
(1982) 04 KL CK 0003
In the High Court Of Kerala
Case No : C.R.P. 1257 of 1979

M\s. D'Cruz Brothers

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 02-04-1982

Acts Referred:

Arbitration Act, 1940 — Section 20, 32, 39
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (1982) KLJ 379

Hon'ble Judges : V. Khalid, J

Bench : Single Bench

Advocate : P. Sukumaran Nair, for the Appellant;

Judgement

V. Khalid, J.—The civil revision petition is directed against the order passed by the Principal Sub Judge, Trivandrum, in O.S. (Arbitration) 185 of 1977, setting aside the award passed by the 2nd respondent on 18-12-1975 and remitting the same to him for disposal on merits. The award in question happened to be passed in the following circumstances: The petitioner is a contractor-firm. This firm had entered into an agreement with the 1st respondent, State of Kerala, on 2-2-1965 for execution of certain construction work. The contract was unilaterally terminated by the 1st respondent after a portion of the work was executed. Differences arose and they were referred to the Government Arbitrator, who, as per his award Ext. C4 dated 12-12-1971 allowed certain claims made by the petitioner. In the last paragraph of the said award, the Arbitrator allowed the retention amount to be released to the petitioner after setting off all the liabilities. The said award was filed in Court and a decree was passed in terms of the award on 20-12-1972 in Arbitration O.P. No. 97 of 1971. The petitioner took out execution of the decree by filing Ext. C5 application. That petition was resisted with the plea that the first respondent had to get Rs. 85,400/- from the petitioner and therefore, no amount could be paid to the petitioner. This objection was overruled and as per Ext. C6 order dated 22-6-1974 execution was allowed to proceed. On 8-3-1974 the decree was

reported satisfied as per Ext. C9 order and the Government Pleader reported to the Court that the amount had been deposited. Subsequent to this the petitioner filed an application for review of the decree claiming certain extra amounts. This was resisted by the State by filing Ext. C7 objection. The review petition was dismissed on 23-3-1976 as per Ext. C8 order. The petitioner received Ext. C12 letter dated 29-12-1977 from the 2nd respondent informing him that an amount of Rs. 85,400/- was outstanding as liability payable by him to the Department. This was followed by Ext. C13 letter by which he was told that if the amount was not paid revenue recovery proceedings would be taken. The petitioner replied to these letters by Ext. C15 denying liability to pay the amount mentioned in the two letters referred to above and also raising a plea that the claim was barred by the earlier decisions. However, as revenue recovery proceedings were initiated, the petitioner filed O.S. (Arbitration) 185 of 1977 u/s 20 of the Arbitration Act to direct the respondents to file the agreement in Court and for reference to the Arbitrator the dispute that had subsequently arisen in the form of the claims made under Exts. C12 and C13 letters. That application was allowed and reference was made to the Government Arbitrator. The Arbitrator entered on the reference and passed an award holding that the claim now made was barred by res judicata. Before the Arbitrator, the 1st respondent had made a counterclaim and that counter-claim was rejected by the Arbitrator. The Arbitrator filed the award in Court. Objections were filed by the respondents and a prayer was made to set aside the award. The Court below after considering the objections held "that the Arbitrator went wrong in holding that the dispute referred to him was barred by res judicata and remitted the award for disposal on the merits. Hence the revision. Before considering the rival contentions put forward before me, it will be useful to refer to the relevant portions of the earlier orders. The only paragraph which is relevant for the purpose of this petition is para 7 of the award which reads as follows:

The respondent shall pay to the claimant the value of the work done on 10-8-1967. The retention amount after settlement of all liabilities shall be released by the respondent to the Claimant.

In the order Ext. C6 passed in execution, the Subordinate Judge made the following observations:

The state has now sought to set off a large amount towards the claim of the petitioner on the allegation that these are the liabilities of the respondents. It is true that there is some ambiguity in the provision in the award noticed above. The contention of the respondent is that if the only liability was the price of the crane, that fact would have been mentioned and not about all the liabilities. But to accept this contention would mean that one has to go beyond the award and hold an enquiry regarding the liabilities. Further, even now, there is no statement as to how the liabilities were arrived at and neither is any evidence given regarding the same.

Execution was allowed to proceed overruling the objection. Ext. C7 is the

objection filed by the State in the application" for review. Paragraph 2 is relevant and the same is extracted.

So far as the order is concerned, there could not be any mistake on the face of the record. The order was made on hearing the parties in existence. "It is the contention of the Respondents, that, liabilities of the petitioner claimant should be adjusted and so deducted from the amount awarded. This liability of the contractor, which is made mention of in the Award, is Rs. 85,400|-. The respondents are aggrieved by the order of this Honourable Court in not allowing their claim to deduct the said amount of Rs. 85,400/- from these awarded amount. The respondents will be preferring an appeal from the order to the extent objected to by them, and as stated above." But the respondents do not say that the order could be modified on a review of the order.

This paragraph is extracted to show that in this application for review, the State had specifically put forward its claim of Rs. 85,400/- which is the bone of contention now and also to show that the State wanted to pursue its remedies regarding this amount. It is with these materials that the question whether the Arbitrator had committed an error upholding the case of the petitioner that the dispute newly raised by the respondents is barred by res judicata is correct or not has to be examined and consequently to find out whether the Court below was in error and had in fact exceeded its jurisdiction in setting aside the award.

2. The paints formulated by the learned counsel for the petitioner in support of his case that the order under revision has to be set aside are (1) the second order of reference passed on 28-6-1978 in O.S. (Arbn) 185 of 1977 cannot be used against him, to contend that the dispute now raised is not covered by the earlier award. The only judicial act that the Court does before giving a direction to file the agreement is to decide whether such a direction is necessary. What follows is only a ministerial act. (2) The claim for the amount in dispute was raised by the respondents at the execution stage and in the review petition and that claim was overruled, rendering a further claim on this count impermissible to be raised by operation of the principles of res judicata. As a second limb to this argument, he raised the additional point that in any case this claim is one that ought to have been raised and Explanation IV to section 11 C.P.C. operated as a bar if it had not been raised. This bar is applicable to proceedings in arbitration cases also. (3) The arbitrator understood the only question referred to him to be the question of res judicata. Even if the Arbitrator commits a mistake in his conclusions on this question, it cannot be interfered with by a Court as an error apparent on the face of the award, (4) Assuming for arguments" sake that this question was not specifically referred, the Arbitrator cannot be said to have committed an error in formulating the question regarding res judicata and coming to the conclusion that there was bar of res judicata since such a conclusion is strictly in conformity with the principle enunciated by binding authorities.

3. I shall answer (these pleas briefly with reference to the authorities cited. On

the first point formulated above, as to the scope of the order passed by the Court reliance was placed by the petitioner's counsel on the observations contained in the decision reported in *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.*, which reads as follows:

This argument overlooks the fact that this is a statutory arbitration governed by its own rules, and that the powers and duties of the Court in sub-section (4) of section 20 are of two distinct kinds. The first is the judicial function to consider whether the arbitration agreement should be filed in Court or not. That may involve dealing with objections to the existence and validity of the agreement itself. Once that is done, and the Court has decided that the agreement must be filed, the first part of its powers and duties is over. It is significant that an appeal u/s 39 lies only against the decision on this part of sub-section (4). Then follows a ministerial act of reference to Arbitrator or arbitrators appointed by the parties.

In the case on hand, the only judicial order passed by the Court was to direct the agreement to be filed. It cannot be said that by doing so the Court had held that some dispute between the parties was still alive. The respondent's counsel wants to submit that the judicial part of the order would bar the petitioner from contending that the dispute now raised was no longer alive and had been constructively decided by the earlier orders. This submission cannot be accepted because the order of reference does not specifically advert to any such issue. I may usefully refer to the following observation of the Supreme Court in the decision reported in *Damodar Valley Corporation Vs. K.K. Kar*, in support of my conclusion that direction to file the agreement does not constitute a bar against the petitioner from contending that the award had concluded all the disputes between the parties.

