

Sarkar and Sarkar Vs. State of West Bengal and ors.

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Court : Kolkata

Decided On : Dec-09-2005

Reported in : 2006(4)CHN86

Judge : Pinaki Chandra Ghose and ;Tapan Kumar Dutt, JJ.

Acts : [Arbitration Act, 1940](#) - Sections 5, 11 and 12

Appeal No. : A.P.O. No. 513 of 2005, G.A. No. 1733 of 2005, A.P.O.T. No. 377 of 2005 and Award Case No. 13 of 200

Appellant : Sarkar and Sarkar

Respondent : State of West Bengal and ors.

Advocate for Def. : Asit Kumar Bhattacharya (II) and ;Sridhar Panja, Advs.

Advocate for Pet/Ap. : Hironmay Dutt and ;Kumkum Das, Advs.

Disposition : Appeal dismissed

Judgement :

1. This appeal is directed against an order dated 28th March, 2005 when the Hon'ble First Court was pleased to set aside the award passed in favour of the appellant.

2. The interesting question arose in this appeal that the appellant herein raised a dispute in connection with an agreement entered into between the State of West Bengal and the appellant. The said agreement contained an arbitration clause. The said disputes were referred before the learned arbitrator. Appellant duly filed its statement of claim before the learned arbitrator and after taking into account the facts of the case placed before the learned arbitrator, learned arbitrator published his award on 21st September, 1991. Appellant in the said application claimed interest which was pendente lite interest. It appears from the facts as also submitted before us that at that point of the time learned arbitrator refused to grant such pendente lite interest to the appellant.

3. The said award was passed under the provisions of [Arbitration Act, 1940](#). The said award thereafter became a decree after appearing before the Court by way of judgment upon award. Such decree was passed on 28th November, 1991. Appellant never raised any objection at that point of time and received the amount under the said decree without making any protest.

4. It further appears as has been submitted before us by the learned Advocate appearing on behalf of the appellant, that the Hon'ble Apex Court in the case of Secretary, Irrigation Department, Government of Orissa and Ors. v. G.C. Roy reported in : [1991]3SCR417 , directed that the pendente lite interest, can be awarded by the arbitrator and the same is in the domain of the arbitrator.

5. After the pronouncement of the said decision the appellant came before this Court, filed an application under Sections 5, 11 and 12 of the Act of 1940 and contended that the erstwhile arbitrator did not decide the issue of pendente lite interest and prayed for appointment of an arbitrator to decide such dispute. It appears that on June 2, 1998, on an application being filed by the appellant. His Lordship Amitava Lala, J. was pleased to refer the matter before the arbitrator, who was appointed by His Lordship. Thereafter, the said arbitrator published his award in favour of the appellant herein and granted pendente lite interest on the principal amount.

6. State of West Bengal thereafter filed an application challenging the said award and the Hon'ble First Court on such application has set aside the award on the

ground of nullity as His Lordship held that the Hon'ble Court could not have appointed such arbitrator at that point of time since disputes between the parties have already been adjudicated upon by the arbitrator.

7. Mr. Dutt appearing on behalf of the appellant contended before us admitting the fact that his client did apply before the Court for appointment of the arbitrator after the order was passed by the Hon'ble Apex Court in the year 1998 and he further submitted that the Hon'ble First Court could not have set aside the award on the ground of nullity since the said Court having a concurrent jurisdiction of the learned Judge, who was pleased to appoint the arbitrator.

8. Mr. Bhattacharya, learned Advocate, who is opposing the appeal, contended before us that the learned arbitrator duly decided the matter and found that the appellant is not entitled to get the pendente lite interest in terms of law prevailing at that point of time. The appellant had a right to challenge the said award before the Hon'ble Court, but the appellant did not take any steps to challenge the said award. On the contrary, appellant received the amount under the said award/decreed and furthermore, the appellant kept silent for a long period of almost five years, since the decree was passed on 28th November, 1991. Therefore, he submitted that such plea could not have been accepted by the Court since the claim and/or dispute of the appellant is also barred under the provisions of laws of limitation. He further submitted that the order so passed by His Lordship Amitava Lala, J. is also a nullity in view of the fact that the Court did not consider the fact that the dispute between the parties was settled by virtue of the said award and the same had reached in its finality. Therefore, the Court had no jurisdiction at that point of time to appoint such arbitrator when there were no disputes subsisting between the parties.

9. We have heard the learned Counsel for the parties. It appears to us that we cannot accept the contention of Mr. Dutt since the dispute including the pendente lite interest was referred before the learned arbitrator and learned arbitrator dealt with the matter, came to the conclusion and published his award on 2nd September, 1991. The said award became a decree under the provisions of law on 28th November, 1991. The appellant duly received the amount under the said

decree. Therefore, in our opinion, disputes between the parties were gone into and decided by the said learned arbitrator. Pendente lite interest relating to the claim of the appellant which was put forward before the learned arbitrator. It cannot be claimed separately if there is no claim of the appellant before the learned arbitrator. Therefore, in our opinion, the said dispute includes the claim of pendente lite interest also and thereby the second application which was filed by the appellant before the Hon'ble Court for appointment of an arbitrator to decide the said pendente lite interest and after five years is also barred under the provisions of res judicata.

10. The other point which also struck us that the appellant did not challenge the said award, accepted the amount and thereafter, after the decision was pronounced by the Hon'ble Supreme Court, the appellant woke up and filed an application before the Court for appointment of an arbitrator to adjudicate upon the disputes which is in relation to the claim already decided by the learned arbitrator. In our opinion, at that point of time there was no dispute between the parties. Therefore, there was no question of applying the arbitration clause for appointment of an arbitrator since the claim of the appellant was under the provisions of law, res judicata, barred under the provisions of laws of limitation and further the appellant was estopped from contending that there was any dispute between the parties. Therefore, in our opinion, at that point of time there was no ground for less jurisdiction of this Court to appoint an arbitrator on the given facts. Hence, we are *ad idem* of the opinion expressed by His Lordship that the Court should not have appointed an arbitrator at that point of time and such order has to be treated as a nullity since there was no dispute between the parties which can come under the purview of the arbitration clause. Hence, we uphold the order of the Hon'ble First Court and further we also hold that the award is also bad on the ground of res judicata and estoppel. Hence, in our opinion the Hon'ble First Court was correctly held and set aside the award in question under the provisions of laws of limitation.

11. In these circumstances and for reasons stated hereinabove this appeal must fail and is hereby dismissed.

12. All parties are to act on a xerox signed copy of this dictated order on the usual undertaking.

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