(1992) 08 KL CK 0009

In the High Court Of Kerala

Case No : M.F.A. No. 478 of 1987

Benny Younachan and Others APPELLANT

Vs

Secy. to Govt. and Others RESPONDENT

Date of Decision : 25-08-1992

Acts Referred:
Arbitration Act, 1940 — Section 14, 16, 16(1)(c), 17, 19

Citation : (1992) 2 KLJ 848

Hon'ble Judges : T.L. Viswanatha Iyer, J;L. Manoharan, J

Bench : Division Bench

Advocate : S. Narayanan Poti and S. Ramesh Babu, for the Appellant; V. Bhaskara Menon Senior Govt. Pleader, for the Respondent

Judgement

Viswanatha Iyer, J.—The appellants are the additional claimants in an arbitration case, being the legal representatives of one Benny Younachan, to whom we shall refer as "the contractor" for purpose of convenience. The contractor had entered into an agreement with the government on 19-10-1976 for the construction of a portion of the P.I.P. Canal, the work to be completed by 31-5-1977. The time was however extended upto 15-1-1978 by agreement between the parties. It is said that the work was completed in time and handed over to the first respondent - State. The contractor claimed additional amounts alleging - defaults on the part of the respondents which led to an arbitration by the Chief Engineer (Arbitration). The contractor''s claim was rejected on the first occasion on the ground that he had received the final bill without objection and was therefore estopped from claiming further amounts. This award was set aside by the Sub Court, Pathanamthitta in arbitration O.P. No. 43 of 1979 with a direction to the arbitrator to consider the matter afresh. This order was taken up to this court in C.R.P. No. 1284 of 1980 which was dismissed on 7-8-1980. But a further contention was taken in this court by the respondents herein that the arbitration proceedings were barred because the contractor had not put forward his claim within a period of six months of completion of the work. This court did not deal with this question, but gave liberty to the respondents to raise the point before the arbitrator. The arbitrator accepted this contention in the subsequent proceedings and again rejected the contractor''s claim. This resulted in another arbitration petition O.P. No. 21 of 1981 in the Sub Court, Pathanamthitta which as allowed by the court and the award set aside, leaving it to the arbitrator to deal with the matter on the merits. This was also carried to this court by the respondents, but the challenge was unsuccessful. The arbitrator thereafter proceeded to deal with the matter on the merits. He gave notice on 3-4-1982, posting the case to 24-4-1982 for evidence. The matter was then adjourned to 4-5-1982 at the instance of the respondents when a witness, one P.P. Jose, retired Chief Engineer, was examined on their side. The arbitrator then gave a notice on 17-5-1982 posting the case for hearing on 22-5-1982. The matter was heard on that day, and an award is stated have been passed on 24-5-1982 awarding a lump sum of Rs. four lakhs to the contractor in respect of all the claims made by him against the respondents. The contractor produced the requisite stamp paper on 25-5-1982 and the award was engrossed thereon. The arbitrator communicated the award to the parties on 29-5-1982.

2. The award engrossed on stamp paper as also the copies of the award furnished to the parties, showed its date as 10-5-1982. The covering letters accompanying the award were also dated 10-5-1982. But the original award which was communicated to the Sub Court, Pathanamthitta on 31-5-1982 bore the date 24-5-1982, with the covering letter bearing the date 10-5-1982. The contractor appeared and filed I.A. No 263 of 1982 under sections 14 and 17 of the Arbitration Act, 1940 (the Act) for passing a decree in terms of the award. The contractor stated in this application flat the award had been passed by the arbitrator on 10-5-1982 and that the same had been filed in court for passing a decree. The respondents in their turn filed I.A. No. 350 of 1982 for setting aside the award alleging misconduct on the part of the arbitrator According to them, the award had been passed in violation of the principles of natural justice, on 10-5-1982, even before the hearing on 22-5-1982, of which notice was given on 17-5-1982. The respondents stated that it was a procedural misconduct on the part of the arbitrator to pass the award before the parties were heard, and therefore it had to be set aside.