It appears to us that the question whether there has been a full and final settlement of a claim under the contract is itself a dispute arising "upon" or "in relation to" or "in connection with" the contract. These words are wide enough to cover the dispute sought to be referred. The respondent's contention is that the contract has been repudiated by the appellant unilaterally as a result of which he had no option but to accept that repudiation because if the appellant was not ready to receive the goods he could not supply them to him or force him to receive them. In the circumstances, while accepting the repudiation, without conceding that the appellant had a right to repudiate the contract, he could claim damages for breach of contract. Such a claim for damages is a dispute or difference which arises between himself and the appellant and is "upon" or "in relation to" or "in connection with" the contract. (Para 6)

The principle is thus clear that the question whether there was a full and final settlement of the claim under the contract is itself a dispute arising "upon" or "in relation to" or "in connection with" the contract. Therefore, the reference order in question cannot be flourished against the petitioner to contend that he is barred from putting forward a plea that the dispute had been earlier decided by the orders referred to above. The petitioner has to succeed on the first point.

4. The second point urged before me by the petitioners' counsel is that the claim now made was raised by the respondents at the execution stage and again in the counter in the application for review, without getting an adjudication in his favour and that a further case based on the same claim cannot be raised again. This contention is based on Section 11 Explanation IV C.P.C. It cannot be disputed that at the time execution was taken by the petitioner, the respondent could have raised the plea that amounts were due to them from the petitioner. Such a plea was, in law open to the respondents. If this plea had been pressed, the execution Court could not have avoided an adjudication upon it. The petitioners' counsel submits that this is a plea which not only might have been raised, but ought to have been raised by the respondents. Not having raised the plea, the bar under Explanation IV to section 11 C.P.C. is directly attracted against the respondents. I find that this contention is well founded for the provision of Section 11 C.P.C. apply to proceedings under the Arbitration Act also. While holding so, I am not overlooking the fact that the respondent had raised this plea at the execution stage feebly and the court had repelled it.

5. The respondents had a further opportunity to raise this claim when the petitioner ill-advisedly filed the application for review claiming certain additional amounts. At this second opportunity, that afforded itself to the respondents, this was raised in the Counter. The review petition was dismissed. It has therefore to be held that the said claim was not therefore alive and had merged itself in to the award.

6. The scope and effect of an award is outlined by the Supreme Court in the decision in *Satish Kumar and Others Vs. Surinder Kumar and Others*, and which the following observations in the un-reported decision in Civil Appeal No. 1962 was read with approval:

The true legal position in regard to the effect of an award is not in dispute. It is well settled that as a general rule, all claims which are the subject-matter of a reference to arbitration merge in the award which is pronounced in the proceedings before the Arbitrator and that after an award has been pronounced, the rights and liabilities of the parties in respect of the said claims can be determined only on the basis of the said award. After an award is pronounced, no action can be started on the original claim which had been the subject matter of the reference. As has been observed by Mookerjee, J., in the case of *Bhajahari Saha Banikya v. Behary Lal Basak* (1909) ILR 33 Cal. 881 at p. 898, "the award is, in fact, a final adjudication of a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceedings, an award, which is on the face of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive.... in reality, an award possesses all the elements of vitality even though it has not been formally enforced and it may be relied upon in a litigation between the parties relating to the same subject-matter." This conclusion, according to the learned Judge, is based upon the elementary

principle, that as between the parties and their privies, an award is entitled to that respect which is due to a judgment of a court of last resort. Therefore, if the award which has been pronounced between the parties has in fact or can, in law be deemed to have dealt with the present dispute, the second reference would be incompetent. This position also has not been and cannot be seriously disputed.

The ratio of the case is to emphasise the finality of an award which has the effect of a judgment of a Court of last resort. When disputes and differences are referred to an Arbitrator and an award is made by the Arbitrator, unless a clear intention is discernible to take out a particular dispute out of the ambit of the reference, the Arbitrator should be deemed to have made his award covering all the disputes between the parties. In this case, the award should be deemed to have decided all disputes between the parties. The respondents should have raised the plea now put forward" at the appropriate time and not having done so, it is not open to them to get the dispute separately adjudicated at this stage. This contention raised by the petitioner's counsel has also to be sustained.

