

Union of India Vs. K.L. Bhalla

Union of India Vs. K.L. Bhalla

SooperKanoon Citation : sooperkanoon.com/679694

Court : Delhi

Decided On : Oct-04-1976

Reported in : AIR1977Delhi82; 12(1976)DLT255

Judge : B.C. Misra, J.

Acts : [Arbitration Act, 1940](#) - Sections 16, 30 and 39; [Constitution of India](#) - Article 227; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115

Appeal No. : O.M. (P) No. 26 of 1976

Appellant : Union of India

Respondent : K.L. Bhalla

Advocate for Def. : Madan Bhatia, Adv.

Advocate for Pet/Ap. : R.L. Tandon, Adv

Judgement :

1. This first appeal from order has been filed under Section 39(1)(b) of the Indian Arbitration Act, 10 of 1940 (hereinafter referred to as the Act) against the order of Mr. D. R. Khanna, then Sub Judge 1st Class, dated 29th May, 1964, by which he set aside the award of the Arbitrator dated 26th May, 1962, mainly on the ground that it had been made beyond the time allowed by the court under Section 16 of the Act and was, therefore, void.

2. The appeal came up for hearing before my learned brother, Ansari J., who by order dated 23rd August, 1972 was pleased to allow the appeal and purporting to follow the decision of the High Court of Calcutta in Ganpatrai & Sons v. Ramgopal Nanda Kishore, : AIR1955 Cal302 , held that the court had power under the proviso to sub-section (2) of Section 16 of the Act to extend the time to make the award even after the award had been made. Having recorded that finding the learned judge allowed the appeal. Thereafter, K. L. Bhalla, respondent in the appeal, filed an application for review of the order. In the application, it was contended that the learned Judge had failed to notice the decision of the Judicial Committee reported as Raja Her Narain v. Chaudhrain Bhagwant, (1891) 13 All 300 (PC) on the point that time under the provisions of the Code of Civil procedure corresponding to Section 16(2) of the Act could not be extended and that the same had been cited before the learned Judge. The other ground submitted was that the arguments were confined by the appellant to the question which had been decided against the appellant by the court of first instance but that the arguments of the respondent on the merits of the case and the other grounds of objection to the award which had been raised before the trial court and repelled by it had not been heard And the counsel wanted to address arguments further.

3. This review application came up for disposal before my learned brother, Ansari J., who by order dated 8th December, 1972 held t hat so far as the first contention was concerned, it was true that the aforesaid decision of the Privy Council had been cited before him at the time of arguments as was also admitted by the counsel for the opposite side. But the mere omission to refer to or discuss the judgments cited by the counsel would not be a valid ground for review of the judgment and so the first ground for review was rejected. The second ground of review prevailed with the court and his Lordship allowed the review application, but the review was limited to the extent of the second contention, viz. addressing arguments on the grounds, which had been decided against the respondent by the court of first instance. The appeal was directed to be heard in the first week of January 1973. Thereafter, the appeal came up for hearing before my Lord Ansari J. on a number of dates, but it could not be disposed of for one reason or the other and finally on 16th January, 1976 his Lordship was pleased to adjourn it to 23rd January, 19,76. His Lordship is no longer a Judge of this court and has been

appointed Chief Justice of the High Court of Jammu and Kashmir and this appeal has hence been placed for hearing before me.

4. The material facts of the case are these: There was a contract between the parties (No. CWE/D-17 of 1955-56). The Union of India, appellant, claimed damages from the respondent for breach of contract. The respondent also claimed some amount from the appellant. In this way, disputes arose between the parties, which were referred to the arbitration of Lt. Col. R. N. Kapur in terms of the arbitration clause. He made an award dated 23rd October, 1958 by which he directed the contractor to Make some payments to the appellant. The appellant thereupon moved the court for an order for filing the award and making it a rule of the court. Objections against the award were raised by the present respondent. On the pleadings of the parties, a number of issues were framed, including an issue whether the award was bad for the reasons detailed in the objection petition and whether there was any error apparent on the face of the record. The award was claimed to be bad. The matter was decided by Mr. O. P. Aggarwal, Sub-Judge 1st Class, by order dated 29th April, 1960. The issues on merits were decided by the court together and in paragraph 8 of the order, it observed that there was no error apparent on the face of the record; however, the arbitrator had been guilty of judicial misconduct in not properly re-cording the evidence of the parties, destroying the pencil notes of evidence and not properly recording the admissions of the objector petitioner and because there was no proof that he inspected the spot fret notice to the objector. The Sub Judge repelled the other objections of the respondent before me, but in answer to sue No. 2, he held that the award was liable to be set aside on account of mis-conduct of the arbitrator. Finally, in paragraph 11, he set aside the award and he remitted the proceedings back to the arbitrator for deciding the matter in dispute afresh after taking into consideration and allowing the parties reasonable opportunity to adduce whatever evidence they necessary in support of their respective assertions. The parties were left to bear their respective costs. By this order, he fixed time till 31st August, 1960 for making of the award which time was later on extended by the successor, to 12th September 1960. It is common ground that there was no order of the time further.

