

(1992) 07 J&K CK 0003

In the Jammu And Kashmir High Court

Case No : Civil 1st Miscellaneous Appeal No. 43 of 1987 and Cross Objections
No. 85/87

State of J & K

APPELLANT

Vs

Kashmir Electric and Hardware Corporation

RESPONDENT

Date of Decision : 17-07-1992

Acts Referred:

Jammu and Kashmir Arbitration and Conciliation Act, 2002 — Section 39

Citation : (1992) JKLR 252 : (1992) KashLJ 356 : (1993) SriLJ 213

Hon'ble Judges : R.P.Sethi, J

Bench : Single Bench

Advocate : A.V.Gupta, A.Kapoor, Advocates appearing for the Parties

Judgement

1. Aggrieved by the award of the arbitrator, the appellants filed objections in the court below on 10th Sept. 1986, praying therein that the award

filed by the arbitrator be modified in view of the submissions made therein. It was submitted that under the circumstances, detailed in the

objections, the arbitrator was not justified in allowing interest on the balance amount which allegedly remained with held for want of deduction of

General Sales Tax and replacement of broken goods. Items 3, 4 & 5 of the award accepted. However, the liability of payment for the J&K

General Sales Tax which was submitted in the supplementary claim before the arbitrator, was disputed as according to them, no reference had

been made by the Minister for the supplementary claim. It was further stated that the order of supply was issued vide letter dated 20th April, 1982

the acceptance whereof was to be conveyed within 7 days from the receipt of the purchase order by the firm failing which it was to be presumed

that all the terms and conditions stipulated in the purchase order had been

accepted. The firm did not allegedly raise the issue and instead entered into an agreement with the department on 20.10.1992. The contractor never claimed the GST, as the same was not payable. The petitioner in his letter dated 18.4.1986, which was in reference to a clarification sought by the Accounts Officer, Electrical Central Stores Division Jammu. Vide his letter dated 23.3.1984 addressed to the Superintending Engineer, Stores and MM Jammu, never preferred any claim with respect to the GST. It was contended that by virtue of clarification GST was not payable by the department and letter dated 28.4.1984 did not modify the relevant clause of the original contract in any way. It was further alleged that the arbitrator was not justified in fixing his own fees and the award filed by him required modification. The court below after holding that, ""It is a well settled principle of law that the arbitrator's award cannot be set aside on the mere ground that some facts have not been taken into consideration and the arbitrator has passed the award which was factually incorrect nor on the ground that the arbitrator has not given any reason for his findings."" rejected the objections and upheld the award vide the judgment impugned in this appeal.

I have heard learned counsel for the parties and perused the record.

2. Learned counsel for the respondents has raised a preliminary objection regarding the maintainability of the appeal. It has been argued that as the appellants had not prayed for setting aside of the award in the court below, no appeal could be preferred under Sec. 39 of the Arbitration Act.

Sec. 39 of the Arbitration Act provides:

39. Appeal able orders: (i) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorized by

law to hear appeals from original decrees of the Court passing the order:

An order

(i) Superseding the arbitration;

(ii) On an award stated in the form a special case;

(iii) Modifying or correcting an award;

(iv) Filing or refusing to file an arbitration agreement;

(v) Staying or refusing to stay the legal proceeding when there is an arbitration agreement;

(vi) For setting aside or refusing to set aside an award;

Provided that the provisions of this section shall not apply to any order passed by a small Causes Court.

3. A perusal of the section makes it clear that while an appeal lies against refusing to set aside an award, 'no appeal is maintainable against an order

refusing to modify or correct an award'. The appeal does lie against an order modifying or correcting an award. A Division Bench of the Mysore

High Court in case Mohammed Esoof v. V. R. Subramanyam and anr. (AIR 1957 Mysore 78), considered the scope of Sec. 39 and held:

Under S. 39 of the Arbitration Act, while an appeal lies against an order refusing to set aside an award, no appeal lies against an order refusing to

modify or correct an award, though an appeal does lie against an order modifying or correcting an award. It therefore follows that the High Court

cannot in appeal against order refusing to set aside award, consider the point raised by the appellant that the Court below should have gone into

the question whether the award should be modified or not.

Similarly in case M/S Mehar Singh and Sons vs. State of Punjab (AIR 1973 Punjab & Haryana 114), it was held:

..... Section 39 of the Act mentions the orders which are appeal able and provides that appeal lies against the order which modifies or

corrects an award. But no appeal can be preferred against the order, which declines to modify or correct the award. Section 39 of the Act also

does not provide an appeal against the order passed by the Court disallowing the interest from the date of decree, under Section 29 of the Act.

According to Section 17 of the Act, no appeal lies against an award, which was made a rule of the Court and the judgment and decree passed are

not in excess of the award. Since the impugned order declined to modify or correct the award or to remit the same for reconsideration to the

Arbitrator and disallowed interest from the date of decree under Section 29 of the Act to the appellants and the application made by them was

under Sections 15, 16. And 29 of the Act, I do not think that the appeal was competent. Even otherwise, as discussed above, the appeal fails on

merits.

4. It is unfortunate that the case of the appellant was not properly conducted in the court below and in the objections no prayer was made for

setting aside the award nor any ground of misconduct of the arbitrator was referred to. The objections appear to have been tiled in a most casual

manner without realizing the consequences with which the appellantState was likely to be burdened. The appellantState only wanted the

modification of the award, which was declined and the order admittedly is not appeal able.

In view of the fact that the appeal is not maintainable, there is no necessity of examining the other points raised by learned counsel for the appellant.

5. This appeal is accordingly held not maintainable and is dismissed as such along with CrossObjections No: 65 of 1991.