3. The lower court posted the matter for trial. We are not referring to the numerous dates on which it was posted, except to state that on 3-1-1987 to which date it was adjourned from 17-12-1986, the Government Pleader for the respondents submitted that there was no evidence to be adduced on their side. The contractor also did not adduce any evidence on his side. The parties were heard and the lower court set aside the award by the order dated 28-2-1987. Inter alia, he accepted the case of the respondents, of misconduct on the part of the arbitrator, namely, that he had passed the award on 10-5-1982 itself when as a matter of fact the hearing took place only oh 22-5-1982. The Court found that there was prima facie evidence to show that this allegation of the respondents was well founded. He also held that there was no evidence to conclude that the date 10-5-1982 appearing in the copies of the award lent to parties was a clerical

mistake. He did not therefore find any reason to hold that the award had actually been passed only on 24-5-1932 as contended by, the contractor, though the copies thereof and the covering letters bore the date 10-5-1982. It was accordingly held that there was procedural misconduct on the part of the arbitrator which vitiated the award. The lower court also mentioned incidentally that the allegation of the respondents that the arbitrator had simply awarded a lump sum without recording any finding on the claims submitted by the contractor was well-founded. But he did not state anything further on this point, except to make this observation. In the result, the lower court set aside the award and remitted the matter for consideration by a new arbitrator to be approved by the parties. It is this order setting aside the award that is challenged by the contractor.

4. Counsel for the contractor submitted that the records of the case are sufficient to show that the award had in fact been passed on 24-5-1982 and that the date 10-5-1982 appearing in the copies of the award, in the covering letters and in the award engrossed on stamp paper was a clerical error committed by the typist. He points out that the original award forwarded to court definitely showed the data as 24-5-1982. He states therefore that the evident mistake in the date in the various documents referred to above, should be ignored and that the court should go by the date 24-5-1982 mentioned in the original award and proceed accordingly.

5. But the learned Government Pleader for the respondents is vehement in his submission that the award had in fact been passed on 10-5-1982 as evident from the various documents referred to above and that no credence should be given to the date 24-5-1982 appearing in the original award. According to him, the award had been passed even before the hearing on 22-5-1982 and as such, it was null and void being one passed in violation of the principles of natural justice. He would also submit that the other factor mentioned by the lower court namely the award of a lump sum amount without any separate consideration of the various claims made by the contractor, also rendered the award void. In addition, he raised a preliminary point that the appeal itself was not maintainable in as much as the order of the lower court was one remitting the case to the arbitrator, which was not one of those contingencies for which an appeal is provided in Section 39 of the Act.

6. We shall deal with the preliminary point in the first instance we have already mentioned that the lower court found that the award of the arbitrator was vitiated by procedural misconduct and that it was on that finding that the award was set aside with a remit to appoint a new arbitrator. Counsel for the contractor locates the power of appeal against this award in section 39 (1) (vi) of the Act, which provides for an appeal from "an order setting aside or refusing to set aside an award". Learned Government Pleader on the other hand would submit that a case of remit falls u/s 16 from which no appeal is provided u/s 39. We shall examine these contentions.

7. It cannot be disputed that no appeal will lie against an order remitting the award u/s 16. This section which appears in the Chapter relating to arbitrations without the intervention of court enables the court to remit the award or any matter referred to arbitration to the 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 (b) where an objection to the legality of the award is apparent upon the face of it. Sub - section (2) states that where an award is remitted as mentioned above, the court shall fix the time within which the arbitrator or umpire shall submit his decision to the court. Sub - section (3) provides that 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.

8. What section 16 contemplates is the remit of an award for reconsideration and for submission to court of the decision, for the court to deal with the matter finally. This is evident from the provisions of sub section (2) requiring the court to fix the time for submission of the decision of the arbitrator or umpire with power to extend it by subsequent order. A remit u/s 16 therefore contemplates a situation where the court continues to be in seisin of the case even after the remit on the particular points referred to in clauses (a), (b) and (c) of sub - section (1) and for decision thereon by the arbitrator or umpire within the time fixed by the court for submission of the decision. Section 19 is also relevant in this context where it states that when an award becomes void under sub-section (3) of section 16 or has been set aside, the court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred. The effect of this provision is that when an award is set aside by the court, the court has got the discretion to supersede the reference itself, in which case the arbitration agreement ceases to have effect. At the same time, the court has also discretion not to supersede the reference and to leave it to the parties to have the arbitration proceedings continued to completion.