5. After remission of the award, the arbitrator conducted some proceedings and finally made a fresh award -dated 26th May 1962, which is the subject-matter of this appeal. By this award, he again ordered the party respondent before me, to pay some amount to the appellant. Notice of the filing of the award was given to the parties and the respondent filed objections on 9th October 1962. There are a number of objections raised against the award which have been noticed in the order of the court of first instance; they included two main objections, which have been reiterated before me, viz, (1) the award had been made beyond the prescribed time and was therefore, void and (2) the remittance of the award under Section 16 of the Act by the previous order was void and without jurisdiction, hence, the arbitrator did not have jurisdiction to make the award, which is consequently void. On the pleadings of the parties, the following issues were framed:

'1 Whether the award, the reference and the proceedings of the arbitrator are illegal, void and liable to be

set aside as per objections in para. 8 of the objection petition? Opa

(Note: This issue will include whether the allegations in para of the objection petition are correct in fact).

2. Whether the objector is stopped from raising objections against the appointment of the arbitrator as per submission in corresponding para of the written reply? Opr

3. Whether the objections are time barred? Opr

4. Relief.

6. The court of first instance by the impugned order dated 29th May, 1964, answered issue No.3 in the negative and held that the objections were within time. In answer to issue No. 1, it held that the legality and validity of the order of remission could not be challenged before it at that stage and the parties ought to have taken steps to have that order set aside and since the order had become final, it could not be challenged. It also held that the respondent had not raised this question when he moved the application for revoking the authority of the Arbitrator.

It therefore, rejected this contention. But the objection that the court had no power to extend the time fixed under Section 16(2) of the Act after making of the award was upheld and the award was set aside. Hence this appeal.

7. The question of law decided by the trial Court on the extension of time has been decided by my learned brother, Ansari J. By his order dated 23rd August, 1972. He has relied upon the decision of the High Court of Calcutta reported as *Ganpatrai & Sons v. Ramgopal Nand Kishore*, : AIR 1955 Cal 302 and he has not taken into consideration the decision of the Privy Council in *Raja Har Narain v. Chaudhrai Bhagwant* (1891) ILR 13 All 300 (PC) which had, as admitted in the order of review, been cited before his Lordship. His Lordship by the review order has not allowed the review of that part of the order, by which he had accepted the contention of the appellant on the question of extension of time and the review has been confined to the limited extent of the other grounds. This order is binding on me and I am, therefore, unable to allow the counsel to argue as to whether or not in a case remitted under Section 16 of the Act, the power to extend the time under Section 28 of the Act after making of the award is in view of the express provision contained in the proviso to sub-section (2) of Section 16 of the Act, available. This point has been decided in favor of the appellant by my learned brother, Ansari J. Mr. Bhatia has further submitted that the learned Judge while allowing the review petition could not allow the view and then confine it only to a part. This submission can again not be allowed to be raised since I am respectfully bound by the terms of the order of review passed by my Lord Ansari, J. I shall therefore, decline to examine the 1st contention.

8. The second contention of Mr. Bhatia has force. Section 16 of the Act reads as follows:

'6. (1) The court may from time to time remit the award or any matter referred to arbitration to arbitrators or umpire for reconsideration upon such terms as it thinks fit-

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

referred; or

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

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

(2) Where an award is remitted under sub-section (1) the court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court.

Provided that any time so fixed may be extended by subsequent order of the court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.'