7. That takes me to the next contention which is as follows: the question referred to the Arbitrator at the second time was a question of law; that is the operation of the principle of res judicata. If a question of law is specifically referred to the Arbitrator and the Arbitrator gives an erroneous decision on the said question of law, the Courts will not interfere with such decisions though the conclusion is seen to be erroneous. This plea is met by the respondents' counsel saying that the question of operation of res judicata was not specifically referred to the Arbitrator. From the materials available before me, I feel persuaded to agree with the respondents' counsel that the question of operation of the bar of res judicata was not specifically referred to the Arbitrator.

8. Then it is argued that even assuming that the said question of law was not specifically referred, if the parties understood that it was the said question that was referred and the Arbitrator himself formulated the said question on the pleadings and contentions of the parties, it should be presumed that what was (referred to the Arbitrator was the said question of law. This submission, according to me merits consideration. The only question that the Arbitrator had to decide was the question whether the earlier orders operated as res judicata. The parties understood the question referred to be this. They joined issue before the Arbitrator only upon, this question. Therefore, the petitioner's counsel cannot be said to be wrong in contending that there was an implied reference to the Arbitrator, of the specific question whether the new dispute raised had been concluded against the respondents by the operation of the earlier orders. The following observation in 1949 P.C. 334 at 336 para 11 lends support to the submission.

In their view the reference was of such a nature that the Arbitrator must be treated as having been appointed by the parties to decide amongst others those specific questions of law which he is now said to have decided wrongly.

I hold that there was an implied reference of this specific question to the Arbitrator. Even if the arbitrator had committed an error in deciding this question of law it will not be proper to interfere with it. Hence, in my view, this conclusion is not in any way erroneous.

9. It is against this background that the order under revision has to be considered. The court below has observed as follows as the basis of the order to sett aside the award:

The fact that earlier the award has been passed in respect of some of the disputes pertaining to the self same agreement was taken note of when the said order was passed. It was on the definite basis that the previous award is no bar for these proceedings that the order was passed. In the circumstances the arbitrator was clearly in error in holding that the question of liability of the Claimants cannot be determined afresh as it is barred by *res judicata*.

The court below, according to me, erred in making the above observation: What was referred to the Arbitrator was not some of the disputes pertaining to the agreement. From the materials on record, it cannot be assumed that certain disputes were left out from the operation of the reference of the Arbitrator. The Arbitrator should be deemed to have decided all the disputes pertaining to the agreement between the parties when the award was made.

The second mistake committed by the Court below is the observation that the order of reference on the second question was made on the definite basis that the previous order is no bar far these proceedings. This again is on a wrong appreciation of the contentions raised by the petitioner. The petitioners definite case is that the present claim is not alive to be considered, as it should be deemed to have been concluded against the respondent by the award. Both at the execution stage and in the review petition, there was scope for adjudication of the dispute. But when it is again raised, what is the petitioner to do. Does the application to get the dispute arbitrated show that the dispute is still at large. It cannot be; for, the only remedy available to him is to get the matter referred to the arbitrator, for a decision that the issue is not at large. He cannot have recourse to the ordinary civil remedies for Section 32 of the Arbitration Act bars all such remedies. He therefore took recourse to the only available legal remedy of a reference to the concerned arbitrator for resolving the new dispute that arose. If in the said application a reference was made it would be improper to say that the petitioner had admitted that the previous award had left open claims for fresh decision. The petitioner was entitled to put forward his contentions before the Arbitrator, which he did and the Arbitrator held in his favour while making the award. Under these circumstances, the Court below was in error in interfering with the award made by the Arbitrator in favour of the petitioner and in so doing, according to me, exceeded its jurisdiction. The Court below has not properly considered the effect of the rule of *res judicata* on which alone a decision had to be rested. The observation in the order that the "claimants have not established that the proceedings initiated by the respondents are actually in

respect of the matters which have been concluded by the earlier award and the decree passed thereon....." is as a result of an erroneous approach to the operation of the principles of res judicata. The court below should have found, that the principle of res judicata was applicable to arbitration proceedings also.

In the result, I hold that the order passed by the Court below has to be set aside. I allow this C.R.P. and direct the Court below to pass a decree in terms of the award made by the Arbitrator. The C.R.P. is allowed with costs.