

(2002) 04 DEL CK 0070

In the Delhi High Court

Case No : C.W.P. No's. 1622 and 1623 of 2002

Orissa Oil Industries Limited

APPELLANT

Vs

Tribal Cooperative Marketing Development Federation of
India Limited (Trifed) and Others
 Utkal Oils Limited Vs
Tribal Cooperative Marketing Development Federation of
India Limited (Trifed) and Others

RESPONDENT

Date of Decision : 18-04-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 12, 13, 16, 16(2), 16(3)
Constitution of India, 1950 — Article 14
Succession Act, 1925 — Section 29(2)

Citation : (2002) 7 AD 198 : (2002) 98 DLT 659 : (2002) 65 DRJ 682

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : B.A. Mohanty, Mamta Tripathy and Shanmya Patro, for the Appellant;
Navin Chawla, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, C.J.—An order of passed by respondent No. 1 herein, i.e., Trifed dated 23.01.2002 appointing respondent No. 3 herein as the sole arbitrator is the subject matter of this writ petition. The said order reads thus :-

"TRIBAL CO-OPERATIVE MARKETING

DEVELOPMENT FEDERATION OF INDIA LIMITED

(MINISTRY OF TRIBAL AFFAIRS, GOVT. OF INDIA)

No. TFD / HO / LEGAL / 2001 - 02 / 8562

23rd January, 2002

Mr. Justice Jaspal Singh (Retd.)

59, Hemkunt,

New Delhi.

Sub : Appointment of Sole Arbitrator for
arbitrator of dispute under Agreement
dated 15.4.94 between Trifed and M/s.
Orissa Oil Industries Ltd., Sambalpur -
768002 Orissa.

Sir,

1. Whereas as per Clause 15 of the Agreement dated 15.4.94 executed between Tribal Cooperative Marketing Development Federation of India Ltd. (Trifed), NCUI - II Floor, August Kranti Marg, New Delhi - 16 and M/s. Orissa Oil Industries Ltd., Sambapur - 768002, Orissa, all disputes or differences, whatsoever arising between the parties within or relating to the construction / meaning and operation or affect of this agreement or the breach thereof shall be referred to the sole arbitration of the Managing Director or his nominee of Trifed.

2. Whereas disputes and differences have arisen and still exist between the parties relating to the performance of the agreement by M/s. Orissa Oil Industries Ltd.

3. And whereas M/s. Tribal Cooperative Marketing Development Federation of India Ltd., invoked the Arbitration Clause.

4. Now, Therefore, by virtue of the provision in the agreement, I hereby appoint you as the sole Arbitrator and request to enter upon reference and pronounce the award as early as possible in respect of the disputes in accordance with the said agreement and in accordance with law.

Thanking You

Yours faithfully

(PRATIBHA KARAN)

IAS

MANAGING DIRECtor

Copy to :

M/s. Orissa Oil Industries Ltd.

Sambalpur - 768002

Orissa."

2. The contention raised in this writ petition is that having regard to the fact that respondent No. 1 had moved this Court for appointment of an arbitrator u/s 8 of

the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") wherein this Court by an order dated 23.01.2001 in A.A. No. 165/2000 appointed Shri N.L. Kakkar, a retired District Judge, to resolve the disputes and differences between the parties and as according to the petitioner, there does not exist any other dispute, the impugned order is liable to be set aside.

3. It has further been contended that the agreements entered into by the parties being dated 15.05.1994, 01.05.1995 and 01.05.1996 are already the subject matter of arbitration proceedings, which are at an advanced stage and thus there cannot be any reason nor there can be any justification for appointment of another arbitrator. Such appointment of an arbitrator, according to the petitioner, is not only mala fide, but contemptuous to the order dated 25.01.2001 passed by this Court in A.A. No. 165/2000.

4. The petitioner in this writ petition has also inter alia questioned the validity of Sections 16, 34 and 37 of the Act as being repugnant to the Article 14 of the Constitution of India (in short, "the Constitution").

5. The learned counsel on behalf of the petitioner would contend that the question as regards jurisdiction of the arbitral tribunal cannot be questioned in terms of Sub-section (2) of Section 16 of the Act inasmuch even if the said question is raised and determined against the petitioner, neither any appeal would lie there against in terms of Section 37 of the Act nor such a case would be converted by Section 34 thereof.

