

SUPREME COURT OF INDIA

K.K. John

Vs.

State of Goa

(V.N. Khare and S.B. Sinha JJ.)

18.09.2003

ORDER

1. The interpretation of Sub-section 3 of Section 16 of the Arbitration Act, 1940 (hereinafter called, for the sake of brevity, 'the Act') arises for consideration in this appeal, which arises out of the judgment and order dated 31st July, 1997 passed by the High Court of Bombay, Appellate Side, Panaji Bench, Goa in Appeal No. 7 of 1997.

2. The appellant and the respondent herein entered into an agreement whereby and whereunder the appellant undertook to carry out certain constructions. The agreement also provided for resolution of dispute by an Arbitrator. It appears certain dispute arose as a result of which the appellant herein preferred a claim on 19th September, 1990 and subsequently on 26th October, 1990, first reference was made. On 12th March, 1991, the respondent herein terminated the agreement. As a result of termination of agreement, the appellant herein made another reference on 26th June, 1991 and put in second claim on 27th September, 1991. The Arbitrator appointed, with the consent of the parties, gave an Award on 25th February, 1994. Thereafter the Arbitrator filed an Award for being made a Rule of the Court. The appellant filed an objection before the learned Civil Judge, Senior Division, Mapusa, in the State of Goa. The learned Civil Judge in terms of the order dated 6th July, 1995 elaborately considered the contentions raised by the appellant herein and came to the following conclusion:

"20. There appears some glaring mistake under item No. 1 and 2 when the arbitrator mentioned that the earth excavation is nil though the quantity appear to have been admitted by the respondent. But on this ground the award cannot be set aside.

21. Similarly, the claim No. 2 though the arbitrator has stated "could not be ascertained" there is no explanation as to why he could not do so and if it would not be ascertained what would be the finding to that effect."

3. The learned Civil Judge, Senior Division, observed thus:

"Considering the no objection of the learned Advocate for the respondent, I feel that the award has to be remitted on two points as under:

(i) To decide the additional terms and reference by order dated 26.6.91 regarding the illegal closure of the contract and

(ii) The undermined part of item No. 1 and 2 as mentioned in page 7 of the award, to specify the term "could not be ascertained".

4. The Arbitrator in concluding part of the order held that the other part of the Award stands not affected by the said order.

5. On 10th October, 1995, the Arbitrator resigned. Under such, circumstances, the appellant herein instead of moving an application under Section 8(b) of the Act, filed a petition under Section 20 thereof for appointment of a new Arbitrator on 6th February, 1996. On 28th May, 1997 the learned Civil Judge, after hearing the parties, was of the view that since the earlier Arbitrator did not give his Award within time, the whole Award has become void. Consequently, he appointed a new Arbitrator with the consent of the parties with a direction to the Arbitrator to give a de-novo Award. Aggrieved, the State of Goa preferred an appeal before the High Court. The High Court was of the view that since the other part of the Award remained intact, the proceeding was required to be restricted to the aforementioned two points only on which earlier the Court wanted determination and, therefore, it was not open to the learned Civil Judge to have directed to resolve the dispute de-novo. It is against the said judgment the appellant is in appeal before us.

6. Mr. Prashant Bhushan, learned counsel appearing for the appellant raised two submissions. The first submission is that since the two points on which the learned Civil Judge required determination were incapable of being decided, therefore, the Arbitrator was required to resolve the dispute de-novo. The second submission is that once the Arbitrator has resigned and could not give the Award within the stipulated period, the Award was rendered void under Sub-section (3) of Section 16 of the Act.

7. We do not find any merit in both the submissions. So far the first submission is concerned that the appellant did not challenge the order of the learned Civil Judge dated 6th July, 1995, whereby and whereunder the learned Civil Judge held that the other part of the Award shall remained intact and only two points were required to be determined. The said order has attained finality. The same, thus, cannot be permitted to be reopened. The submission of Mr. Prashant Bhushan to the effect that before the period for filing the revision application expired, the Arbitrator resigned and, thus, there was no occasion for the appellant to question the said order is misconceived. Irrespective of the resignation of the Arbitrator, the judgment of the learned Civil Judge remained operative and enforceable. If, thus, the appellant was in any manner aggrieved thereby, the only remedy open to it was to move the High Court. It having failed to do so cannot now be permitted to raise the said question again before this Court. It is trite that what could be done directly cannot be permitted to be done indirectly. So far the second submission is concerned, it is relevant to set out Section 16 of the Arbitration Act, 1940, which reads as under:

"16. Power to remit award (1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or empire for reconsideration upon such terms as it thinks fit

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(a) where the award has left undermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the fact of it.

(2) Where an award is remitted under Sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court:

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under Sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed."

