ANDHRA PRADESH HIGH COURT

Union of India

Vs.

South India Corporation Madras (Private) Ltd

A.A.O. No. 290 and Civil Revn. Petn. No. 1568 of 1958

(P. Chandra Reddy, C.J. and Mohd. Ahmed Ansari, J.)

09.09.1958. 17.10.1959

JUDGMENT

Ansari, J.

1. Messrs. South India Corporation (Madras) Private Ltd., the respondent in these Civil Miscellaneous Appeal and Revision Petition, had entered into a contract with the Government of India on 20-12-1953. Thereby the respondent had undertaken to construct domestic accommodations at the Naval Armament Depot, Vizag for Rs. 11,82,950. The agreement was subject to the several clauses contained in the General Conditions of Contracts with the Government, whose clause 65 provides among other things that no claims would be entertained after the receipt of the final bill in respect of measurement and lump-sum contract. Clause 67 of the conditions reserves the right to the Government to carry out a post-payment audit and an examination of the final bill including ail supporting vouchers, abstracts etc., and thus provides for the recovery of excess sums should it be paid to the contractor. By clause 69 all disputes between the parties to the contract arising out of or relating to the contract are after notice by either party referable to sole arbitration of an Engineer officer to be appointed by the authority mentioned in the tender. The respondent had presented the final bill of 7-6-1956, which has the certificate that they had no further claim under the contract beyond the net amount of the bill, which was mentioned as Rs. 1,25,927.48 and a cheque for the sum of Rs. 1,25,456/5/- was issued. There is on the back of this bill a receipt also for Rs. 1,25,456-5-0 which contains the following words :

> "I have no further claim in respect of the" and the last line on the fourth page of the bill contains the words "contract or works Order with Nos....."

After sending the bill the respondent on 19-6-1956 had put forward a claim of having suffered Rs. 1,20,577 as damages due to the breach of contract by the Government of some of the terms of the contract and for extra work; but the claim was rejected on 29-9-1956; and the contractor received the final payment as mentioned already on 22-1-1957. The respondent by their letter of 19-3-1957 again wrote that the no-claim certificate in the bill did not cover the extra claim

preferred by them and under these circumstances the matters may be reconsidered or otherwise it may be referred to an arbitration. Thereafter the Engineer-in-Chief, Army Headquarters appointed Col. A. L. Gomes as the sole arbitrator in terms of the arbitration clause of the General Conditions of Contracts mentioned earlier. This was done by a letter dated 14-5-1957.
The arbitrator issued notices and each party had put forward claims and counter-claims. The legal position taken by the Union Government before the arbitrator is that the claim for damages and for the extra work amounting to Rs. 1,20,577 was barred in face of the final bill of 7-6-1956, receipt of 22-1-1957 endorsed on the said final bill, the letter from the contractors of 19-6-1956 and the reply rejecting the claim. The arbitrator thought it proper to use his powers under Section 13(b) of the Indian Arbitration Act, and referred a special case for the opinion of the Subordinate Judge, Vizagapatam, on the following point of law :

> "Whether the claimants, Messrs. South India Corporation (Madras) Private Ltd., are debarred and precluded from making all or any of the claims they have made in the face of the final bill dated 7-6-1956 and receipt dated 22-1-57 endorsed by the claimant on the said final bill attached thereto, and the letter dated 19-6-56 from the claimants to the respondent and the reply thereto dated 29-9-56 from the respondent to the claimant, also attached thereto".

The Sub-Judge on 9-9-1958 has given the opinion that though clause 65 of the General Conditions of Contracts provided that no claim would be entertained after the receipt of the final bill, yet it has to be read in conjunction of clauses 67 and 69 of the aforesaid General Conditions, and that having regard to the circumstances relating to the bill as well as the action of the Government in referring the matter to the sole arbitrator and to the equities in the matter, the claimants were not debarred and precluded. In other words the opinion given by the Subordinate Judge is that the final bill and the receipt dated 22-1-1957 as well as the letter of 19-6-1956 and the reply thereto rejecting the claims do not preclude the respondent from making the claim against the Government. The Subordinate Judge in particular has relied on *Neuchatel, Asphalte Co. Ltd. v. Barnett*[1], where Denning, L. J., among other things has observed that printed forms should not be made a trap for the unwary.

2. Against this the Union Government has filed a C. M. A. 290/58 as well as C. R. P. No. 1568/58 in this Court and the arguments before us have been not on the merits of the opinion, but on whether a miscellaneous appeal or revision petition lay against the reply to the legal point stated as a special case by the arbitrator. Indeed the counsel for the respondent has urged that even assuming for the sake of argument that the opinion is not legally correct, this Court at this stage of the case has neither the appellate nor the revisory jurisdiction to correct the reply made by the Subordinate Judge. We therefore decide only the question of whether a miscellaneous appeal or revision lies at this stage of the case, and for this purpose it would be useful to have the provision under which the question has been stated.

