
(2007) 11 CHH CK 0002

In the Chhattisgarh High Court

Case No : Arbitration Application No. 12 of 2007

Smt. Pamela Wasan and Others

APPELLANT

Vs

Omprakash Satyapal Contractors and Another

RESPONDENT

Date of Decision : 16-11-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11(6), 34, 34(2)
Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (2008) 1 CGLJ 439 : (2008) 2 MPJR 42

Hon'ble Judges : Dharendra Mishra, J

Bench : Division Bench

Advocate : Sharmila Singhai, for the Appellant; Vinod Tyagi, for the Respondent

Final Decision : Dismissed

Judgement

Dhirendra Mishra, J.—Heard on I.A. No. 1/07, application for taking additional facts on record, which is supported by an affidavit. Not opposed. The application is allowed.

2. The applicants have preferred this application u/s 11(6) of Arbitration and Conciliation Act, 1996 (for brevity "the Act of 1996") for appointment of arbitrator as per arbitration clause of the dissolution deed of partnership to resolve the dispute arisen between the parties with the averments that the original applicants i.e. Kewal Krishna Wasan and Virendra Kumar Wasan were partners of the Firm of non-applicant No. 1, which came into existence in the year 1963-64 with Satyapal Wasan, Kewal Krishna Wasan and Virendra Kumar Wasan and others as its partners. The partnership deed (in short "the deed") was modified on 1st April 1992 when Shri Naresh Wasan and Smt. Shyama Wasan were included in the Firm as partners. The deed was executed between the partners on 27.4.2000, which came into force w.e.f. 1st April 2000 whereby partners of the above Firm mutually agreed to dissolve the partnership business by retiring the applicants from the said Firm and the assets and liabilities of the Firm were to be taken over by the remaining partners with mutual consent of the

parties. The deed contained an specific clause No. 14, which provided that any difference of opinion regarding dissolution of partnership or regarding the interpretation of any clause, will be referred to arbitration or UMPIRE and decision of the UMPIRE shall be final and binding on all the parties and their legal representatives. In view of the above arbitration clause when Shri K.B. Gorha was nominated arbitrator by Kewal Krishna Wasan for adjudication of the dispute as his claim dated 29.12.2000 remained unresolved, the proposal was accepted by all the parties and the arbitrator, so appointed, proceeded with the arbitration proceedings and on 28th August 2001 an award for a sum of Rs. 5,00,000/-, which was withheld and kept in Firm, was made by the arbitrator.

3. The applicants being aggrieved by the above award challenged the same by filing a petition u/s 34 of the Act of 1996 for setting aside the award before the Learned District Judge, Korba and the District Judge vide order dated 29th March 2005 of Annexure A/2 set aside the award. Thereafter, Late Krishna Kumar Wasan vide notice dated 15.1.2007 called upon the non-applicants to propose the name of an arbitrator as per Clause 14 of the deed within a period of 30 days from the receipt of the notice. However, since the non-applicants failed to act as directed, the instant petition was filed.

4. A subsequent application for taking additional facts on record has been filed and it has been pleaded that the non-applicants sent notice of Annexure A/4 whereby they expressed their disagreement to the appointment of Shri K.B. Gurha as sole arbitrator and the sole arbitrator in its award of Annexure A/5 has mentioned this fact that the non-applicants did not consent to his appointment. The applicants moved an application of Annexure A/6 u/s 34 of the Act of 1996 for setting aside the award dated 28th August 2001 and accordingly, the Learned District Judge has set aside the award.

5. Learned Counsel for the applicants submitted that the appointment of arbitrator without the consent of the non-applicants was nullity. The non-applicants did not participate in the proceedings before the arbitrator, so appointed, and therefore, any award passed by the said arbitrator was void ab initio and as such nullity. The dispute had arisen between the parties with respect to difference of opinion regarding dissolution of partnership or regarding interpretation of any clause of the deed, which was referable to the arbitrator for adjudication as per Clause 14 of the deed. Since the non-applicants, failed to propose name of sole arbitrator within a period of 30 days after they were called upon by the applicants, the instant application for appointment of arbitrator has been made. It is argued that the award passed by the sole arbitrator has been already set aside by the Learned District Judge as both the parties prayed for setting aside of the award, however, the dispute is still alive and therefore, the same may be referred to arbitrator for adjudication.

