
(2016) 12 SHI CK 0016
In the High Court Of Himachal Pradesh
Case No : Arbitration Appeal No. 3 of 2015

Dhani Ram

APPELLANT

Vs

Divisional Manager, Forest Working Division

RESPONDENT

Date of Decision : 14-12-2016

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2017) LatestHLJ(HP) 53

Hon'ble Judges : Tarlok Singh Chauhan, J.

Bench : Single Bench

Advocate : Mr. Suneet Goel, Advocate, for the Appellant; Mr. Bhupinder Pathania, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Tarlok Singh Chauhan, J.(Oral) - The question posed in this petition is purely a legal one and, therefore, it is not at all necessary to refer to the facts, save and except that the appellant filed objections against the award passed by the Arbitrator in the Court of learned Civil Judge (Senior Division), which were dismissed on the ground that the same were not maintainable, under section 34 of the Arbitration and Conciliation Act, 1996 (for short "Act of 1940"), as the award has been passed under the Arbitration Act, 1940.

2. The moot question, however, is whether the learned Civil Judge (Senior Division) at the first place had the jurisdiction to entertain such objections or the order passed by him is without jurisdiction and is thus coram non judis.

3. It is not in dispute that the proceedings, which have ultimately culminated into an award under challenge, had been initiated in the year 1986 and it is for the fourth time that an award has come to be passed on 10.2.2009 by the Arbitrator-cum-Managing Director of the respondent-corporation.

4. A notice of the commencement of the arbitration is the first essential step towards the making of default appointment in terms of Chapter-II of the

Arbitration Act, 1940 (for short "Act of 1940").

5. In the instant case, evidently, this notice was issued somewhere in the year 1986 when the provisions of the Act of 1940 alone were in vogue wherein section 8 of the Act conferred the power upon the Court to appoint Arbitrator on an application made in this behalf. Section 20 conferred wide jurisdiction on the Court for directing the filing of the arbitration and appointment of Arbitrator. Section 21 conferred powers on the Court in a pending suit on an agreement of the party to refer the differences between them for arbitration in terms of the Act. The Act provided for filing of the award in the Court on making of a motion by either of the party to make award rule of the Court to have the award set aside on the grounds specified in the award and for an appeal against the decision of such a motion. This Act was replaced by the Act of 1996, which by virtue of section 85 repealed the earlier enactment.

6. Therefore, seminal issue, which arises for consideration at this stage is whether the proceedings would be governed by the Act of 1940 or the Act of 1996.

7. This question is no more res integra in view of the judgment rendered by the Hon"ble Supreme Court in Milkfood Limited v. GMC Ice Cream (P) Ltd. (2004) 7 SCC 288, wherein it has been clearly held that where the notice of arbitration has been issued under the Arbitration Act, 1940, then the proceedings thereafter would be governed by the Act of 1940 irrespective of the Act of 1996 having come into force. It shall be apt to reproduce the relevant observations as under:

"[45] "Commencement of an arbitration proceeding" and "commencement of a proceeding before an arbitrator" are two different expressions and carry different meanings.

[46] A notice of arbitration or the commencement of an arbitration may not bear the same meaning, as different dates may be specified for commencement of arbitration for different purposes. What matters is the context in which the expressions are used. A notice of arbitration is the first essential step towards the making of a default appointment in terms of Chapter II of the Arbitration Act, 1940. Although at that point of time, no person or group of persons charged with any authority to determine the matters in dispute, it may not be necessary for us to consider the practical sense of the term as the said expression has been used for a certain purpose including the purpose of following statutory procedure required therefor. If the provisions of the 1940 Act applies, the procedure for appointment of an arbitrator would be different than the procedure required to be followed under the 1996 Act. Having regard to the provisions contained in Section 21 of the 1996 Act as also the common parlance meaning is given to the expression "commencement of an arbitration" which admittedly for certain purpose starts with a notice of arbitration, is required to be interpreted which would be determinative as regard the procedure under the one Act or the other is required to be followed. It is only in that limited sense the expression

"commencement of an arbitration" qua "a notice of arbitration" assumes significance."

8. It is not in dispute that under the Act of 1940, there is no provision for filing objections directly in the Court before the award having been filed as per the mandate of section 14 of the Act of 1940 for making it rule of the Court and notice thereof issued to the parties. It is only thereafter while resorting to section 30 of the Act that the award can be set aside, which procedure admittedly has not been followed in the instant case.

9. However, learned Assistant Advocate General would, however, argue that the appellant having taken a chance by filing objections before the Civil Judge (Senior Division) cannot now turn around and question the jurisdiction.

10. I am afraid, such contention cannot be accepted for the simple reason that neither consent nor waiver nor acquiescence can confer jurisdiction upon a Court, which otherwise is not competent to try the lis.

11. It is well settled and needs no authority that "where a Court takes upon itself to exercise a jurisdiction it has not possessed its decision amounts to nothing". Consequently, any order passed by the Court having no jurisdiction is non est and its invalidity can be set up when it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. Any order passed by such authority is coram non judis.

12. This aspect of the matter has been considered by the Hon'ble Supreme Court in Hasham Abbas Sabbad v. Usman Abbas Sayyad and others, AIR 2007 (SC) 1077, wherein it was held as under:

"[21] The core question is as to whether an order passed by a person lacking inherent jurisdiction would be a nullity. It will be so. The principles of estoppel, waiver and acquiescence or even res judicata which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/Court which has no authority in that behalf. Any order passed by a court without jurisdiction would be coram non judice being a nullity, the same ordinarily should not be given effect to.

[22] This aspect of the matter has recently been considered by this Court in Harshad Chiman Lal Modi v. DLF Universal Ltd. and Another, 2005 7 SCC 791, in the following terms :

"We are unable to uphold the contention. The jurisdiction of a court may be classified into several categories. The important categories are (i) Territorial or local jurisdiction; (ii) Pecuniary jurisdiction; and (iii) Jurisdiction over the subject matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject matter, however, is totally

distinct and stands on a different footing. Where a court has no jurisdiction over the subject matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is nullity."

See also Zila Sahakari Kendrya Bank Maryadit v. Shahjadi Begum & Ors., 2006 (9) SCALE 675 and Shahbad Co-op.Sugar Mills Ltd. v. Special Secretary to Govt. of Haryana & Ors. 2006 (11) SCALE 674 para 29]

[23] We may, however hasten to add that a distinction must be made between a decree passed by a court which has no territorial or pecuniary jurisdiction in the light of Section 21 of the Code of Civil Procedure; and a decree passed by a court having no jurisdiction in regard to the subject matter of the suit. Whereas in the former case, the appellate court may not interfere with the decree unless prejudice is shown, ordinarily the second category of the cases would be interfered with."

13. Consequently, the order passed by Civil Judge (Senior Division) Mandi on 29.12.2014 is coram non judis and is accordingly quashed and set aside and the objections preferred by the appellant are ordered to be returned to him for being presented before the competent court. In case the same is done within 30 days of the receipt of the certified copy of the Award, the Court shall extend the benefit of section 14 of the Limitation Act to the appellant and thereafter proceed to decide the objections as expeditiously as possible and in no event later than three months from the date of filing of objections.

14. The appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs.