

(2009) 10 BOM CK 0059

In the Bombay High Court

Case No : Misc. Civil Application No. 758 of 2007

Surendra Ramnarayan Shivhare

APPELLANT

Vs

Chairman cum Managing Director, Western Coalfields Ltd. and
Chief General Manager, Western Coalfields Ltd.

RESPONDENT

Date of Decision : 05-10-2009

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 12(1), 20, 28

Citation : (2009) 6 BomCR 266 : (2009) 111 BOMLR 4465

Hon'ble Judges : C.L. Pangarkar, J

Bench : Single Bench

Advocate : A.R. Prasad, for the Appellant; S.C. Mehadia, for the Respondent

Final Decision : Dismissed

Judgement

C.L. Pangarkar, J.—Present applicant has filed this application for review of the order passed by this Court on 25.01.2007 whereby Civil Revision Application filed by present non applicant was allowed.

2. Facts giving rise to this review application are as follows:

Applicant was entrusted with a work of repairs to certain road by the non applicant under a contract. The contract contained a clause that in case of a dispute between parties the dispute shall be referred to Arbitrator and the non applicants Managing Director would appoint Arbitrator. The dispute arose. A reference was sought by the applicant by a notice. Non applicant ignored the notice. Later proceedings u/s 20 were filed and the non applicant agreed for a reference. The non applicant appointed Shri S. L. Doshi Chief Mining Engineer serving with the non applicant as an Arbitrator and made a reference to him by memo dated 15.07.1987. The applicant felt that Shri S. L. Doshi was not an independent person and was biased. Applicant however appeared before the Arbitrator and filed a statement of claim on 09.12.1987. Non applicant also filed its statement before the Arbitrator on 05.10.1987. Applicant during the course of

proceedings found that the Arbitrator was not acting fairly. Applicant therefore applied u/s 5 and 11 of the Arbitration Act, 1940 to the Civil Court for revoking the reference to Arbitrator and to replace Shri S. L. Doshi by another Arbitrator. This application was filed on 22.08.1988. Nothing was done in the matter for quite long time. Vide Ex. 41 the Civil Court was informed on 04.10.02 of the death of Arbitrator Shri Doshi. The Civil Judge passed an order on 13.12.2002 directing both the parties to suggest the name of new Arbitrator. Accordingly by pursis Ex. 42 the applicant suggested name of Shri I. K. Adwani. Later the Civil Judge passed order on 05.07.2003 appointing Shri I. K. Adwani as Arbitrator.

3. This order was challenged in revision before this Court by the present non applicant. Upon hearing, this Court found that reference to Shri Doshi had become in fructuous as no award was passed within 4 months and therefore allowed the revision and set aside the order of Civil Judge. It is this order of which review is sought.

4. Shri Prasad learned Counsel for the appellant submits that this Court had failed to take into account the application for extension of time filed vide Ex. 33 and had not taken into consideration in proper perspective the provisions of law. He submits that trial Court as well as this Court should have taken into account this fact and if this application is taken into account time is deemed to be extended by the Court. He also submits that the fact that trial Court appointed a new Arbitrator itself suggests that the time was extended by the trial Court.

5. Shri Mehadia learned Counsel on the other hand submits that the time of 4 months is statutorily fixed and once the time expires the Arbitrator becomes functus officio. He submits that revocation order after the arbitrator becomes functus officio is in fact a redundant order. He also submits that there is no question of revocation once the Arbitrator ceases to hold the appointment. According to him in such cases the only course open is to file suit.

6. Entry No. 3 in the Ist Schedule of Arbitration Act says that the Arbitrator is bound to make the award within 4 months or within time extended by Court. In the instant case the applicant had appeared before the Arbitrator and had filed statement of claim on 09.12.1987. Obviously Arbitrator had entered into a reference at least from that date. Award as per Entry No. 3 should have been passed by 09.04.1988. M. J. C. No. 141 of 1988 was filed on 22.08.1988 i. e. 4 months beyond expiry of time, statutorily stipulated. Ex. 33 the application for extension of time was filed on 13.09.1993. Be that as it may, the material question is whether revocation can be made after 4 months and a new Arbitrator could be appointed.

