
(1990) 01 MP CK 0031
In the Madhya Pradesh High Court
Case No : M.A. No. 134 of 1989

National Fertilizers Ltd. and another	Vs	APPELLANT
Pooranchand Nangia		RESPONDENT

Date of Decision : 23-01-1990

Acts Referred:

Arbitration Act, 1940 — Section 39, 39(1)

Citation : (1990) JLJ 173

Hon'ble Judges : T.N. Singh, J;S.K. Dubey, J

Bench : Division Bench

Advocate : J.P. Gupta, for the Appellant; A.D. Choudhary and R.A. Roman, for the Respondent

Final Decision : Dismissed

Judgement

Dr. T.N. Singh, J.—Counsels are heard at length on two questions, to decide which instantly this order is rendered.

2. Counsels are heard on the maintainability of the appeal and also on the prayer made in the memo of appeal for the matter to be converted into a revision and heard as a revision. We have seen no merit in the prayer, and we are also of the view that the appeal also is not maintainable for reasons to follow:?

3. What is not disputed is that the parties had entered into an arbitration agreement, and thereunder a sole arbitrator had to be appointed by common consent of parties or by Court with their consent. Accordingly, with their consent, the Court appointed Shri P.P. Dharwarkar who filed his award in the Court of District Judge, Guna, on 7-7-1988. In those proceedings, registered as Miscellaneous Civil Case No. 12/1987, an order was passed on 28-4-1989 and that is the bone of contention between the parties. Accordingly, that is reproduced in extenso:

This instant appeal, however, was filed against an order dated 27-10-1989, passed by the Court below, Shri Gupta has contended that the order being one

by which the Court below has refused to set aside the award, the appeal is maintainable u/s 39 of the Arbitration Act, 1940 (for short the "Act"). Counsel has additionally, with his usual ingenuity, submitted that the order passed on 28-4-1989 be treated as an order setting aside the award. The appeal, according to Shri Gupta, is maintainable under Cl. (vi) of section 39 (1) of the Act. We propose to examine that contention first.

4. We have no doubt that the provision has to be construed on its own term and language primarily. In that connection, it must be pointed out that the appealable orders are exhaustively enumerated in S. 39 (1). It has further to be noted that within parenthesis words appearing "and from no other orders"?stress primacy of the rigor of the restricted scope of the provision. Strong reliance is placed by learned counsel on a decision of the Apex Court in *Munshi Ram Vs. Banwari Lal*, to submit that the order dated 28th April 1989 was a perfectly valid and jurisdictional order. We disagree because of what we read in section 30 and in the cited decision of their Lordships. What the order records is merely that parties have expressed an intention that the award filed may be set aside and that fresh arbitrators to settle the same dispute may be appointed by parties, one each. The purport and object of the order is beyond dispute, in our view, on the language used. We read no ambiguity in the order at all, and we are of the view that the Court below had also correctly construed its own order for the reasons it had given in the impugned order dated 28-4-1989. *Munshi Ram* case (supra) clearly lays down that the Act does not disable the parties from terminating their dispute in a different way, and if they do, it could not be intended by law that the dispute which has been successfully terminated, should again become the subject of litigation. Their Lordships held:

If the parties are dissatisfied with the award and want to substitute it by a compromise involving matters alien to the original dispute which are inseparable the Court may supersede the submission, and leave the parties to work out their agreement in accordance with the law outside the Arbitration Act, (Emphasis added)

The parties did not express that intention which would bring the order within the ambit of the holding in *Munshi Ram* (supra) as the arbitration had to continue under the Act. We need not, in this view of the matter, examine Shri Choudhury's contention that the intention of the parties referred to in the order was, in fact, a suggestion of the Court to which the parties had agreed. Counsel has submitted that an application was filed on 26-8-1989 to explain the conduct of the instant appellants in regard to the matter recorded on 28-4-1989. However, as earlier observed, we need not deal with that contention, and for that reason we do not consider Shri Gupta's submission that law is well settled that Courts are to read the order and not anything outside the order. Records are sacrosanct, Shri Gupta submits; for that proposition there is and can be no quarrel. The question, indeed, is of the construction of the order.

5. The words "setting aside" are used in section 30 of the Act, and we do not

read any warrant therein to support the view canvassed by Shri Gupta. It does not contain a whisper of parties agreeing to have the award set aside on the ground of appointment of fresh arbitrators in violation of the arbitration agreement. Shri Gupta has relied also on section 41 (a) of the Act to submit that the provisions of the CPC are applicable to the proceedings in the Court below. That position also we accept and in that view also we have no hesitation to hold that the contention does not have any merit because of what we read in O. 23, R. 1, CPC. This view the Court below has also taken, and we appreciate the decision in that regard of the Court below. There was never any written compromise drawn up between the parties, and signed by parties, and duly filed and processed in accordance with the provisions of O. 23, C.C.

6. What is very clear, according to us, is that in the pending proceedings which was for making the award a rule of the Court objections have been filed and those were to be determined. The order dated 28-4-1989 has to be read only as an interlocutory order in those proceedings which confers no right on any parties, as the order itself expresses that intention. The order was not an enforceable order, and for that reason also it cannot be treated as an order finally deciding the rights of the parties to the dispute to make it an appealable order. If no names of arbitrators were suggested by the parties, though they had volunteered for that the order dated 28-4-1989 would fall through by itself and die a natural death; and that is what happened, in fact, in this case.

7. What is of signal significance, though that is derided by Shri Gupta arguing strenuously to the contrary, is that in express terms the award had not been set aside, and mere expression of will of parties gave no jurisdiction to the Court to make the order, if the Court did not possess jurisdiction in that regard. If the parties could not agree to have the dispute according to the existing arbitration agreement settled by more than one arbitrator, even the view of parties recorded in that regard was a futile exercise. We have perused the arbitration clause and it bespeaks appointment not only of sole arbitrator to enter upon an arbitration initially but to his being substituted in the same manner only. No other mode or method of arbitration is agreed upon between the parties except that of arbitration by sole arbitrator.

8. The conclusion which we have reached is also an answer to Shri Gupta's second contention and appellants' prayer for conversion of the appeal into a revision. If the order passed on 28-4-1989 was an order passed without jurisdiction, that could have been validly ignored, and that is what was done by impugned order dated 27-10-1989. The impugned order cannot be challenged as an order passed without jurisdiction on that ground so as to make out a case for revision. That apart, revisional jurisdiction is and can be invoked only when any party is left remediless and he has to suffer irreparable injustice causing irreparable loss. That position does not obtain in this matter. Not only in the pending proceedings the question is at large regarding the validity or confirmation of the award, here would still be a forum open to the aggrieved

person to challenge the award passed by the Court below, in appeal.

9. For the foregoing reasons, the appeal is dismissed as not maintainable. The prayer for conversion of the appeal into a revision is also rejected.

10. The records received from the Court below shall be sent down post-haste for the pending proceedings to continue. Parties shall appear in the Court below on 15-2-1990 to take further orders thereat.