Reference may also be made to Section 30 of the Act, which is quoted below:

'30. An award shall not be set aside except on one of the following grounds, namely:

(a) that an arbitrator or umpire has mis conducted 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 arbitration proceedings have become invalid under Section 35:

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

The power to set aside an award arises only on the grounds mentioned in clauses (a), (b) and (c) of Section 30 which provides that the award shall not be set aside except on the aforesaid grounds. The power to remit the award to the arbitrator is expressly conferred by Section 16 of the Act and its exercise is confined to the grounds mentioned therein. Should the court set aside the award on the ground of misconduct of the arbitrator, there is obviously no award left to operate upon and nothing can be referred to the arbitrator. It would also look incongruous to refer the matter again to the same arbitrator, who has been found guilty of misconduct. The order of Mr. O. P. Aggarwala, setting aside the award on the ground of misconduct and then remitting it to the same arbitrator for reconsideration is obviously without

jurisdiction. It may be further emphasised that in answer to the other issues raised before Mr. Aggarwala he expressly found that there was no mistake apparent on the face of the record, which could attract Section 16 of the Act. The only ground he found was the misconduct of the arbitrator mentioned in clause (a) of Section 30 and thereupon he set aside the award. As such on the findings arrived at by him he did not have any jurisdiction to remit the award under Section 16 of the Act.

9. The Judicial Committee of the Privy Council in *Shree Meenakshi Mills Ltd. v, Patel Brothers* , observed on page 78 as follows:

'When what purports to be the decision of the Arbitrator is a nullity, there is no power to remit it nor is there need for any such power since there is nothing to remit, and since it necessarily follows from the fact that the decision is annulled that the parties are entitled to a new and effective hearing and determination.'

In *Sheo Karan v. Kanhaya*, Air 1935 Lah 113 although the decision was given under the Code of Civil Procedure, it was held, if none of the grounds mentioned in the appropriate provision existed for remitting the award, the order of the court remitting the award would be without jurisdiction. In *Mehta Teja Singh v. Fertilizer Corporation of India*, : AIR1968 Delhi188 at 190. I. D. Dua, C. J. (as his Lordship 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 was not intended to include within its fold setting aside of the award or part of it as contemplated by Section 30, which was apparently an exhaustive provision specifically dealing with setting aside of awards. I have, therefore, no doubt that the order of Mr. O. P. Aggarwala remitting the award to the arbitrator was legally void and without jurisdiction. As such, it could not confer any jurisdiction on the arbitrator to make the impugned award.

10. The question now arises for consideration is whether the failure of the respondent to file an appeal or revision against the order of Mr. Aggarwala, estops him from agitating the question at the present stage. The order of the court remitting the award to the arbitrator under Section 16 of the Act does, not amount to setting aside or refusing to set aside the whole of the award as provided by

clause (vi) of Section 39(1) of the Act, since operative part of the order is to remit the award and as such the same would not be appealable. In the decision of Mehta Teja Singh's case (*supra*), this question also came up for consideration. His Lordship held that Section 30 seemed to suggest that it was exhaustive of the grounds on which an award was to be set aside and it did not contemplate setting aside or refusing to set aside a part of an award. Section 39(1)(vi) would also seem to contemplate an appeal from an order setting aside or refusing to set aside an award -as a whole and an order remitting a part of an award and affirming a part did not necessarily amount to an order setting aside or refusing to set aside an award within the contemplation of S. 39(1)(vi) of the Act and it would thus be not appealable. Consequently, when the case does not fall under this clause, no appeal lies against an order remitting the award. In laying down this rule of law, his Lordship quoted with approval a decision of the High Court of Punjab, reported as *State of Patiala and East Punjab States Union v. Puran Chand Rangiram*, (1966) 68 Pun Lr 694 and a decision of the High Court of Madras, *R. T. Perumal v. John Deavin*, : AIR1960 Mad43 . In the Madras decision, it was clearly held in paragraph 7 that there was no right of appeal against the order of the court remitting the award to the arbitrator and the court had jurisdiction to remit an award only on one or more of the grounds specified in Section 16 and under no other ground. Where the court remitted an award on any ground other than those specified in Section 16 such an award would be without jurisdiction and in such a case one of the grounds on which a revised award could be sought to be set aside was that it was the result of an invalid order of remittal and on this view, an appeal from the decree based on the revised award was competent.

