
(2008) 09 CAL CK 0071
In the Calcutta High Court
Case No : A.P. No. 351 of 2006

Shakambari and Co.

APPELLANT

Vs

Union of India (South Eastern Railway)

RESPONDENT

Date of Decision : 19-09-2008

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 34, 4
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2008) 09 CAL CK 0071

Hon'ble Judges : Pinaki Chandra Ghose, J

Bench : Single Bench

Advocate : Jayanta Mitra, Bijon Majumdar, for the Appellant; L.K. Chatterjee, Deepak K. Singh, for the Respondent

Final Decision : Dismissed

Judgement

Pinaki Chandra Ghose, J.

The Judgment of the Court was as follows:

1. This is an application for appointment of an Arbitrator u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act").
2. It appears from the facts of the case that the disputes between the parties were referred before the learned Sole Arbitrator, Justice P.K. Banerjee (retired). On 9th July, 2003, an award was published by the learned Arbitrator and the application was filed for setting aside of the said award u/s 34 of the said Act and hence, the award was set aside.
3. It is submitted on behalf of the petitioner that since the disputes between the parties not decided, the matter should be referred for appointment of a learned Arbitrator. Mr. Jayanta Mitra, learned Senior Advocate appearing in support of this application submitted that at the hearing it was demonstrated on behalf of the Union of India that the award was full of inconsistencies and at the time of hearing it was also held by the Hon'ble Judge that the award itself was "a trifle

incoherent".

4. It was further pointed out that at that point of time the present petitioner also agreed that the award should be set aside and prayed that the matter should be referred to the Hon''ble Chief Justice for appointment of a new Arbitrator. But the Union of India opposed the prayer for reference of the matter for appointment of a new Arbitrator and it was submitted that the Union of India should be given liberty to appoint an Arbitrator in place and stead of the deceased Arbitrators in terms of the appointment procedure laid down in the agreement.

5. It was further pointed out that since the original appointment of the Arbitrator was made u/s 11(6) of the said Act, the Court held as follows:

The petitioner having participated in the said proceedings, the provision of section 4 of the Arbitration and Conciliation Act, 1996 will squarely apply, and the petitioner cannot now raise the point that no Arbitrator can be appointed u/s 11(6) and that the petitioner should be afforded the opportunity to appoint a departmental Arbitrator.

6. It is further submitted that no appeal was preferred from the said order and the parties are bound by the said judgment and/or order of the Hon''ble Judge and both the. parties were aggrieved by the said Order. Therefore, Mr. Mitra submitted that the appointment could be made u/s 11(6) of the said Act in the instant case.

7. The only point as has been taken by the respondent before this Court that since the disputes between the parties were referred before the learned Arbitrator, award has already been published. Therefore, it is not open to the parties to have second reference on the self-same disputes.

8. Mr. L.K. Chatterjee, learned Advocate appearing on behalf of the respondent however submitted that once the award is passed, in which the reference is held to be valid, no second reference is permissible in respect of the same disputes and he relied upon a decision reported in Nalini Mohan Choudhuri Vs. Malda Co-operative Urban Bank Ltd., and submitted that the application is not maintainable. He further relied upon another decision reported in K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another, and submitted that the principles of res judicata applies only in arbitration matter.

9. On the other hand, Mr. Mitra submitted that neither of the aforesaid decisions would have any application in the facts and circumstances of this case. In the case of Nalini Mohan Choudhuri (supra) the Hon''ble Court laid down the principle that once valid award is made by the Arbitrator, no second reference on the self-same disputes would be possible, since such award operates to extinguish and merge the claims and disputes referred to arbitration. According to Mr. Mitra, in the instant case, the Court has held that there was no valid award, since it was inconsistent and incoherent and hence, the said decision has no application in

the facts and circumstances of this case.

10. So far the case of K. V. George (supra) is concerned, the questions involved therein were totally different from the issues in the instant case. The Court held that it did not require that when there are several causes of action from one transaction, the plaintiff is required to sue for all of them in one suit. Hence, according to Mr. Mitra, the decision has no application in the facts and circumstances of this case.

11. He further relied upon a decision reported in P.C. Ray and Co. (India) Pvt. Ltd. Vs. Union of India (UOI), and submitted that a valid and legal award is *sine qua non* for invoking the principles of *res judicata* in a dispute between the parties which has been referred to arbitration. If the award is set aside because it is inconsistent and incoherent, there is no finality of the merit of controversy and, therefore, no question of *res judicata* arises. Hence, there will be no legal impediment in appointing a second Arbitrator in respect of the same dispute.

12. Reliance was further placed upon a decision reported in State of Orissa Vs. Orient Paper and Industries Ltd., pointing out that the Hon'ble Supreme Court clearly held in the decision that an authority for the proposition that on a reference if the Arbitration did not deal with the points raised by the parties and did not consider the same, the award made by him would not be a valid award, and would be liable to be set aside with a direction to remit back the same to the Arbitration for a valid and final adjudication.

13. Hence, according to Mr. Mitra, there is no question of the principles of *res judicata* applying to the facts and circumstances of this case and there was no finality on the merits of the controversy between the parties. Therefore, he submitted that the disputes should be referred to an Arbitrator.

14. After considering the facts and circumstances of the instant case and after going through the materials on record placed before me, it is clear that the disputes were referred before a learned Arbitrator and it is also clear that the disputes were gone into by the said learned Arbitrator and the award was published. It is also true that the award was set aside on the ground of inconsistencies and incoherence. Therefore, the Court also emerges from the fact that there is no dispute that the said award in fact did not decide the disputes prevailing between the parties.

15. In my opinion, the reference could be made only by consent of the parties and otherwise since, in my view, the disputes were referred and the matter was decided by the Court by setting aside the award passed by the learned Arbitrator. If I draw analogy from the suit filed by the party and the suit is dismissed then it is sure that if there is no fresh cause of action arose between the parties, then no suit will lie on the self-same cause of action.

16. Therefore, in my considered opinion, the second reference cannot be made on the identical disputes and it has to be held following the Division Bench

decision in *Nalini Mohan Choudhuri Vs. Malda Co-operative Urban Bank Ltd.*, if a second award is made on a second reference to the arbitration of the identical disputes, the same would be without jurisdiction. Further, the Supreme Court held in the decision *K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another*, that the rule of *res judicata* as indicated in section 11 of the CPC has doubt some technical aspects, for instance the rule of constructive *res judicata* may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Article 32.

17. It is also to be noted that in the decision reported in *Satish Kumar and Others Vs. Surinder Kumar and Others*, the Supreme Court held as follows (at page 838):

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.

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.

18. Hence, I am of the opinion that the decision reported in *State of Orissa Vs. Orient Paper and Industries Ltd.*, which has been referred by Mr. Mitra has no application in the facts and circumstances of the case since in the said decision the Court came to the conclusion that the learned Arbitrator did not decide the points arising in respect of first dispute and has not answered those points and that was the reason for remanding the matter back before the said Arbitrator but in the instant case there is no question of referring the matter before the Arbitrator since the parties at that point of time agreed to have the award set aside and accordingly the order was passed by the Court and the parties did not challenge the same. Therefore, the award has already been published and the disputes between the parties culminated to an award.

19. Hence, this application must fail and is hereby dismissed.