> "13. The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to -
> (a) .....

[1](1957) 1 All England Reporter 362

(b) state a special case for the opinion of the Court on a question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the court.
(c) to (e) ....."

It is clear that the arbitrator has been given by the enactment the choice to state a special case for the opinion of the court on a legal issue, or to state the award and a legal issue for the opinion of the Court. The distinction is material for under Section 39 of the Arbitration Act an appeal is provided for only where an award is stated in the form of a special case. It follows that were he to choose the first alternative no appeal lies against the opinion. The leading case on the point is *Purshotumdas Ramgopal v. Ramgopal Hiralal*[2], There the parties to a suit for partition of joint family property agreed to refer the matter to arbitration and a consent order of reference was taken. The arbitrators disagreed on certain points, but instead of referring their differences to an umpire which they were authorised to do under the agreement, they submitted their opinion in the form of a special case for the opinion of the Court. The matter was decided by the Chamber Judge and an appeal was preferred against the decision. The Division Bench held that no appeal lay. It was argued before the Division Bench that this was an award in the form of a special case, which the arbitrators were competent to submit and against which an appeal was provided under Section 104 of the Civil Procedure Code. In this connection the learned Chief Justice observed as follows :

"The special case is in no sense an award. The award would have to provide, if any provision is in law necessary, for the expenses of the marriage of Keshavdeo or of Ratni, what sums should be set aside; but no sum is mentioned in the case as having been agreed upon between the arbitrators as a reasonable and proper sum. Again the special case leaves it open to the Court to take a view which is not the view of either of the arbitrators upon the questions submitted.

There is, therefore, no award which can be adopted by the Court by the mere expression of its opinion, and the case only be, as it is expressed to be in clause 14, statement of a question of law for the opinion of the Court". It appears to us that the absence of the appellate jurisdiction is the inevitable result of the arbitrator being authorized to ask for the opinion only by stating a special case with a legal question; for the court then decides nothing and what it returns does not bind the arbitrator. It follows that no appellate power should be exercised against such a consultative jurisdiction. This is the principle on which the cases relied by the counsel for the respondent rest. The learned Government pleader has attempted to distinguish the cases on the ground that the Indian provision regarding special case for the opinion of a court is different to those of the English Arbitration Act which has undergone modification because of the Judicial pronouncement on the earlier provision. Section 19 of the English Arbitration Act, 1889, was as follows :

"Any reference, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the court or a judge, state in the

[2] ILR 35 Bom 130

form of a special case for the opinion of the Court any question of law arising in the course of the reference".

In, In re, Knight and Tabernacle Permanent Building Society (1892) 2 QB 613, Lord Esher, M.R., dealing with the question whether an appeal lay said at page 617 :

> "It appears to me that what the statute in terms provides for is an 'opinion' of the court to be given to the arbitrator or umpire, and that there is not to be any determination or decision which amounts to a judgment or order. Under those circumstances, I think that there is no appeal. I base my decision on the words of the statute; but when I consider the result of holding otherwise, I am fortified in the conclusion at which I have arrived. It seems to me that it would be most inexpedient that, where an opinion is given by the court under this statute in the course of a reference for the guidance of arbitrators, there should be an appeal which might be carried up to the House of Lords".

Bowen, L. J. stated as follows :

> "He may state his award in the form of a special case. When that is done, the arbitrator has exhausted his powers; he has made his award in such a shape that the opinion of the court will determine the rights of the parties, and turn the award into one groove or the other. Therefore the opinion of the court is, in that case an effective determination of the rights of the parties. I do not doubt that in such a case there might be an appeal from the decision of the Divisional Court upon a special case. But there is another way in which an arbitrator may, during the arbitration, take the opinion of the court. Under Section 19, he may voluntarily take, or by order of the Court or a judge he may be compelled to take, by means of a special case, the opinion of the Court for his guidance, and as a step for arriving at his own ultimate award in the matter. That is an interlocutory proceeding in the reference, and I do not think that it can have been intended that, whenever a case is stated under this section for the opinion of the court, such opinion when taken is to be treated as an absolute determination of the rights of the parties with the result that there may be an appeal from it which may be carried to the House of Lords.

