

(1972) 03 KAR CK 0003

In the Karnataka High Court

Case No : Civil Revision Petition No. 1293 of 1969

M.S. Ramaiah

APPELLANT

Vs

The State of Mysore

RESPONDENT

Date of Decision : 08-03-1972

Acts Referred:

Arbitration Act, 1940 — Section 17, 33, 9

Citation : AIR 1973 Kar 17 : AIR 1972 Kar 17 : (1984) ILR (Kar) 452 : (1972) 2 MysLJ 119

Hon'ble Judges : K. Jagannatha Shetty, J

Bench : Single Bench

Advocate : S.K. Venkataranga Iyengar and B.T.A. Raman, for the Appellant;
S.G. Sundaraswamy, General, for the Respondent

Final Decision : Dismissed

Judgement

K. Jagannatha Shetty, J.—This is a Civil Revision Petition and it arises in this way.

The petitioner M. S. Ramiah (briefly "the contractor"), entered into a contract with the State Government for the construction of a masonry dam at Talakalale which was a part of Sharavathy Valley Project. By Clause 51 of the said contract it was provided that if there was a dispute in regard to "non-technical matters" relating to the construction, either party may resort to arbitration by giving a notice in writing of the existence of the dispute. On such a notice being given, the matter shall be referred to an arbitration of two persons one to be nominated by the Government and the other by the contractor. Such reference should be deemed to be a submission to an arbitration within the meaning of the Indian Arbitration Act, 1940, or any statutory modification thereof. The award of the arbitrators be final and binding on both the parties.

2. In the year 1960, the contractor raised certain disputes and the matter was ultimately referred to an arbitration composed of two arbitrators, one nominated by the contractor and the other by the Government. The contractor complained

before the Arbitrators regarding the acceptance of very high rates for the Lingamanamukhi Dam at 18 to 20 per cent, over and above that for the Talakalale Dam with the additional difficulty of lesser issue rate for surki mortar etc., resulting in an extra cost of Rs. 22,21,454 on Talakalale Dam. This dispute was specifically gone into by the arbitrators and the arbitrators after hearing the parties by their award dated 7-2-1962, held on the said dispute as follows:--

"Under law, there is no implied term in the contract restricting the powers of the Government to accept tenders at higher rates for similar work to be done simultaneously at and near this locality. As such, the claim III of the claimant is untenable".

Claim III was none other than the dispute to which I have already referred above, the arbitrators, however, awarded a sum of Rs. 13,97,585/- in favour of the contractor, on other disputes.

By the letter dated 4-5-1962, the contractor wrote to the Arbitrators requesting them to file the original award in the Court of the District Judge Bangalore, or to send a copy to him empowering him to file the same in the Court, so that the Court might pass a decree in terms of the said award. The award was not, however, filed in the Court. But the contractor was paid the entire amount as per the award which he accepted without any protest or reservation.

3. Thereafter, the contractor started complaining to the Government that the dispute relating to the part of the claim which was rejected by the arbitrators was not Properly enquired into and should be referred to for a fresh arbitration. He said:

"I have drawn the one-sided award amount and I am now approaching the Government for relief regarding the third item".

In one of his letters dated 7-2-1963. he said as follows:--

"I am now establishing my claim as under:--

As you know. Sir, my claim is based on equity and justice and I am only requesting that the principle recognised by the State, viz.. to award higher rates in view of change in the circumstances, should be extended to my case also". Finally, in his letter dated 16-2-1963, he said:--

"My claim crystallised in my last letter dated 7-2-1963 to the first of you has not been settled yet. It is obvious that you are disputing my said claim and hence there exists a dispute between us in regard to my said claim.

In the circumstances, I hereby notify to you that I have appointed and nominated Lt. Col. S. P. Joga Rao No. 4, Brunton Road, Bangalore-1, as my arbitrator to settle and adjudicate the above dispute between us under Clause 51 of the terms and contract and in accordance with Section 9 of the Arbitration Act. 1940.

I hereby call upon you to appoint and nominate your arbitrator within 15 clear days from the date of receipt of this communication by you, failing which I will be constrained to invoke the provisions of Section 9, Sub-clause (b) of the Arbitration Act".

4. The State, on receipt of this letter filed a petition before the District Judge. Bangalore, u/s 33 of the Arbitration Act, praying for an order as follows:--

"that there is no agreement between the petitioner and the first respondent to refer to fresh arbitration a dispute which has already been decided by an Award of Arbitrators and hence the proposed reference to arbitration contained in the 1st Respondent's notice dated 16-2-1963 is outside any arbitration agreement between the parties;

"That the award of the arbitrators dated 7-2-1962 bars a fresh arbitration in respect of the alleged dispute sought to be referred to arbitration by the 1st respondent's notice dated 16-2-1963; to restrain the 1st respondent from proceeding with the proposed arbitration; to restrain the 2nd respondent from acting as Arbitrator in pursuance of the purported appointment by the 1st respondent by his notice dated 16-2-1963".