11. Since the appeal was not available to the party against the order. It cannot be stopped from challenging the same at a subsequent stage of the proceedings. It is true that it was open to the party to file a revision petition in the High Court under Section 115 of the Code of Civil Procedure or a petition under Article 227 of the Constitution, but those remedies are extraordinary and discretionary (see *Durga Prasad v. Chief Controller of Imports and Exports*, : [1969]2SCR861). Since no party has a right to apply under those provisions and the court is not bound to grant relief, the failure of the party to go up to the High Court in revision at that stage cannot stand in its way to agitate the point at a subsequent stage, Had the

order been appealable, certainly in the absence of the appeal, the order could be treated as final and binding, but if no appeal is provided, the party is entitled to wait until the matter is finally concluded and then raise the point as a ground of attack. Moreover, as held in *Kiran Singh V. Chaman Paswan*, : [1955]1SCR117 , if the proceedings are without jurisdiction, the party is entitled to challenge the same at any stage of the proceedings. In this decision, the Supreme Court also observed that a defect of jurisdiction could not be cured even by consent of parties.

12. Mr. Tandon, counsel for the appellant, submits that the respondent before me had acquiesced in the proceedings before the arbitrator and as held by the court: below he did not raise the objection at the other stages of the proceedings when he could do so. Dispositions factually not correct. The respondent before me filed an application under Sections 5 and 11 of Arbitration Act for revocation of the authority of the arbitrator. In this he raised the ground that the order remitting the matter to the arbitrator was bad and without jurisdiction; this application was rejected by the party ought to have challenged the order of Mr. O. P. Aggarwala by revision in the High Court. This shows that the party did not acquiesce in the order and was challenging the same seriously, but could not do so successfully unless and until the final award had been made. Even. As the court on the ground than a matter of law, I am inclined to agree with Mr. Bhatia that if the order of the court remitting the award to the arbitrator is without jurisdiction and the party does not have a right to appeal against the same at that stage, but is obliged to wait till the making of the award, the party will have no option except to appear before the arbitrator and proceed with the case in pursuance of the order of the court. The participation in the proceedings of the arbitrator in such circumstances cannot amount to waiver of his rights or acquiescence in the order. The legal remedy of the party to resuscitate the objection against the order of Mr. O. P. Aggarwala lies in raising objections against award which is finally made in pursuance of the order of remission. This view finds favor in the authorities referred to above them has no force and is rejected.

13. In the end, Mr. Tandon made a feeble attempt to urge that the previous order of Mr. Aggarwala Sub-Judge, may be construed as an order setting aside the

award and remitting the dispute to the arbitrator for re-determination, since the arbitration agreement had not been superseded by exercise of power under Section 19 of the Act and he has relied upon *Prabhat Kumar v. Jagdish Chandra Narang*, : AIR1968 Pat399 . I am unable to accept the submission. Firstly, this had not been raised in the court below; secondly the arbitration agreement is not before the court from which it could be deduced as to whether in an arbitration to which the Government is a party the power of the court to supersede the reference is or is not excluded and whether any machinery is provided for re-arbitration of the dispute after the setting aside of the award. The case of *Prelist Kumar* (supra) was an arbitration between private parties and the High Court found as a fact that the lower appellate court had not superseded the reference, but continued the reference by sending the matter back to the arbitrator after setting aside the award and so the appeal was maintainable. This is not the position in the instant case and there is no doubt about the maintainability of the present appeal. It may be significant to notice that in Patna judgment reference is made to a decision of the Supreme Court in *Juggilal v. General Fiber Dealers Ltd.*, : AIR 1962 SC1123 , where the following observations occur:

'The scheme of the Arbitration Act as disclosed from Sections 8, 10, 12, 19, 20(5) and 25 is whether the arbitration is under Chapter Ii, Chapter Iii or Chapter Iv of the Act, to give discretion to the court to decide whether to supersede the reference or not when it sets aside an award. Where it decides to supersede the reference it has to order that the arbitration agreement shall cease to have effect with respect to the difference referred: but where it decides not to supersede the reference and the reference and the arbitration agreement subsist and if there is machinery provided in the arbitration agreement for making a further reference or for continuing the same reference further arbitration can take place.'

The said observations only indicate that after the award has been set aside, what are the provisions applicable to the case for super session of the reference or for proceeding with the arbitration contained in the arbitration agreement and the provisions of law will have to be determined in each case. In the instant case, we do not have any material on the subject. Moreover, even in the Patna case, the High Court observed that it was not desirable to appoint the same arbitrators

whose award had been set aside. Under the circumstances I find there is no substance in the contention of Mr. Tandon. I have already held that the appeal against the order of Mr. Aggarwala was not maintainable in this court and so the submission, is of no avail.

14. As a result, the appeal is dismissed and the final order of the court below is confirmed. The appellant will pay to the respondent costs of the appeal in this Court.

15. Appeal dismissed

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