9. It is now well settled that an award could be remitted only on one or other of the grounds specified in section 16 and on no others. (Vide Shree Meenakshi Mills Ltd. v. Patel Brothers, AIR 1944 Privy Council 76 at 78; R.T. Perumal Vs. John Deavin and Another, . These grounds are exhaustive of the grounds on which an award could be remitted to the arbitrator. B.B. Rajwanshi Vs. State of U.P. and Ors, . Misconduct of the arbitrator is not a ground covered by clauses (a), (b) of (c) of subsection (1) of section 16 so that an order setting aside an award on the ground of misconduct does not fall u/s 16, but is referable to section 30 under which misconduct of the arbitrator or of the proceedings is a ground for setting aside an award. The order of the lower court setting aside the award on the ground of procedural misconduct is therefore not one of remit u/s

16 but one falling u/s 30. In such cases, where an award is set aside, though with a remit for further consideration by a new arbitrator, the case falls under clause (vi) of sub section (1) of section 39 and the order setting aside the award is appealable.

10. We may refer to a few decisions which were cited before us by the parties. Chairman, The Orissa State Electricity Board and Another Vs. Jayashree Chemicals Ltd. and Others, , was a case where the award was set aside and the matter remitted to the same arbitrator for fresh consideration in the view that the arbitrator had only misconceived the nature of the investigation entrusted to him and there was no factual misconduct on his part. Dealing with the matter, the learned Judge while holding that the reference back to the same arbitrator was unsustainable, observed:

It is not a remittance u/s 16 (1) (c). The entire award is vitiated and has no legal existence. It is only when an award is sustained either in full or in part, that the question of remittance arises

In Duryodhan Mohapatra Vs. Executive Engineer, Irrigation Division, the court was concerned with an award which was partly set aside and remitted back to the arbitrator for reconsideration. The contention, as in this case, was that it was a case of remit u/s 16 and therefore the order was not appealable. The court observed that all cases of remittance of award u/s 16 may not involve setting aside of the award in its entirety or even in part. But where the court sets aside the award either in whole or in part the same becomes appealable u/s 39(1) (vi). A similar view was taken in Prabhat Kumar Lala and Others Vs. Jagdish Chandra Narang, . M/s. Allen Berry & Co. v. Union of India was also referred to by the appellant. That was a case where an award was confirmed in relation to certain claims which fell within the jurisdiction of the arbitrator, but remitted for reconsideration of certain other claims. Paragraphs 2 and 3 of the Judgment bear out these facts. Both sides appealed/cross appealed against that part of the award which was against them. The appeals were maintained and the matter was dealt with on merits.

11. As against these decisions, learned Government Pleader for the respondents refers to the decision of the Supreme Court in Iftikhar Ahmed and Others Vs. Syed Meharban Ali and Others, where the Supreme Court observed in paragraph 10 that the appeal in that case was not maintainable as the civil judge had set aside the award and remitted the case to the arbitrator for passing a fresh award u/s 16 of the Act. It was evidently a case of remit u/s 16 as stated by the Supreme Court itself and therefore it was held that an appeal will not lie against the order. The case dealt with by this court in Ramanathan v. Nazir Hussain, 1986 KLT 1295 was plainly a case of remit u/s 16, and it was accordingly that the Division Bench held that the order was not appealable.

