

SUPREME COURT HIGH COURT

State of Maharashtra

Vs.

S.D. Shinde & Co.

C.A.No.640 of 1998

(V.N. Khare CJI. with S.B. Sinha J.)

17.09.2003

ORDER

S.B. Sinha, J.

1. The appellant and the respondent entered into an agreement under which the respondent undertook to construct project. The appellant herein from time to time issued work orders which the respondent alleges to have completed. It appears that certain disputes arose between the appellant and the respondent as a result of which the respondents filed a petition under Section 20 of the *Arbitration Act, 1940* (hereinafter referred to as "the Act") for appointment of an arbitrator. An arbitrator was appointed who gave an award. Subsequently, the arbitrator filed an *interim* award before the Civil Judge (Sr. Division) for being made rule of the Court. After the notices were issued, the respondent filed an application for making the said *interim* award a rule of court. An *interim* order was passed whereby the appellant was directed to pay the final bill to the respondent in relation whereof an application was filed by the respondent purported to be under Section 18 of the Act. Civil Suit No. 44/1995 was finally decided, whereby the award dated 21.1.1995 was set aside the matter was remitted back for fresh arbitration and the sole arbitrator was directed to reconsider the matter. The said directions are as under:

"The plaintiff petitioner, has already observed, wants a decree in the terms of modified Award in the sense that whatever has been awarded to him under doubt retained in addition to awarding his claim to loss of profit on illegal termination of the contract and has claim to waiver of interest while the Defendant, Respondent wants it to be either set aside or remitted. The discussion in the foregoing and my various findings already recorded lead me to conclude that the award, at this stage, does not deserve either confirmation or modification at my hands. On the other hand, it also does not deserve setting aside once for all. On the other hand, it deserves to be set aside for remittance back to the Arbitrator for going into the entire Arbitration proceedings afresh, on the basis of points of dispute already referred to him by the learned Civil Judge who appointed him under Order dated 25th May, 1993, giving full opportunity to both the parties to lead oral and documentary evidence, if they so

desire, and to ensure that all the material documents are brought before him under his instructions. Hence, issue No. 10 is answered accordingly."

2. The respondent herein filed a revision application before the Aurangabad Bench of the Bombay High Court. By reason of the impugned order, a learned Judge relying on and on the basis of preparation of the final bill by the Executive Engineer directed the appellant herein to pay a sum of Rs. 26,62,856/- together with interest accrued thereon on bank guarantee being furnished by the respondent herein. The material portion of the order of the High Court is as under:

".....It appears that at the instance of the application of the respondents the learned trial Judge has set aside the *interim* award and remanded the matter back to the sole arbitrator, for fresh hearing. The respondent has already deposited Rs. 26,62,856/- in Sangli Urban Bank Branch at Beed, in response to the *interim* order passed by the learned Civil Judge. The Government by its letter dt. 21st of Oct., 1995, has accorded its approval for payment of Rs. 27,76,604/- to the present petitioner. The Executive Engineer's reply to the notice issued by the Civil Judge is at Page No. 116 of the paper book and the letter of the Government is at page No. 124. If these two documents are taken into account, the present petitioner is definitely entitled to get the amount already deposited in the Sangli Urban Bank's Branch at Beed. The matter is very old and as per the *interim* order passed earlier, the Government has deposited the amount to be paid to the petitioner. The Government has already given approval for payment as reflected in the letter of the Government dt. 21st of Oct. 1995."

3. The award had already been set aside by the Civil Judge. No award therefore was in existence which was capable of execution. Unless and until the order of the Civil Judge was set aside and the award was directed to be made a rule of court, no decree in terms thereof would have been drawn up. The execution case would have been maintainable only after preparation of the decree in terms of the award after the same is made a rule of court. In the absence of any award, therefore in our opinion the High Court had no jurisdiction to pass the impugned order. In any event, in the name of an *interim* order, the High Court could not have passed the impugned order the effect of which will be that not only the order of the Civil Judge is set aside, the decree also would stand executed. Such an order at the *interim* stage is not contemplated in law.

4. Under such circumstances, the impugned order deserves to be set aside. We, accordingly, set aside the order under challenge and send the matter back to the High Court for decision of the civil revision on merits. The bank guarantee furnished by the respondent shall be renewed for a period till the revision is decided by the High Court.

5. The appeal is allowed. There shall be no order as to costs.

Appeal allowed.