5. The contractor filed a counter-statement contending inter alia as follows:

That each dispute covered in the prior arbitration proceedings formed a distinct and separate dispute; that he was not legally barred or estopped from accepting the award in respect of certain heads and agitate his claim in respect of the remaining; that he wanted the award to be filed in the Court to enable him to seek further remedies but it was not done; that the fact that he received the amount awarded did not mean that he had accepted the award in respect of the claim which he seeks to agitate and that at any rate, a second reference on the same dispute by Clause 51 of the agreement was not barred. He also contended that in view of the prior award not having been made a decree of the Court u/s 17 of the Arbitration Act, It was not worth the paper on which it was written and could not form the basis either for estoppel or for res judicata.

6. The Court below, on the facts and circumstances of the case, gave the order in favour of the State. It held that the dispute which the contractor seeks to agitate in the present proceedings was already the subject-matter of the dispute decided by the earlier award and a second reference on the same question was not permissible under the law. It also said that even though the award was not made the rule of the Court, since the contractor had accepted the same and acted upon it, he was estopped from re-agitating the claim. Aggrieved by the order, the contractor has preferred the revision petition.

7. Mr. S. K. Venkataranga Iyengar. learned counsel for the contractor, urged two contentions:-- (1) whether the present dispute is barred by the principles of estoppel or res judicata, could not have been decided by the Court below, as it falls for determination within the exclusive jurisdiction of the arbitrators on a

reference made to them; and (2) the award dated 7-2-1962 since not made a decree of the Court, cannot form the basis for refusing to refer the present dispute for arbitration.

8. The first contention, in my opinion, does not merit serious consideration on a reading of Section 33 of the Arbitration Act, which provides:--

"33. Arbitration agreement or award to be contested by application-- Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also and it may pass such orders for discovery and particulars as it may do in a suit".

When the State made an application under the abovesaid section to determine the effect of the arbitration clause and the earlier award between the parties, it was the duty of the Court to decide the question. It could not have said that it was for the arbitrators to decide. To say so, would be nothing short of abdication of the statutory functions.

9. So far as the second contention is concerned, I find myself in agreement with the view taken by the Court below. It was not disputed before us that the dispute on which the contractor wants a fresh reference for adjudication, was one of the disputes before the arbitrators at the time of making the earlier award. The contractor then contended that acceptance of very high rates for Linganamukhi Dam at 18 to 20 per cent, over and above that of Talakalale Dam, with the additional advantage of lesser issue rate for Surki mortar has upset the economic equilibrium of the (project, resulting in an extra cost of Rs. 22,21,455/- on Talakalale Dam (vide Claim III of the contractor). The arbitrators by their Award dated 7-2-1962, rejected the said claim stating thus:--

"Under law there is no implied term in the contract restricting the powers of the Government to accept tenders at higher rates for similar work to be done simultaneously at and near this locality. As such the claim III of the claimant is untenable".

In respect of the other claims, the arbitrators directed the payment of a sum of Rs. 13,97,585/-. The State paid the said sum and the contractor accepted it without any reservation. Can he now turn round and say that he is not bound by the said award as it was not made rule of the Court. The question presents no difficulty as the same has been decided by the Supreme Court in Satish Kumar and Others Vs. Surinder Kumar and Others, . The Court approved the ratio of the earlier unreported decision in Uttam Singh Dugal & Co. v. Union of India, Civil Appeal No. 162 of 1962 (SC), wherein it was held:

"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. ILR (1909) 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 proceeding, 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 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".

Hegde, J., while concurring with the above view said:

"Arbitration proceedings, broadly speaking may be divided into two stages. The first stage commences with arbitration agreement and ends with the making of the award. And the second stage relates to the enforcement of the award. Paragraph 7 of the first schedule to the Arbitration Act lays down that "the award" shall be final and binding on the parties and persons claiming under them respectively".

The learned Judge further said:

"Therefore it is not possible to agree with the Full Bench decisions of the Patna High Court and that of the Punjab and Haryana High Court that an award which is not made a decree of the Court has no existence in law".

In the above decision, the Supreme Court has clearly stated that the award though not made a rule of the Court, becomes final and binding on the parties and it is not a waste paper. In the Present case, the contractor did not object to the earlier award and he willingly took the benefits of it. The subject-matter of the present reference was already considered and rejected by the arbitrators in the previous award. In these circumstances, it must be held that it was binding on the parties though not made a rule of the Court.

10. In the view that I have taken, it is unnecessary to refer to the decisions Cited by counsel for the contractor,

11. Finally, I would only add thus: Since I have held on the facts of the instant case, that the present dispute raised by the contractor was the subject-matter in the first arbitration proceedings and it was considered and disallowed by the award made, then, in law, a second reference of the same dispute is impermissible. As P. B. Mukharji, J. pointed out in Pushraj Puranmal Vs. Clive Mills Co. Ltd.,

"One arbitration agreement can produce one or more awards and the law of arbitration, as I understand. does not nurse any dogma to say that it can never do so under any circumstances because of some fancied universal doctrine of legal merger of the arbitration agreement in the award This is however very far from saying that the same point can be decided over and over again by different awards, which of course cannot be done".

The principle as it appears to me is that the dispute which is once referred to and considered in an award, does not survive for another reference. It became extinguished and merged in the award in which it is considered.

12. In the result, the revision petition fails and is dismissed with costs.