
(2006) 10 OHC CK 0045
In the Orissa High Court

Prantik

APPELLANT

Vs

Gayatri Pharmaceuticals Pvt. Ltd.

RESPONDENT

Date of Decision : 27-10-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 34, 37

Citation : (2007) 1 ARBLR 560 : (2007) 103 CLT 110 : (2007) 1 OLR 105

Hon'ble Judges : I. Mahanty, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. Mahanty, J.—The appellant in the present appeal u/s 37 of the Arbitration and Conciliation Act, 1996 (in short "the Act") seeks to challenge the order dated 1.10.2004 passed by the learned District Judge, Cuttack in Arbitration Misc. Case No. 35 of 2002 setting aside the award dated 26.12.2001 passed by the Arbitrator.

2. The appellant challenges the impugned order, inter alia, on the ground that the learned District Judge had failed to consider the statutory requirement u/s 34 of the Act and in particular, after holding that the Arbitrator had not acted illegally or arbitrarily, he came to hold that an opportunity should have been given to the petitioner (Respondent herein) to place its case before the Arbitrator for proper adjudication and if it is not done the petitioner would suffer irreparable loss.

3. The learned Counsel for the appellant vehemently submits that the impugned order suffers from non-consideration of the requirement of Section 34 of the Act and further submits that the learned District Judge ought not to have remanded the matter on payment of costs of Rs. 1000/- in view of the categorical finding reached by him that the Arbitrator had not acted illegally or arbitrarily. The learned Counsel for the appellant placing reliance upon a decision of this Court in the case of Hyder Consulting Ltd. Vs. The Governor for the State of Orissa,

submitted that the power and jurisdiction of the learned District Judge to set aside an award are specifically laid down in Section 34 of the Act and none of the conditions laid down in the said Section is specified in the order for setting aside the award. He further submitted that the reason for which the learned District Judge has set aside the award is clearly not sustainable in law since the ground stated in the impugned order is not available in Section 34 of the Act and accordingly, the impugned order dated 1.10.2004 passed by the District Judge, Cuttack in Arbitration Misc. Case No. 35 of 2002 is liable to be set aside.

4. Learned Counsel for the respondent has placed reliance on the relevant provisions of Section 34(2)(a)(iii) of the Act which are quoted herein below:

34. Application for setting aside arbitral award.

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Sub-section (2) and Sub-section (3).

(2) An arbitral award may be set aside by the Court only if - (a) the party making the application furnishes proof that-

xxx xxx xxx (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

xxx xxx xxx

Learned Counsel for the Respondent submitted that the first date of sitting of the Arbitration was fixed to 22.9.2001 on which day, the next sitting was fixed to 19.10.2001. On that date the respondent was directed to file statement of defence. On 10.11.2001 to which. the case was adjourned, neither the respondent nor his counsel appeared before the Arbitrator and the Arbitrator's next sitting was fixed to 8.12.2001. On that date, i.e., 8.12.2001 since neither the respondent nor its counsel turned up, the respondent was set ex-parte and the impugned award dated 26.12.2001 was passed.

The learned Counsel for the Respondent further submitted that on 10.11.2001, although the defence statement had been filed on behalf of the respondent but due to certain unavoidable circumstances, the counsel for the respondent-petitioner could not attend the arbitral sitting fixed to 10.11.2001. On the same date, it is further averred that the learned Counsel for the Respondent range up the learned Arbitrator to ascertain the next date and he was informed telephonically that the matter was posted to 8.12.2001 for hearing. It is further averred in the application filed before the learned District Judge that the learned advocate one Mr. B. Jalli had suddenly fallen sick with malaria and he was bedridden since 5.12.2001 in his village which is situated 200 Kms. away from Cuttack and he could not be informed either by the learned Arbitrator or his client about fixing of the sitting to 8.12.2001. Drawing attention to the aforesaid averments, learned Counsel for the Respondent submitted that the respondent

had a right to seek setting aside the arbitral award and the same was set aside by the learned District Judge only after the respondent made the application furnishing proof that "it was otherwise unable to present its case" before the Arbitrator.

5. In the present appeal, learned Counsel for the appellant submitted that the learned advocate Mr. B. Jalli, who claims to be the conducting advocate, never appeared before the Arbitrator in any sitting and instead Dr. G. Tripathy, learned advocate had appeared on behalf of the Respondent-company and, therefore, the plea raised by the respondent about illness of the said advocate Mr. B. Jalli, is wholly unworthy of consideration.

Learned Counsel for the respondent submitted that Mr. B. Jalli, advocate is the junior counsel attached to the office of Dr. G. Tripathy and since the name of Dr. G. Tripathy, advocate appeared in the order-sheet maintained by the learned Arbitrator, as the Junior Counsel of Dr. G. Tripathy, Mr. Jalli's name was not mentioned and necessarily when a learned Counsel is making a statement to the effect that he is a junior of same Senior Counsel appearing in the said case, there is no reason to doubt such averment.

6. On consideration of the rival contentions raised in the present proceeding, I am of the view that in terms of Section 34 of the Act, an arbitral award may be set aside by a Court if the Court is satisfied that the party making an application for setting aside an arbitral award "was otherwise unable to present his case" before the Arbitrator. I am of the view that in the circumstances as pleaded in the application, the Arbitral Proceedings were held on the following dates, i.e., on 22.9.2001, 19.10.2001, 10.11.2001 and 8.12.2001. It is clear that the respondent appeared through Advocate before the learned Arbitrator on the first two dates i.e., 22.9.2001 and 19.10.2001 and also filed the statement of defence. The Respondent and its learned Counsel were absent on 8.12.2001 and the respondent has given the reason of illness of the learned Counsel for being unable to appear before the Arbitrator on that date.

7. I am of the view that the inability of a lawyer to attend an arbitral sitting due to illness is a ground which would be covered u/s 34(2)(a)(iii) of the Act and in the present case on account of illness of the learned Counsel for the Respondent, "the respondent was otherwise unable to present its case" and therefore, the learned District Judge is justified in setting aside the award and remanding the matter to the Arbitrator to pass an award afresh.

8. In view of the aforesaid findings arrived by me, the ratio of the decision in the case of Hyder Consulting Ltd. (supra) is inapplicable to the facts of the present case, inasmuch as I am of the view that the respondent (the petitioner before the Court of learned District Judge) has made out a case for setting aside the award u/s 34(2)(a)(iii) of the Act.

9. Though the impugned order passed by the learned District Judge could have been more elaborate and it does not contain any detailed reason for setting aside

the award, I am of the view that the conclusion by the learned District Judge deserves to be upheld in view of the aforesaid provision of law and facts as noted hereinabove.

Accordingly, the present Arbitration Appeal is dismissed and the order dated 1.10.2004 of the learned District Judge, Cuttack is affirmed with the further direction to the Arbitrator to pass an award afresh upon notices to both the parties within a period of three months from the date of receipt of copy of this order. Learned Arbitrator is further directed to pass a reasoned award, on consideration of the rival contentions of the parties, as well as the counter claims, if any, raised by the respondent. Parties are directed to co-operate with the Arbitrator and unnecessary adjournments need not be granted.