6. Reliance is placed on the order passed by this Court in the matter of M/s P.D. Maheshwari v. South Eastern Coalfields Ltd. and Anr. M.C.C. No. 60 of 2003, Dharma Prathishthanam Vs. Madhok Construction Pvt. Ltd., , Shree Ram Mills

Ltd. Vs. Utility Premises (P) Ltd., , Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., , McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, .

7. The non-applicants have not filed any reply to this petition. However, it was argued that from the averments in the petition it would be evident that Kewal Krishna Wasan and Virendra Kumar Wasan stood retired from the Firm w.e.f. 1.4.2000 with the mutual consent of the erstwhile partners and they or their successors did not have any right in the movable and immovable properties of the Firm or Satyapal Wasan. Clause 14 of the deed provides for reference of any dispute regarding dissolution of the partnership or regarding interpretation of any clause. The applicants themselves proposed sole arbitrator for referring the alleged dispute arising out of the deed and the same was accepted by all the parties to the dispute and the arbitrator with the consent of all proceeded with the arbitration proceedings and ultimately, an award was made by the said arbitrator. However, the applicants challenged the award by filing application u/s 34 of the Act of 1996 before the Learned District Judge and the same was set aside as the non-applicants in their reply also prayed for setting aside the award. After filing of the petition, the applicants have come up with an entire contradictory pleading that appointment of the sole arbitrator was irregular as the same was unilaterally made by the applicants without consent of the other party to the agreement. The applicants have deliberately suppressed the stand taken by the non-applicants before the District Judge in the proceedings u/s 34 of the Act of 1996. Neither the application u/s 34 of the Act of 1996 nor the reply filed by the nonapplicants to the said application before the District Judge, has been filed along with the instant petition. The applicants have also not pleaded the nature of dispute that has arisen in relation to the deed, which is to be referred to the arbitrator in accordance with Clause 14 of the deed. In these circumstances, the award passed by the sole arbitrator, which has been subsequently set aside by the District Judge, has attained finality and the present dispute, which is sought to be raised by way of reference, would not be competent as the same is barred by the principles of constructive res judicata, which applies to the arbitration proceedings also.

8. Reliance is placed on the decisions in the matter of K.V. George Vs. Secretary to Government, Water and Power Department, Trivandrum and Another, , Ram Charan Lal v. Registrar Co-operative Societies, U.P., Lucknow and Ors. 1985 ALL.L.J. 461 , Talchar Coalfields Ltd. Vs. Central Coalfields Ltd., , Jiwnani Engineering Works Pvt. Ltd. Vs. Union of India (UOI), , Daryao and Others Vs. The State of U.P. and Others, .

9. I have heard Learned Counsel for the respective parties.

10. In the matter of Dharma Prathishthanam Vs. Madhok Construction Pvt. Ltd., it has been held that where the appointment of sole arbitrator is made unilaterally and dispute is referred unilaterally by one party without consent of the other party, the whole procedure of appointment is illegal and the award

made by such arbitrator is void ab initio. However, in view of the averment in the petition and conduct of the parties, the above proposition of law is not applicable in the facts of present case.

11. In the matter of McDermott International Inc. Vs. Burn Standard Co. Ltd. and Others, the Hon"ble Supreme Court while dealing with grounds for setting aside the award u/s 34 of the Act has held that Section 34 provides for supervisory role to the Courts for the review of the arbitral award. Intervention of the Court is envisaged only in the circumstances enumerated u/s 34 of the Act and the Courts cannot correct the errors of the arbitrator, it can only quash the award leaving the parties free to begin arbitration again, if they so desire.

