

Sachidananda Misra Vs. Executive Engineer, Earth Dam Division Balimela Dam Project and anr.

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Court : Orissa

Decided On : Feb-27-1975

Reported in : AIR1975Ori203

Judge : G.K. Misra, C.J. and ;P.K. Mohanti, J.

Acts : [Arbitration Act, 1940](#) - Sections 16, 30 and 39(1)

Appeal No. : Misc. Appeal No. 154 of 1970

Appellant : Sachidananda Misra

Respondent : Executive Engineer, Earth Dam Division Balimela Dam Project and anr.

Advocate for Def. : B.B. Mohanty, Addl. Govt. Adv.

Advocate for Pet/Ap. : R.N. Sinha and ;S.N. Sinha, Adv.

Disposition : Appeal dismissed

Judgement :

Mohanti, J.

1. The relevant facts are as follows:--

The State of Orissa had undertaken the construction of the Balimela Dam Project in Koraput District and the appellant had entered into a contract with the respondents to execute the work styled as 'Excavation of Drainage Channel at Dyke III'. The agreement was executed on 18-3-1965. Differences having arisen between the parties both as to the rates payable to the appellant and the quantum of work done and also about the interpretation of the agreement, the work could not be proceeded with. Respondent No. 1 having terminated the contract the appellant felt aggrieved by the loss suffered by him. As the agreement provided for the appointment of a sole arbitrator of the rank of a Superintending Engineer, the appellant requested the Chief Engineer by an application dated 1-8-1967 to appoint an arbitrator. As no such appointment was made, the appellant filed a petition under S. 20 of the Indian Arbitration Act in the court of the Subordinate Judge of Jeypore. The court appointed Shri M.L. Das, Superintending Engineer, Balimela Civil Circle as the sole arbitrator. The arbitrator submitted his award on 31-10-1969. After service of the notice of the filing of the award, the appellant filed an objection and prayed for remission of the award to the arbitrator on the grounds stated therein. In a composite order dated 20-8-1970 the learned Subordinate Judge rejected the prayer for remitting the award and passed judgment according to the award which was followed by a decree. On 25-11-1970 the appellant filed the present appeal under Section 39 of the Arbitration Act.

2. It is contended on behalf of the appellant that the order of the court below refusing to remit the award to the arbitrator amounted to an order refusing to set aside the award and hence it is appealable under Section 39(1)(vi) of the Act.

3. The jurisdiction of the Civil Court to set aside the award or to remit it for reconsideration is circumscribed by the provisions of Section 30 and Section 16 of the Act.

4. Section 30 of the Act enumerates the grounds for setting aside award which are as follows:--

'(a) That an arbitrator or umpire has misconducted himself or the proceedings;

(b) that an award has been made after the issue of an order by the Court superseding the arbitration or after the arbitration proceedings have become invalid under Section 35;

(c) that an award has been improperly procured or is otherwise invalid.'

The objection filed by the appellant would not fall either under Clause (a) or under Clause (b) nor under the first part of Clause (c). Mr. Sinha's contention is that it falls within the second part of Clause (c), that is, the award is 'otherwise invalid'. The grounds of invalidity of an award contemplated by Clause (c) refer to those matters which apparently go to the root of the award. Moreover, when the first part of this clause refers to the improper procurement of the award, it contemplates the improper procurement of the award as a whole and not a part of it, and if that be so, then the invalidity of the award otherwise would also refer to the award as a whole and not a part of it. The second part of this clause would get colour from the first part.

5. Section 16 of the Act enumerates the grounds on which an award may be remitted to the arbitrator for reconsideration. The grounds are:

'(a) Where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to the arbitration and such matter cannot be separated without affecting the determination of the matters referred.

(b) where the award is so indefinite as to be incapable of execution.

(c) Where an objection to the legality of the award is apparent upon the face of it.'

Interpreting this section in AIR 1968 Delhi, 188, (Mehta Teja Singh and Co. v. Fertilizer Corporation of India, Ltd.), Dua, C. J. (as he then was) observed that Section 16 of the Act dealing with the power of the court to remit the award should be construed independently and the remission of the award or any matter contemplated by this section is not intended to include within its fold setting aside of the award or a part of it as contemplated by Section 30, which is apparently an exhaustive provision specifically dealing with setting aside of awards. It was also

observed that refusal to remit an award cannot constitute refusal to set aside an award and, therefore, was not appealable. Reliance was placed on a decision of the Supreme Court in *B. C. Madhava and Co. v. Kapila Textile Mills Ltd.*, Civil Appeal No. 1094 of 1963, decided on 9-9-1964 (SC), in which it was observed that an order under Section 16(1)(c) of the Act refusing to remit an award to the arbitrators or the umpire is not appealable under the Act.

Under Sub-section (1) of Section 16, the court can remit the award or any matter referred to arbitration to the arbitrator or umpire for reconsideration upon such terms as it thinks fit. If only one or some of the matters referred to arbitration is or are remitted to the arbitrator for reconsideration, pending the second reference, the award as to the matters not sent back to the arbitrator remain suspended. The arbitrator is *functus officio* as to those matters and cannot alter its judgment as to them: vide AIR 1963 Cal 583, (*Brahma Swaroop Gupta v. Diwan Chand*).

6. In his objection petition dated 23-1-1970 the appellant did not challenge the legality or validity of the award. The grounds of attack were as follows:--

- (i) Cost of blasting for excavation of the rocks was not awarded.
- (ii) The claim for excess work of 1,05,205 Cfts. should not have been reflected,
- (iii) Interest should have been allowed at 12 p. c. p. a. for unjustly withholding the appellant's bills from 31-5-1966.
- (iv) The work done by the appellant after termination of contract should have been paid at the lowest of the tendered rates, but not at the old rate.
- (v) The appellant's claim for compensation had not been properly considered.
- (vi) The arbitrator had not given the total amount due by the Department to the appellant, but had left the same to be calculated by them.

The objections come clearly within the ambit of Section 16. There was no allegation that the arbitrator had committed any legal misconduct or that his decision on any question of law was erroneous. There was also no allegation that the arbitrator acted dishonestly. It is, therefore, difficult to appreciate how the

objection filed by the appellant falls 'within the second part of Clause (c) of Section 30. In each and every paragraph of the objection petition, it was specifically stated that the award should be remitted to the arbitrator for reconsideration and at the end of the petition the following prayer was made:

'The applicant therefore prays that award be remitted to the arbitrator on the above grounds and for stating the definite amount due to the applicant by the Department.'

Even in the memorandum of appeal there is a prayer for remitting the award to the arbitrator for reconsideration. When there was no prayer for the setting aside of the award, no question of refusing to set it aside can arise. For the aforesaid reasons, we hold that the order refusing to remit the award does not fall within Clause (vi) of Sub-section (1) of Section 39 of the Act as it does not amount to an order refusing to set aside the award and, therefore, the appeal is not maintainable.

7. Section 17 of the Act provides that where the court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce Judgment according to the award and upon the judgment so pronounced a decree shall follow. This section bars an appeal against the decree except on the ground that it is in excess of, or not otherwise in accordance with the award. The appellant has not preferred any appeal against the decree which has now become final and conclusive between the parties. Consequently, the present Miscellaneous appeal is incompetent.

8. In view of our above findings, we dismiss the appeal with costs.

G.K. Misra, C.J.

I agree.