8. A perusal of Sub-section (1) of Section 16 shows that the Court may from time to time remit the Award or any matter referred to arbitration to the Arbitrator or Umpire for reconsideration upon such terms as it thinks fit. Thus, Sub-section (1) of Section 16 is in two parts and talks of two distinct factors; one is for remission of the entire Award and the other 'any other matter'. Whereas Sub-section (3) of Section 16 of the Act provides that an Award remitted under Sub-section (1) shall become void on the failure of the Arbitrator or Umpire to reconsider it and submit his decision within the time fixed, it is silent as regards 'any other matter'. It is well settled principle of law that no word used in a statute should be presumed to be surplus. In the event the contention of Mr. Prashant Bhushan is accepted, the words 'or any matter referred to arbitration' become otiose. Sub-section (3) of Section 16 is referable to Sub-section (1) thereof. It is not in dispute that an Award could be good as regard one part thereof and bad as regards the rest. In Russell on Arbitration 19th Edition at page 484 it is stated:

"An award bad in part may be good for the rest. If, notwithstanding that some portion of the award is clearly void, the remaining part contains a final and certain determination of every question submitted, the valid portion may well be maintainable as the award, the void part being rejected."

9. In the present case, we find that the entire Award was not remitted to the Arbitrator. The Arbitrator was only required to give determination on two points, and therefore, Sub-section (3) is not applicable in the present case. The Parliament advisedly has restricted Sub-section (3) of Section 16 of the Act to an Award which would mean the whole Award or a part of it. The valid part of the Award always remains enforceable in a Court of law.

What can be held to be void is that part of the Award which has not been made a Rule of Court by sustaining the objections raised with regard thereto inter alia on the ground that the same suffers from an error apparent on the face of the record or for any other reason; in the event the Arbitrator or Umpire fails to reconsider it and submit his decision within the time fixed therefore by the Court. In other words, the word 'Award' within the meaning of Sub-section (3) would also include a part of the Award, which has been the subject matter of the order of remission by the competent Court. In any view of the matter the applicability of Sub-section (3) of Section 16 of the Act, in the facts and circumstances of the present case, does not arise inasmuch as the matter is still pending before the Arbitrator. This view of ours find support from the following:

10. Johnson v. Latham, reported in 1851 (20) Law Journal 236 at 238 reads:

"Suppose an award good as to three points, and bad as to the fourth, and sent back as to that alone, as at present advised, I am of opinion that the arbitrator is functus officio as to the three, and cannot

alter his judgment as to them."

Para 618 of Halsbury's Laws of England reads as:

"Partial remission. The whole or only a part of an award may be remitted; in the former case the award so remitted is of no effect, in the latter only that portion of the award which is remitted is avoided, and the remainder is valid and enforceable."

11. Para 19 of 74 Calcutta Weekly Notes reads as:

"This very point may be considered from another angle. Under Section 16(1) of the Act there are two kinds of remission, viz. (I) remission of the Award and (II) remission of any matter referred to the arbitration. In the instant case if we proceed on the footing that only certain matters and not the Award were remitted by the court below for reconsideration-the question arises whether the Award will be void under Section 16(3) of the Act in such cases even if the arbitrator fails to reconsider these matters and submit his decision within the time fixed. It appears that, although the court has power to remit any matter referred to the arbitration under Section 16(1) of the Act the consequence that follows on the arbitrator's failure to comply with the court's direction to reconsider and submit his decision on such matters is not the same. Under Section 16(3) it is only when the Award is remitted and the arbitrator fails to reconsider and submit his decision, the Award shall become void. But not so, in cases where only certain matters are referred to for this purpose by the court as, clearly, the words "any matter" referred to the arbitration are significantly absent in the provision of Sub-section (3) of Section 16 of the Act and that only shows, in such cases Section 16(3) may not have any application at all. In other words, it may be said that if there is any failure of the arbitrator to reconsider and submit his decision on certain matters referred to him the Award does not become void; In this connection we may usefully refer to a passage in Sarkar's Tagore Law Lectures, 1942 on the 'The Law of Arbitration in British India' in which it is stated (at page 207, printed Edition 1942) as follows:

"...Under Sub-section (3) of the Section 16 an award remitted becomes void on failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed, but there is no provision to cover the case where instead of the award, 'any matter referred to arbitration' is remitted. In re Aitken's Arbitration, (1857) 8 Jur. (N.S.) 1296, only one question out of several left undecided was remitted. Apparently in a case like this, Section 16(3) has no application."

Even so, we do not think it necessary to decide finally this aspect of the matter in the facts and circumstances of the present case. For the reasons, however, already given the question of superseding the arbitration under Section 19 of the Act on the ground of 'the Award' being void, does not arise at all."

12. Page 494 of Russell on the Law of Arbitration states:

"Invalidity of remitted award

An award when remitted may cease to have any validity.

An award made by an arbitrator appointed to assess compensation under the Lands Clauses Act 1845 was remitted at the request of the claimants. For seven months nothing was done, and then, on

the claimants notifying their desire to have the compensation settled by a jury, the railway company applied for an extension of time to make the amended award. The C.A., on account of the delay, refused the application and left the matter to go before a jury for determination: *Re Dare Valley Ry.* (1869) L.R. 4 Ch. 554.

But where only one or more matters out of several are remitted, a question may arise whether the award remains valid as regards the matters therein not remitted. "What became of the award as to the residue of the matters which were not sent back pending the second reference? It seems to be in a manner suspended." (Per Erle J. *Johnson v. Latham* (1851) 20 L.J.Q.B. 236 at p. 238). Apparently, therefore, the part not remitted will continue valid."

