
(2007) 05 MP CK 0046
In the Madhya Pradesh High Court

B.D. Bhanot and Sons

APPELLANT

Vs

Shri Narmada Enterprises and Others

RESPONDENT

Date of Decision : 09-05-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2007) 3 MPHT 206

Hon'ble Judges : Shubhada R. Waghmare, J; Dipak Misra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Dipak Misra, J.—In this intra-Court appeal preferred u/s 2(1) of the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 the sustainability and legal acceptability of the order dated 1-10-2002 passed by the learned Single Judge in W.P. No. 1055/2002 is called in question.

2. The facts which are requisite to be dwelled upon are that the respondent Nos. 1 and 2 invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India for issue of a writ of certiorari for quashment of the award dated 24-12-2001 which has been made the rule of the Court by the learned Vth Additional District Judge, Bhopal. The award was passed by the learned Arbitrator, the respondent No. 5, in an arbitration proceeding under the provisions of the Arbitration and Conciliation Act, 1996 (for short "1996 Act"). As is manifest from the order of the learned Single Judge that the contract was awarded in favour of the present appellant by the M.P. State Mining Corporation (for short "the Corporation") and as some dispute arose, the owner rescinded the contract and forfeited the amount of security. The appellant invoked the arbitration clause and eventually the respondent No. 5 who was the respondent No. 4 before the Writ Court was appointed as the arbitrator.

3. Before the arbitrator the writ petitioners filed an application for intervention and participation in the proceeding which was rejected by the learned arbitrator.

In the ultimate eventuate the award came to be passed on 24-12-2001 in favour of the present appellant. It was contended before the learned Single Judge that the arbitrator had passed an interim order not to auction the quarry till the decision of the matter and had extended the period of operation of quarry which is detrimental to the interest of other persons and also caused financial loss to the public exchequer and thereby the arbitrator had misconducted himself and, therefore, there was error apparent on the face of the record inasmuch as the arbitrator had travelled beyond the terms of the agreement.

4. The Corporation and the present appellant resisted the relief sought for in the writ petition on the ground of its maintainability since the validity of the award passed under 1996 Act can be assailed by the a party to the award in an appeal and not by a stranger invoking the inherent and extra-ordinary jurisdiction of the Writ Court under Article 226 of the Constitution of India.

5. The learned Single Judge posed three questions relating issue of maintainability of the writ petition : locus standi of the writ petitioners to challenge the award; and scope of interference in the matter of an award passed by the arbitrator.

6. As is evincible from the order passed by the learned Single Judge he addressed himself at length with regard to the scope of interference in an award passed by the arbitrator and came to hold that the State exchequer is bound to suffer loss because of the extension of the term by the arbitrator by which he travelled beyond agreement.

7. With regard to the locus standi of the writ petitioners the learned Single Judge in Paragraph 20 of the order expressed the view as follows:

20. The petitioner cannot be said to be stranger as contended by learned Counsel for respondent No. 3. He has the right to participate in the fresh tender process and had also participated in the tender process in which the tender of respondent No. 3 was accepted pursuant to which agreement P-2 was entered into. All these important aspects have been illegally discarded by Court while passing order (P-5) making award rule of the Court.

8. After so holding the learned Single Judge proceeded to deal with the maintainability of the writ petition under the 1996 Act. He has referred to Section 2 (h) of the 1996 Act which defines the term "party" and Section 37 which confers right on a party to file an appeal. Thereafter, he proceeded to observe that as the writ petitioners were not parties to the arbitration agreement they cannot file an appeal but they can file a writ petition as it is a matter pertaining to distribution of public largess and the State or Corporation cannot be allowed to act arbitrarily in these matters. The learned Single Judge further observed that the Mining Corporation which was the objector before the rule making Court could have challenged the award.

9. Being of the said view the learned Single Judge quashed the order passed by

the learned Vth Additional District judge and imposed cost of Rs. 5,000/- on the Mining Corporation to pay to the writ petitioners.

10. We have heard Mr. Satish Sharma, learned Senior Counsel alongwith Mr. S.N. Prajapati, learned Counsel for the appellant. Mr. Vipin Yadav, learned Counsel for the respondent Nos. 1 and 2. Mr. Yogesh Dhande, learned Counsel for the State Mr. M.L. Jaiswal, learned Senior Counsel with Mr. K.K. Gautam, learned Counsel for the respondent No. 4.