6. The learned counsel would, Therefore, contend that in any event if such a question can be raised before the arbitrator, the petitioner would not be in a position to file any counter claim as the same would negate its challenge on the ground of acquiescence and thus it may be held that it is estopped and precluded from raising the said question of jurisdiction.

7. The questions, which arise for consideration, in this writ petition thus are :-

"(i) Whether the provisions of Section 16, 34 and 37 of the Act are ultra virus under Article 14 of the Constitution?

(ii) Whether such a question of absence of jurisdiction can be raised before the arbitral tribunal?"

8. The purpose and object of enactment of the Act is now no longer required to be considered in details and suffice it to say that through out the world, the necessity was felt to make the law of arbitration simple, less technical and more responsible to the actual realities of the situation.

9. The Parliament of India (in short, "the Parliament") from amongst several International Model laws chose to follow Model Law on International Commercial Arbitration, which was adopted by the United Nations Commission on International Trade Law (UNCITRAL) in 1985, considering the definite advantages contained therein.

10. Before the enactment of the Act not only extensive consultations had been held with arbitral institutions, but several meetings took place among the Law Ministers and the Law Secretaries of the States. The Act recognizes the freedom of the parties to agree on how their arbitration should be conducted. In certain respects, improvements have also been made over the Model Law.

11. In differing with the UNCITRAL Rule Model Law, it provided for a procedure that in the event of unsuccessful challenges regarding the jurisdiction of the arbitral tribunal before it, a request could be made to a court or authority to decide challenge but Section 13 of the Act does not permit the challenging party to approach the Court at that stage. However, after the award is made, the party could challenge the award on the ground that the arbitrator had wrongly rejected the challenge.

12. Similarly in the event, the arbitral tribunal turns down the plea that he had no jurisdiction, although Section 16 of the Act does not make any provision of approaching the Court at that stage, there cannot be any doubt that such a question can be raised in terms of Section 34 of the Act.

13. We may, however, notice that in the event, a question as regards lack of jurisdiction raised before the arbitral tribunal is determined against the party, an appeal in terms of Section 37 of the Act would not be maintainable. The question, however, would be as to whether such a plea can be taken even in terms of Section 34 of the Act or not.

14. The provisions of the Act must be read as a whole. Sub- section (2) of Section 16 of the Act provides that a question as regards the jurisdiction of the arbitral tribunal can be raised not later than the submission of the statement of defense. Such a question can be raised despite the fact that a party has participated in the appointment of the arbitrator.

15. Sub-sections (5) and (6) of Section 16 of the Act read thus :-

"16. Competence of arbitral tribunal to rule on its jurisdiction

(5) The arbitral tribunal shall decide on a plea referred to in Sub-section (2) or Sub- section (3), and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with Section 34."

16. In terms of the provisions as contained in Sub-section (5) of Section 16 of the Act, the arbitral tribunal is required to decide the plea of lack of jurisdiction in terms of Sub-section (2) or Sub-section (3) and where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

17. There cannot be, thus, any doubt whatsoever that Sub- section (6) of Section 16 of the Act shall constitute a ground for questioning an award made in

terms of Section 34 of the Act having regard to the doctrine of incorporation by reference.

18. In *Ichchapur Industrial Cooperative Society Ltd. Vs. Competent Authority, Oil and Natural Gas Commission and Another*, it has been held :-

"18. The definition of "minerals" which we have already quoted above would indicate that the meaning given to it in the Mines Act, 1952 is to apply here also on the basis of classic principle of Legislation by Reference or Incorporation which is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. The provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it."