7. Shri Mehadia learned Counsel for the non applicant submits that it cannot be done. He relies on a decision of the Calcutta High Court in *Arbn Hindusthan Steel Vs. Appejay Pr. Ltd.*, . The High Court relying on a decision of the Supreme Court in *Hari Shankar Lal Vs. Shambhunath Prasad and Others*, observed as under:

(6) It will be noticed from what has been stated above that the time to file an

award expired on the 12th day of April 1964, that is to say, after the expiry of four months after the date of entering on the reference on December 12, 1963. in view of the provisions of Section 28 of the Arbitration Act read with Clause 3 of Schedule I of the Arbitration Act the arbitrators have become functus officio on the expiry of the 12th day of April, 1964. This view receives support from AIR 1931 289 (Privy Council) . This matter, however has been clinched beyond doubt by the majority view of the Supreme Court in the case of Hari Shankar Lal Vs. Shambhunath Prasad and Others, . in this connexion reference maybe made to the observations of the majority view of the Supreme Court in which they have observed, inter alia as follows:

And in that event, after the expiry of the said four months the arbitrators become functus officio unless the period is extended by Court u/s 28 of the Act; such period may also be extended by Court though the award has been factually made.

Their Lordships again observed as follows:

So till the time is extended the award cannot be made though when extended the words "factually made" may be treated as award made within the time so extended. To put it differently if the time was not extended by Court the document described as award would be treated as non est.

(7) In the fact of these observations it is difficult for me to accept the contention advanced by Mr. D. K. Sen appearing on behalf of the respondent that the observations of Reghubardayal, J. to the following effect "the competency of the arbitrator to act in pursuance of the reference arises out of the reference and is not dependent on the period during which they ought to make the case" is only an elucidation of the rule laid down by the majority of their Lordships. In this case there was no application for extension of time after the expiry of four months and there is still no application for extension of time before me. Hence, in my opinion there can be no question of revoking the authority of an arbitrator when in law the arbitrators do not exist and/or cannot function. Hence the prayers for removal and revocation of the authority on these grounds are misconceived and accordingly the consequential prayers that the said arbitration agreement shall cease to have effect with respect to the differences referred to the said arbitrators.

(10) In this connection it was urged by Mr. Sen on behalf of the applicant that the revocation of authority not only denudes the arbitrators of their authority but also puts an end to the reference so that the fresh arbitrators may not be appointed in respect of the same disputes and differences. In this connection reliance was placed on the decision of Prafulla Chandra v. Panchanon 50 Cal WN 287 at p. 294 : AIR 1946 Cal 427 at p. 433 where His Lordship Chakravarti C. J. as he then was observed inter alia "when the section speaks of the authority of the arbitrators it means the reference." Sub-clause (a) of Clause (2) of Section 12 militates against it. In the case of Juggilal Kamlapat Vs. General Fibre Dealers

Ltd. (And Connected Appeal), the Supreme Court has expressed a contrary view. Hence, the observation in Prafulla Chandra 50 Cal WN 287 : AIR 1946 Cal 427 is no longer good law.

(11) The allegations relied upon for removal of the arbitrators after setting out the facts already stated hereinbefore is summarised in paragraph 8 of the petition which is as follows:

In the premises the said arbitrators have not (sic) become functus officio and are not proceeding with the said reference since the said December 4, 1964.

In my opinion, notwithstanding the wide import given to the words "is incapable of acting" in Section 8 it is not wide enough to embrace a case where he is incapable by reason of the fact that he has become functus officio due to the expiry of the time fixed by Rule 3 of Schedule I and/or by reason of the service of a notice u/s 35 of the Act. In these circumstances, in my opinion the arbitrators followed the right course by refraining from proceeding with the arbitration because they had become functus officio after the expiry of four months. Assuming they had not become functus officio then the decision given by them was bound to be invalid u/s 35. In my opinion, it cannot be said in these circumstances that the arbitrators had failed to use reasonable despatch in proceeding with the reference and in making an award when the arbitration proceeding has been brought to an end by flux of time and by reason of a notice u/s 35. Section 11 makes provision for removal of an arbitrator in certain circumstances. Section 12(1) comes into play when the Court has removed an arbitrator u/s 11 and where an application is made to the Court to fill up the vacancy. Likewise Clause 2 of Section 12 is attracted when inter alia there has been a removal u/s 11 and an application is made by a party to the Court to fill up the vacancy. There is, in my opinion, no independent power to remove an arbitrator under Clause 2 of Section 12. The cases relied upon in my opinion do not support the contention of Mr. D. K. Sen, appearing for the applicant. In my opinion no relief under Clause (b) of Section 12 or Clause (c) can be given in view of Sections 11 and 12 of the Arbitration Act. Hence in the result the application is dismissed and the respondent will have only half the costs."