11. The seminal question that arises for consideration is whether the award passed by the arbitrator under the 1996 Act can be challenged by a person who is not a party to the agreement in a writ petition. Section 2 (1) (h) of the 1996 Act defines "party" to mean as under:

(h) "party" means a party to an arbitration agreement

Under the Arbitration Act, 1940 (for short "1940 Act") there was no definition of the party. In the 1996 Act the party has been defined to make it clear as day that the persons who are not parties or strangers to the contract have no right under the Act. Section 7 deals with agreement means an agreement by the parties. Section 9 enables a party before or during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with Section 36 to apply to a Court for passing orders as interim measures. Section 37 (1) (a) provides an appeal against an order passed u/s 9. Section 11 deals with appointment of arbitrator and if the anatomy of section is scrutinized there can be no scintilla of doubt that it revolves around the parties to the agreement. Section 17 which deals with the interim measures ordered by Arbitral Tribunal which clearly pertains to the parties to the agreement. Section 24 deals with hearings and written proceedings. Section 25 provides for default of a party. Section 26 enables to Arbitral Tribunal to appoint expert. The said provision also clearly conveys the role ascribed to the party to an agreement. Section 31 deals with form and contents of arbitral award. Section 34 provides for method and the grounds for setting aside the arbitral award. Sub-section (2) of Section 34 provides the ground on which the Court can set aside the award. The onus is cast on the party making an application to prove the grounds enumerated therein. Sub-section (3) of Section 34 reads as under:

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made u/s 33, from the date on which that request had been disposed of by the Arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of third days but not thereafter.

Section 35 which deals with the finality of arbitral award reads as under:

35. Finality of arbitral awards.- Subject to this part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

Section 37 deals with appealable orders. It reads as under:

37. Appealable orders.- (1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decree of the Court passing the order, namely:

(a) granting or refusing to grant any measure u/s 9.

(b) setting aside or refusing to set aside an arbitrator award u/s 34.

(2) An appeal shall also lie to a Court from an order granting of the Arbitral Tribunal,-

(a) accepting the plea referred in Sub-section (2) or Sub-section (3) of Section 16; or

(b) granting or refusing to grant an interim measure u/s 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court.

Section 37 has to be read in conjunction with other provisions of the Act. Section 46 provides that when foreign award is binding. Section 48 provides the conditions for enforcement of foreign awards.

12. On a perusal of the aforesaid provisions it is absolutely clear that a complete Code has been enacted to consolidate the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards. Thus, not a single provision in the Act countenance an appeal by a stranger. As is perceptible the learned Single Judge while holding that the appeal is not maintainable has expressed the opinion that the respondent Nos. 1 and 2 cannot be said to be strangers to the proceeding as they participated in the tender process. The entire concept of arbitration, as is understood in the context of 1996 Act, is restricted to the parties to the arbitration agreement and the rights that have been conferred under the Act. No right has been conferred on a stranger. As is discernible from the order of the learned Single Judge as he has been guided by the concept that the Corporation should have come up in appeal as the matter relates to distribution of public largess. The learned Single Judge has referred to the decision rendered by the Apex Court in the case of The Engineering Mazdoor Sabha Representing Workmen Employed Under the Hind Cycles Ltd. and Another Vs. The Hind Cycles Ltd., Bombay, . In the aforesaid case an award passed by an arbitrator u/s 10-A of the Industrial Disputes Act, 1947 was assailed under Article 226 of the Constitution of India by a workman who was grieved by the award. In our considered opinion, the said decision has no applicability to the case at a hand and has been erroneously relied upon.

13. At this juncture, we may give an example. In a Land Acquisition proceeding the Collector under the Land Acquisition Act has the authority to pass an award. An aggrieved party can seek reference u/s 18 of the said Act. If the Reference Court passes an award where the beneficiary is not a party an appeal can be preferred by the beneficiary (in whose favour the land has been acquired and who is required to deposit the compensation) is entitled to obtain leave of the Court and prefer an appeal, for he is a person aggrieved. It is totally inconceivable that a third party to an arbitration agreement can invoke the extraordinary jurisdiction of the Writ Court and challenge the award. He does not have the locus standi as he is not a party to the agreement. He might have participated in the tender process but that will not clothe him with the locus to challenge the award. An award is passed basically inter se parties. The parties can assail the award u/s 34 of the 1996 Act by satisfying conditions enumerated therein. Who can assail award is enumerated therein. The period of limitation is also prescribed for challenging the award. The statutory appeal lies at the instance of the party to appropriate Court. The Corporation, owner a party to the agreement had the right to file an appeal but it did not file the appeal. The same cannot be taken into consideration to entertain a writ petition at the instance of a party who is a total stranger to the agreement. In fact, we would also not hesitate in stating that even a party to the agreement would not be in a position to challenge the award in a writ petition. The concept of any kind of public interest or distribution of public largess or the concept of loss of public exchequer has no role to play in a case of this nature. Therefore the irresistible conclusion is that the writ petitioner was maintainable and it has been erroneously entertained.

14. Ex consequenti, the writ appeal is allowed. The order passed by the learned Single Judge is set aside and the award passed by the Vth Additional District Judge stands restored. We have restored the award as we have been informed at the bar that the award has gone unchallenged by the Corporation. There shall be no order as to costs.