19. In *Mary Roy and Others Vs. State of Kerala and Others*, the law has been laid down in the following terms :-

"7. It was then contended on behalf of the respondents, though faintly, that by reason of Section 29, Sub-section (2), the Indian Succession Act, 1925 must be deemed to have adopted by reference all laws for the time being in force relating to intestate succession including the Travancore Christian Succession Act, 1092 so far as Indian Christians in Travancore are concerned. This contentions was sought to be supported by reference to the decision of the Travancore-Cochin High Court in "*Kurian Augusty v. Devassy Aley*, AIR 1957 Tra 1. We do not think this contention is at all sustainable. The legislative device of incorporation by reference is a well-known device where the legislature instead of repeating the provisions of a particular statute in another statute incorporates such provisions in the latter statute by reference to the earlier statute. It is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provision of an earlier statute in a later statute. But when the legislature intends to adopt this legislative device the language used by it is entirely distinct and different from the one employed in Section 29, Sub- Section (2) of the Indian Succession Act, 1925. The opening part of Section 29, Sub-section (2) is intended to be a qualificatory or excepting provision and not a provision for incorporation by reference. We have no hesitation in rejecting this contention urged on behalf of the respondents."

20. Thus there cannot be any doubt whatsoever that the petitioner can raise all such questions before the arbitral tribunal in terms of Section 16 of the Act.

21. Yet again, such jurisdictional question came up for consideration before a Division Bench of this Court in *Bharat Heavy Electricals Ltd. v. C.N. Garg & Ors.*, (88) 2000 DLT 242 where it has been held :-

"9. The function of the Courts is only to expound and not to legislate. Entertaining such a petition would amount to encouraging ingenuous methods to introduce that very provisions by judicial interference which the legislature has deliberately done away with. This would be doing violence to the mandate of the

legislature. Legislation in a modern state is actuated with some policy to curb some public evil or to effectuate some public benefit. The legislation is primarily directed to the problems before the legislature based on the information derived from past and present experience. When the "purpose and object" or the "reason and spirit" pervading through the statute is clear, Court has to adopt purposive approach in interpreting such a statute and it cannot encourage petitions which would defeat the very purpose and object with which the new Act was enacted.

Thus going on with the ethos of the new Act of speedy progress of arbitration proceedings without judicial interference coupled with the fact that an aggrieved party is not without remedy, it cannot be said that the absence of a provision regarding removal of an Arbitrator renders the relevant provisions of the statute ultra virus the Constitution. We are of the considered view that absence of a provision of removal of an Arbitrator does not render the relevant statutory provisions invalid or ultra virus the Constitution of India."

22. In *Konkan Railway Corporation Ltd. and Another Vs. Rani Construction Pvt. Ltd.*, the Apex Court held :-

"22. It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the arbitral tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the arbitral tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the arbitral tribunal may rule on its own jurisdiction. That the arbitral tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the arbitral tribunal's authority u/s 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, Therefore, be no impediment in contending before the arbitral tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, Therefore, it had no jurisdiction."

23. The matter has also been considered although in a different context in *Narayan Prasad Lohia Vs. Nikunj Kumar Lohia and Others*, it was held thus :-

"18. ... Now an award can be set aside only on a ground of challenge under Sections 12, 13 and 16 provided such a challenge is first raised before the arbitral tribunal and has been rejected by the arbitral tribunal., the only other provision is Section 34 of the said Act...."

24. Thus even the Supreme Court accepted that apart from Section 34 of the Act, an award can be set aside on a ground of challenge under Sections 12, 13 and 16 of the Act subject to the condition that such a challenge is made at the first instance before the arbitral tribunal.

25. So far as validity of the Act is concerned, the same is squarely covered by a decision of the Apex Court in Babar Ali Vs. Union of India (UOI) and Others, wherein it has been held :-

"1. We find that there is no question of the Arbitration and Conciliation Act, 1996 being unconstitutional or in any way offending the basic structure of the Constitution of India, as the High court has rightly observed that judicial review is available for challenging the award in accordance with the procedure laid down therein. Only because the question of jurisdiction of the arbitrator is required to be considered after the award is passed and not at any penultimate stage by the appropriate court, it cannot be a ground for submitting that such an order is not subject to any judicial scrutiny. The time and manner of judicial scrutiny can legitimately be laid down by the Act passed by Parliament. The challenge to the validity of the Act was rightly rejected by the High Court. We fully endorse that view."

26. Furthermore, only because, according to the petitioner, it may face some hardship, the same by itself may not be a ground for invalidating a statute or declaring a statute ultra vires. (See Devi Prasad and ors Vs. Government of Andhra Pradesh and ors,

26. For the reasons aforementioned, we do not find any merit in these writ petitions, which are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.