12. Coming to the facts of this instant case, we have already pointed out that a case for remit u/s 16 arises only in one or other of the circumstances specified

therein as forming a ground for remittance of the case. In a remit u/s 16, the court continues to be in seisin of the case, and the court fixes a time limit within which the award is to be passed by the arbitrator and the decision rendered back to the court. The award in this case was set aside on the ground of misconduct, which falls u/s 30, and the Sub Court ceased to have seisin of the case after its order. The entire scene shifted to the parties to agree upon the arbitrator and to proceed with the reference. Section 16 postulates a reference back to the arbitrator may be the same arbitrator or some other, if the arbitrator is not willing or is dead or otherwise incapable of acting - but the case before us is one where the parties have been left to appoint another arbitrator to adjudicate on the disputes between them. On the facts, this is not a remit falling u/s 16. The order is one which falls squarely within sub-clause (vi) of section 39(1), and therefore appealable. The preliminary objection is therefore overruled.

13. Now, coming to the merits of the case, the controversy between the parties is as to whether the award was passed on 24-5-1982 as contended by the contractor or on 0-5-1982 as contended by the respondents. Incidentally another question also arises as to whether the award of a lumpsum amount vitiates the award. So far as the first point is concerned, we have already referred to the conflict which arises by reason of the fact that the covering letters addressed to the court and the parties, as also the copies of the award furnished to them, all bear the date 10-5-1982, and only the original award sent to the court bears the date 24-5-1982. As to whether the date 10.5.1982 is one mistakenly entered is a point which requires consideration. It is not possible to take a decision on the point based merely on the conflicting documents which are before us. It is true that the original award contains the date 24-5-1982, but the contention of the respondents is that the real date is 10-5-1982 and not 24-5-1982 which is seen entered on the award. This matter requires investigation. Both parties did not adduce any evidence on the point as to what exactly was the true date of the award, and as to whether there was any typographical error in the date 10-5-1982 appearing in the various documents mentioned earlier. It must also be remembered that the contractor himself mentioned the date 10-5-1982 as the date of the award in his application I A. 263 of 1982, though in his counter to I.A.No. 350 of 1982, he has taken up the stand that the date was 24-5-1982, and not 10-5-1982. It is also a fact that the original award bears the date 24-5-1982 and the stamp paper on which it was engrossed was purchased on 25-5-1982. Since the matter has not been explained by evidence or by examination of any witnesses, who could speak on these matters, it requires further examination in the light of the evidence which the parties may adduce by examination of any person connected with the preparation of these documents or otherwise. Of course the arbitrator himself is dead, but there must be other witnesses available to speak about the true date of the arbitration award, whether it was 24-5-1982 or 10-5-1982. The matter requires a remit to the lower court for this purpose.

14. There is also another aspect of the matter namely the award of the lumpsum

amount. We have mentioned earlier that a casual observation was made by the Subordinate Judge that the award of a lumpsum amount may not be proper. But then the matter has not been discussed by the lower court. Of course learned Government Pleader submits on the basis of the decisions in Government of Kerala v. Kuriakose, 1989 (2) KLT 23 (Case No. 28), and Sudarsan Trading Co. v. Government of Kerala. 1989 (1) KLT 534 (SC) that the award of a lumpsum amount by an arbitrator is not valid in law when there are numerous claims made by the contractor. Sri. Narayanan Poti, counsel for the contractor, however relies on the decisions in State of Orissa and Others Vs. Lall Brothers, , Smt. Santa Sila Devi and Another Vs. Dhirendra Nath Sen and Others, , Allen Berry and Co. Pvt. Ltd. Vs. The Union of India (UOI), New Delhi, and others to contend that the award of a lumpsum amount does not vitiate or render the award void. Since this is a matter which hat not been properly considered by the lower court, we do not thick we should enter a finding on this aspect as the matter will have to be decided with reference to various relevant matters. This may also be considered by the lower court after the remand. We therefore set aside the order of the lower court and remit the matter back to it for consideration of the case afresh with opportunity to the parties to lead evidence as to the date on which the award in question was passed, whether it was 10th May or 24th May, 1982, and as to whether the award of a lumpsum amount vitiates the award. Sloes the matter is a fairly old one, the lower court shall dispose of the matter before 31st March, 1993. Parties shall appear in the lower court on 12th October, 1992.

This matter was posted for being spoken ''to today. We direct that the parties will appear in the lower court on 9th November, 1992. Send back the records forthwith.