If that were so, the opinion of the Court might be carried to the House of Lords, though it ultimately decided nothing. It might turn out that, after the point of law had been carried to the House of Lords, it did not really arise. That is one reason, but not the only reason, for the conclusion that the jurisdiction of the court under this section is consultative only. The section contemplates a proceeding by the arbitrator for the purpose of guiding himself as to the course he should pursue in the reference. He does not divest himself of his complete authority over the subject-matter of the arbitration. He still remains the final judge of law and fact". Finally in British Westinghouse Electric and *Manufacturing Co. Ltd. v. Underground Electric Rly. Co. of London, Ltd*[3]*.,* it was held that though the opinion of the High Court upon a special case stated by an arbitrator with regard to a question of law arising in the course of the reference

[3]1912 AC 673

cannot be the subject of an appeal; yet if that opinion be erroneous, an award founded on it can be set aside as containing an error of law apparent on the face of the record. These cases have been followed in this country as we will presently show, but before doing so, the changes introduced in the enacted law because of these pronouncements may be stated. These legislative changes are to be found in Section 9 of the Arbitration Act, 1934 that provided for statement of a question of law by the arbitrator both in the form of a special case or as an award for the decision of the court. Sub-section 3 of Section 9 further provided that the decision should be deemed to be a judgment of the Court. These have been substantially reproduced by Section 21 of the Arbitration Act of 1940. Though our Arbitration Act has been enacted in 1940 and the changes made in the English Act, 1934 were available, the word 'opinion' has been retained in Section 13(b). It follows that the principle of the English decisions under the earlier law because of the use of the word 'opinion' in the enactment would still be relevant, and so would the decisions in this country, where the English cases have been followed. We have already referred to ILR 35 Bom 130 and in In re: Adamji Lukmanji and Louis Dreyfus and Co., AIR 1925 Sind 83 it has been again held that opinion signifies the consultative jurisdiction of the court, is not a judgment and cannot operate as res judicata. This was with reference to Section 10(b) of the old Act which has been substantially reproduced in the new Section 13(b). It follows that no miscellaneous appeal lies in this Court against the reply of the Subordinate Judge. Therefore C. M. A. 290/58 should be dismissed.

3. It has been urged that English case law is not a safe guide for construing the provisions of the Indian Arbitration Act, 1940 in view of Section 14(3) of the Indian Act, which reads thus :

> "Where the arbitrators or umpire state a special case under clause (b) of Section 13, the court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award".

In this connection reference was made to *Clive Mills Ltd. v. Swalal Jain*[4], where it was held to be unwise in view of the differences in the two Acts to draw any analogy from the English law in determining the power of the arbitrator as the differences were far too great for any analogy to be useful. With all respect we would adhere to the view that because of the retention of the word 'opinion' in Section 13(b), the English case law on the consequences following the use of such word would be still relevant and the weight attaching to these cases is in no way lessened because of the changes introduced by Section 14(3). Clearly the Court's jurisdiction is still consultative and because of the direction to make the reply part of the award the court's reply does not become a judgment or decision. In this connection it may be useful to refer to Section 27 of the Workmen's Compensation Act - where a Commission may submit a question of law for the decision of the High Court and if he does so, he is bound to decide the question in conformity with such decision. It follows that because the Court's jurisdiction under Section 13(b) of the Arbitration Act is still consultative, no appeal lies where such a jurisdiction is exercised.

[4] AIR 1957 Cal 692

4. We would next determine whether a revision would lie, and it is clear that the jurisdiction under Section 115 of the Civil Procedure Code is circumscribed one. In *Keshardeo v. Radha Kishen*[5], the observations of the Privy Council in *Venkatagiri Ayyangar v. Hindu Religious Endowments Board, Madras*[6], and *Joy Chand Lal v. Kamalaksha Choudhury*[7], were affirmed, where it had been held that revisions would lie under sub-sections (a) and (b) of Section 115 C. P.

C. only against those erroneous decisions of the Subordinate Courts where they exercise jurisdiction not vested in them by law or fail to exercise jurisdiction so vested because of an error of law. In *Jagdish Prasad v. Ganga Prasad*[8], it has been again affirmed that the powers of the High Court to correct questions of jurisdiction are to be found within the four corners of Section 115 and only as regards the errors which fall within the section. We do not think there is any error of jurisdiction to justify our exercising powers under Section 115(a) and (b), C. P. C. Then there is the difficulty in sustaining a revision petition, under Section 115(c) C. P. C. for there is no final order deciding a legal point in the case. It follows that the decisive objection against exercise of power under Section 115(c) is similar to the one precluding exercise of appellate power. In other words the opinion of the Subordinate Judge in the special case on point of law not being a judgment, the jurisdiction of this Court under Section 115(c) of the Civil Procedure Code to correct errors in mere opinion cannot be invoked. We therefore think no revision petition lies in this case and the C. R. P. 1568/58 is also dismissed. Accordingly both the appeal and the C. R. P. fail and are dismissed, but we order only one set of costs in the C. R. P.

Appeal and Revision dismissed.

[5] AIR 1953 SC 23
[6] 76 Ind App 67
[7] 76 Ind App 131
[8] 1959 SCJ 495