Now if the observations particularly in para 7 of the judgment are seen it would be clear that the decision does not lay down the ratio that once time of 4 months is over no action can be taken under the Arbitration Act and the parties should be relegated to Civil Suit. I would lay stress on the following observation of the learned Judge in para 7:

In this case there was no application for extension of time after the expiry of four months and there is still no application for extension of time before me. Hence, in my opinion there can be no question of revoking the authority of an arbitrator.

Now therefore the purport of this is that had there been application even before the High Court then there would have been some order for either extension or no extension even after lapse of 4 months. The learned Judge seems to be of the

opinion that such application for extension of time could be entertained and there would be no necessity to relegate the parties to the civil suit.

8. In a decision reported in *M.S. Kuanna and Others Vs. New Delhi Municipal Committee and Another*, Delhi High Court observes as follows while dealing with the same question and dealing with the same decision of the Supreme Court in *Harishankar's* case as well as decision of the Calcutta High Court. The Court observes as under:

It would be seen that while u/s 11 the power for removing the arbitrator is limited to the grounds of his failure to use all reasonable despatch in entering upon and proceeding with the reference and making the award or his misconduct, u/s 28 the discretion of the Court has not been limited by referring to any grounds therein and this power of extension of time can be exercised not only before the expiry of the statutory period of four months but also thereafter and again not only before the making of the award but also after the making of the award. Keeping these factors present in mind we may come across cases where one party is not allowed to make an application u/s 11 of the Act relying upon the view expressed in *Arbn Hindusthan Steel Vs. Appejay Pr. Ltd.*, . It may be possible that the award is made after the lapse of the statutory period of four months and the invalidity thereof on account of the arbitrator having become *functus officio* may be removed by the court extending the time u/s 28 of the Act for making the award. In such cases the party who had desired to make an application u/s 11 of the Act for revoking the authority of the arbitrator on the grounds specified in that provision of law, would be left askance and helpless. In the fact of the possibility of such a contingency which may arise quite often, the view taken in *Arbn Hindusthan Steel's* case with respect, does not appear to lay down the correct proposition of law and consequently the analogy of AIR 1931 289 (Privy Council) and *Hari Shankar Lal Vs. Shambhunath Prasad and Others*, (majority judgment) does not afford a proper guide for determining the pointy on hand and for the reasons referred to above what looks to be a more reasonable point of view is that an application u/s 11 of the Act for revoking the authority of an arbitrator is maintainable even after the expiry of the statutory period of four months reckoned from the date of the arbitrator's entering upon reference. This view is, however, subject to the exception that if an application u/s 28 of the Act for extension of time for making and pronouncing the award is rejected by the Court and then any party moves the court for the removal of the arbitratory.

Delhi High Court while dealing with the case has quoted the observations of the Supreme Court. If those observations of the Supreme Court and the High Court are seen it would be clear that even an *expost facto* extension can be granted. It even says that when an award is passed beyond stipulated time that would be void but if extension is granted even after expiry, that would validate the award. I find that the decision of the Delhi High Court lays down the correct proposition . In such cases *expost facto* extension could be granted and I give here few lines reasons:

When the Arbitrator enters into a reference and completes the formalities of recording the evidence and hears the parties and closes the proceedings for passing an award an occasion may arise that he may not be able to pass an award at the eleventh hour for unavoidable circumstance. The parties may not be sure if the award would be passed on the last day after the proceedings are closed and are fixed for passing of the award. Are they supposed to apply for extension of time a week in advance apprehending that the award may not be passed and it would be necessary to seek extension? Infact parties are not supposed to apply until last day or may choose not to apply for they may still carry an impression that award would be passed on the last day. Is the law going to punish the parties for carrying a reasonable impression of award being passed on the last day. A provision cannot be interpreted in that way. Question of seeking extension from Court would arise only if the parties come to know that the award has not been passed within stipulated time.

9. In the case at hand the applicant had applied for revocation and substitution of the new Arbitrator. The Arbitrator died during the pendency of that application. Further vide Ex. 33 applicant had certainly applied for extension of time also. Therefore the learned Judge did have an application before him for extension of time when he passed an order appointing Shri Adwani as an Arbitrator. The fact that the learned Judge made an appointment of new Arbitrator also suggests that he thereby impliedly extended the time. In the circumstances, I find that the order passed by this Court in revision needs to be recalled. Order passed by this Court is therefore recalled and the revision stands dismissed with no order as to costs.