12. In the matter of P.D. Maheshwari (supra), this Court considering the facts of the above case that award in favour of the applicant was set aside with the consent of the non-applicants and also considering the fact that cheques against the award deposited by the non-applicants was returned to the applicant on the submission of the non-applicants that they have no objection if the cheques is accepted by the applicant under protest, inferred from the above conduct of the parties that both the parties agreed for setting aside the award with clear understanding that fresh arbitration proceedings shall be commenced for settling the dispute between the parties arising out of the contract agreement. However, no such factual scenario exists in the present case.

13. In Shree Ram Mills Ltd. Vs. Utility Premises (P) Ltd., the Hon"ble Supreme Court while considering the question of limitation of filing petition u/s 11(6) of the Act of 1996 has held that where the designated Judge reaches to the conclusion that there was a live issue, the question of limitation automatically gets resolved and where the negotiations were still on between the parties, there is no question of starting of limitation period. However, in the present case the objection is not with regard to limitation but the question that has been raised by the other side is that of constructive res judicata as the dispute between the parties stands adjudicated by the passing of an award, which was subsequently set aside by the Court.

14. In the matter of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., the phrase "public policy of India" occurring in Section 34(2)(b) of the Act of 1996 was under consideration and it has been concluded that an arbitral award can be set aside on account of conflict with the public policy of India, that is to say, if it is (i) contrary to (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (ii) is patently illegal or (iii) is so unfair and unreasonable that it shocks the conscience of the court, apart from other reasons mentioned in paragraph 74-A of the judgment. It has also been held that the procedural law cannot fail to provide the relief when substantive law gives the right as it is settled principle of law that there cannot be any wrong without a remedy.

15. In K.V. George Vs. Secretary to Government, Water and Power Department,

Trivandrum and Another, , it has been held that the principles of res judicata or for that matter the principles of constructive res judicata apply to the arbitration proceedings and as such, the award made in the second arbitration proceedings being Arbitration Case No. 276 of 1980 cannot be sustained and therefore, the same is set aside.

16. In the matter of Ram Charan Lal 1985 ALL.L.J. 461 (supra) the Hon''ble Apex Court while dealing with Section 11 of the CPC has held that second arbitration proceedings between the same parties and as regards the same controversy, is barred by general principles of res judicata.

17. In Talchar Coalfields Ltd. Vs. Central Coalfields Ltd., also it has been held that principles of resjudicata or principles of general law are applicable to arbitration proceedings as well as awards. It is also well settled that questions of law can be submitted to Arbitration. Consequently, as a general rule all claims which are the subject matter of the reference to Arbitration merge in the award and after pronouncement of an award, the respective rights and liabilities of the parties in respect of any claim so referred can only be determined in the light of and on the basis of the award. So also, prior to an award being pronounced or even thereafter, no second action can be commenced on the original claim which was the subject matter of the reference. Nor can it be disputed that if an award which has been pronounced between the parties has in fact or can in law be deemed to have dealt with the dispute raised in the suit subsequent to the award second adjudication of the same in the suit would be incompetent. Similar is the principles of law laid down in the matter of Jiwnani Engineering Works Pvt. Ltd. Vs. Union of India (UOI), .

18. In the matter of Daryao and Others Vs. The State of U.P. and Others, the Hon''ble Apex Court while dealing with Section 11 of the CPC has held thus:

The argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Article 32 cannot be accepted. The rule of res judicata as indicated in Section 11 of the CPC has no 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 Petitioner filed under Article 32.

19. From the averments of the applicants and from the documents annexed with the petition the following undisputed facts emerge;

(i) that the partners of the Firm M/s Omprakash Satyapal executed a deed of dissolution of partnership, which came into force w.e.f. 1st April 2000 and by the said deed Kewal Krishna Wasan and Virendra Kumar Wasan retired from the

Firm. The amount of capital for retiring partner stood ascertained and the same was to be paid within 2 1/2 months. However, no interest was payable from 1.4.2000. It was also decided to keep Rs. 5,00,000/- of the retired partners in the Firm for meeting contingent liabilities of income tax of the Firm. However, balance amount, if any, was refundable after clearing liabilities. The retiring partners or their successors had no any right in the movable and immovable properties for the Firm and as per Clause 14 of the deed difference of opinion regarding the deed or regarding interpretation of any clause, was to be referred to the arbitrator whose decision shall be final and binding.

