstances in order to prevent miscarriage of justice, as for instance, when sending the case back for arbitration would cause unconscionable delay and prejudice the parties or where unsurmountable technical difficulties are likely to arise in re-commencing the arbitration proceedings or where the parties or the party to the reference may be guilty of

such gross laches as to disentitle them from the benefits of arbitration. On the facts of the present case where no fault or negligence could be attributed to the plaintiff, the powerunder Clause (b) of Section 12(2) should not have been exercised and we have no doubt that the court exercised its discretion arbitrarily.

7. The learned Chief Standing Counsel advanced yet another argument which, though ingenious, cannot be accepted. He submitted that under Section 12(1) of the Act the court had no jurisdiction to remove all the arbitrators appointed by an arbitration agreement and consequently the prayer made by the plaintiff in his application was mis-conceived. He invited our attention to the parenthetical clause incorporated in Section 12(1) of the Act i.e. 'not being all the arbitrators' and on its basis contended that the court was not competent to remove all the arbitrators i.e. the two arbitrators appointed in the present case. This argument proceeds from a misreading of Sub-sections (1) and (2) of Section 12 and inadequate appreciation of the scheme of that section. The substantive power of removing the arbitrators is conferred independently by both the provisions, namely, Sub-sections (1) and (2) of Section 12 which operate in two distinct fields. Sub-section (1) applies, inter alia, where the court orders removal of one or more arbitrators (not being all the arbitrators) whereas Sub-section (2) is attracted where the removal relates to the sole arbitrator or all the arbitrators. To take an illustration, where there are four arbitrators the court may remove only three arbitrators or all the four. Where only three arbitrators are removed it would become necessary to fill their vacancies and this is provided for under Sub-section (1). On the other hand, where all the four arbitrators are removed the court has the discretion to proceed under Clauses (a) and (b) of Subsection (2) of Section 12 of the Act. We have already indicated that the more drastic powers under Clause (b) should be sparingly exercised. Taking into consideration the pith and substance of the provisions embodied in Sections 11 and 12 we hold that in the instant case the court should have allowed the plaintiff's application and after removing the arbitrators appointed a sole arbitrator and such order alone would have met the ends of justice.

8. In the result, we allow this appeal with costs, set aside the impugned order and allow the plaintiff's application and direct that the court below should appoint a sole arbitrator in the case within three months from the date of receipt of the order. The

office is directed to send down the record without delay.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com