13. In *Brahma Swaroop Gupta v. Diwan Chand* (sic) , , a Division Bench of the Calcutta High Court considered the question as regards the order of remission in relation to the whole Award and some of the matters referred to Arbitration in the following terms:

"7. If the whole award is remitted, the effective award is the second award, see *Brearcy v. Kemp*, (1855) 24 LJ QB 310 at 312. On such an order being made, the arbitrator must make a fresh award on all the matters referred to arbitration. Section 16(3) shows that on the failure of the arbitrator to reconsider the award and submit his decision within the time fixed, the award remitted to the arbitrator becomes void, see also *Mohun Kishen v. Bhoowun Shyam*, 7 Suth WP 406. In this context it would appear that the first award is avoided altogether also on the making and filing of the fresh award, see *Ganpatrai and Sons v. Ramgopal Nanda Kishore*, 59 Cal WN 807 at p. 809: .

8. But if only one or some of the matters referred to arbitration is remitted to the arbitrator for reconsideration, pending the second reference, the award as to matters not sent back to the arbitrator seems to be in a manner suspended. The arbitrator is *functus officio* as to those matters and cannot alter his judgment as to them, see (1851) 20 LJ QB 236 at p. 238. The order under Section 16(1) may be made on such terms as the Court thinks fit. The Court may, therefore, give directions to the arbitrator as to the form of the fresh award. The arbitrator is bound to abide by and carry out the directions of the Court in this behalf. In the absence of any such direction the arbitrator acting under an order referring back some of the matters for reconsideration, must make a fresh award, confirming and repeating the first award as to matters not sent back which he could not alter "as it were a dry pen", thus the fresh award would embrace all matters originally referred, and in the result the first award would become null and inoperative, see (1851) 20 LJ QB 236 at pp. 239 and 240. In that case it was held that as the first award became thus null, the Master's allocated for costs issued under it also became null though the second award repeated the terms of the first award as to costs. In this context the observation in *Halsbury's Law of England*, 3rd Edition, Vol. II, Art. 122, page 57 to the effect that where only a part of the award is remitted, the remainder is valid and enforceable, appears to be too broad. I am, however, inclined to think that where the order of reference back of one or some of the matters referred to arbitration specially directs the arbitrator to make his fresh award limited to the matters remitted to him, the fresh award must be limited to those matters and consequently the first award with regard to the matters not remitted to the arbitrator would remain operative."

14. In *Goverdhan Dass v. Gaya Prasad and Ors.*, reported in ILR 1981 Allahabad at page 310, K.N. Singh, J., (as His Lordship then was), followed the decision of the Calcutta High Court in *Brahma Swaroop Gupta's* case, stating as under:

"If the court instead of referring the entire award remits only certain matters for reconsideration to the arbitrator and if the arbitrator fails to submit his award within time specified by the court, the consequence as contemplated by Section 16(3) would not arise. This would be clear on a close scrutiny of the language used in Section 16(1) and Section 16(3) of the Act. The consequence contemplated by Section 16(3) would arise only when the entire award is remitted as Section 16(1) confers power on the court either to remit the entire award or to remit any matter for consideration. By enacting Section 16(3) the Legislature has laid down that if the entire award is remitted for reconsideration and the arbitrator fails to consider the same within the time specified by the court, the entire award would become void but that situation would not arise in a case where only certain matters are referred to the arbitrator for reconsideration. Therefore Section 16(3) will not be applicable and the award in respect of those matters which are not remitted to the arbitrator for fresh award would become final between the parties."

15. Yet again in *Mehta Teja Singh and Co. v. Fertilizer Corporation of India Ltd. and Anr.* , , the law has been stated in the following terms:

"(9) The order under Section 16(1) may be made on such terms as the Court thinks fit. The Court may, therefore, give directions to the arbitrator as to the form of the fresh award. The arbitrator is bound to abide by and carry out the directions of the Court in this behalf. In the absence of any such direction the arbitrator acting under an order referring back some of the matters for reconsideration, must make a fresh award, confirming and repeating the first award as to matters not sent back which he could not alter 'as it were with a dry pen', thus the fresh award would embrace all matters originally referred, and in the result the first award would become null and inoperative.

"Where the order of reference back to on or some of the matters referred to arbitration specially directs the arbitrator to make his fresh award limited to the matters remitted to him, the fresh award must be limited to those matters and consequently the first award with regard to the matters not remitted to the arbitrator would remain operative."

Shri Chawla has also referred us to *Russel on Arbitration* (17th Edition) and has submitted that the observations at page 305 that not only an award but the matters or any of them can be remitted, are based on a misappreciation of the ratio decidendi of the English decision in *Johnson's case* (1851) 20 LJ QB 236. Same comment has been made in regard to paragraph 122 of *Halsbury's Laws of England*, Third Edition, Vol. II."

16. We agree with the views expressed in the aforementioned decisions.

17. For the aforesaid reason, we do not find any merit in this appeal. The appeal fails and is, accordingly, dismissed. There shall be no order as to costs.