(ii) that the applicants raised a dispute by way of claim dated 29th December 2000 and when the said dispute was not resolved a proposal for appointment of arbitrator was made by the applicants, which was accepted by all the parties to the dispute and the arbitrator proceeded with the arbitration proceedings with the consent of all the parties. An award was made by the sole arbitrator, which was challenged by the applicants by filing an application u/s 34 of the Act 1996 before the District Judge and accordingly, the District Judge vide order dated 29.3.2005 has set aside the award passed by the sole arbitrator as the non-applicants also in their reply prayed for setting aside the award. Subsequently, the applicants have pleaded that the non-applicants did not consent for appointment of Shri K.B. Gurha as sole arbitrator nor they participated in the arbitration proceedings and appointment of the arbitrator was unilateral and as such void ab initio, therefore, subsequent proceedings also became void. In respect of the above pleading a notice sent by the non-applicants through advocate of Annexure A/4 and the award of Annexure A/5 have been filed.

(iii) that after the award was set aside a notice was sent to the nonapplicants calling upon them to propose the name of arbitrator in accordance with Clause 14 of the deed and when the same was not replied to, the instant application for appointment of arbitrator has been filed.

20. Now coming to the first contention of the applicants that the appointment of the sole arbitrator was unilaterally made by the applicants without consent of the non-applicants, as such same is nullity and void ab initio and therefore, the order of District Judge passed on the application u/s 34 of the Act of 1996 is meaningless, is concerned, the applicants have categorically averred in this petition that all the parties to the dispute accepted the appointment of the arbitrator, who proceeded with the arbitration proceedings with the consent of all the parties. In these circumstances, the applicants cannot be permitted to take a diametrically opposite stand as they are estopped from their own admission. Furthermore, the applicants participated in the arbitration proceedings before the sole arbitrator without any objection and thereafter, challenged the award passed by the said arbitrator u/s 34 of the Act of 1996 and in that proceedings the non-applicants also participated and ultimately, the award was set aside.

21. So far as the argument of Learned Counsel for the applicants that the award was set aside by the District Judge on the prayer of both the parties, however,

the dispute between the parties is still alive, therefore, the same may be referred for adjudication to the sole arbitrator as per Clause 14 of the deed, is concerned, the applicants have not filed the application u/s 34 of the Act of 1996 filed before the District Judge nor they have filed reply of the non-applicants, which could reveal the stand of the respective parties before the District Judge and the circumstances under which the award was set aside. There is nothing on record to infer that the award was set aside with the mutual consent of the parties and that the parties agreed to refer their dispute arising out of the deed for fresh arbitration. The instant petition does not mention existence of any specific dispute arising out of the deed, which warrants reference to the arbitrator under Clause 14 of the deed. In the absence of any specific plea with respect to existence of dispute, it is not possible to reach to the conclusion whether the claim was a dead one; or a long-barred claim that was sought to be resurrected and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations.

22. As already stated in the foregoing paragraphs, the principal civil Court while dealing with petition u/s 34 of the Act of 1996 perform supervisory role to review the arbitral award only to ensure fairness. The errors committed by the arbitrator cannot be corrected and it can only quash the award and the parties are free to begin the arbitration again, if they so desire. Thus, parties to the award, if they so desire, may give their consent for setting aside the award and may further participate in the arbitration proceedings as per arbitration agreement. However, there is no such consent, express or implied, which can be inferred from the conduct of the rival parties.

23. In the light of aforesaid discussions, the instant application for referring the dispute between the parties arising out of the arbitration deed to sole arbitrator is held to be barred by principles of res judicata, the same is liable to be rejected and is accordingly, rejected.