

CASE NO.:
Appeal (civil) 4759 of 2006

PETITIONER:
Chief Engineer of B.P.D.P./R.E.O., Ranchi

RESPONDENT:
M/s Scoot Wilson Kirpatrick India Pvt.Ltd.

DATE OF JUDGMENT: 10/11/2006

BENCH:
ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T
Arising out of S.L.P. (C) No. 15033 of 2005

ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the order passed by a learned Single Judge of the Jharkhand High Court holding that the appeal filed by it was not maintainable as the same does not fall within the ambit of Section 37 of the Arbitration and Conciliation Act, 1996 (in short the 'Act').

Learned counsel for the appellant submitted that the appeal is clearly maintainable under Section 37(1)(b) of the Act.

Per contra, learned counsel for the respondent submitted that the case is covered by the decision of this Court in Union of India v. Popular Construction Co. (2001 (8) SCC 470) and State of Goa v. Western Builders (2006 (6) SCC 239), and the High Court was justified in holding that the appeal was not maintainable. Therefore, it is submitted that certain aspects which have not been raised specifically in the grounds raised before this Court but submitted during the course of arguments cannot be taken note of.

Section 37(1)(b) of the Act is in pari materia to Section 39(1)(vi) of the Arbitration Act, 1940 (in short 'Old Act'). The provisions in the Acts read as follows:

"1996 Act:

Section 37(1)(b) "An appeal shall lie from the following orders of the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely :-

b. Setting aside or refusing to set aside an arbitral award under Section 34 of the Act".

1940 Act:

Section 39. Appealable orders: "(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorized by law to hear appeal from original decrees of the Court passing the

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order :-
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An order:

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xxx          xxx          xxx          xxx
(vi)      Setting aside or refusing to set aside an
award".

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In *Dharma Prathishthanam v. Madhok Construction (P) Ltd.* (2005 (9) SCC 686) it has been held by this Court as follows:

"27. In the event of the appointment of an arbitrator and reference of disputes to him being void ab initio as totally incompetent or invalid the award shall be void and liable to be set aside de hors the provisions of Section 30 of the Act, in any appropriate proceedings when sought to be enforced or acted upon.

This conclusion flows not only from the decided cases referred to hereinabove but also from several other cases which we proceed to notice.

28. In Chhabba Lal v. Kallu Lal and Ors., (AIR 1946 P.C. 72)their Lordships have held that an award on a reference presupposes a valid reference. If there is no valid reference, the purported award is a nullity.

29. On this point, there is near unanimity of opinion as amongst the High Courts of the country as well. Illustratively, we may refer to a few cases. In *Union of India v. Ajit Mehta and Associates*, Pune and Ors. (AIR 1990 Bom 45), the Division Bench held that the Court has suo motu power to set aside an award on ground other than those covered by Section 30 such as an award made by arbitrators who can never have been appointed under Section 8, as such an award would undoubtedly be ab initio void and no nest. In *Union of India v. South Eastern Railway* (AIR 1992 M.P. 47) and *Rajendra Dayal v. Govind* (1970 MPLJ 322), both Division Bench decisions, the High Court of Madhya Pradesh has held that in certain situations the Court may set aside an Award even without there being an

application under Section 30 or even if the petition under Section 30 has not been filed within the period of limitation if the Court finds that the award is void or directs a party to do an act which is prohibited by law or is without jurisdiction or patently illegal. We need not multiply the number of authorities on this point as an exhaustive and illuminating conspectus of judicial opinion is found to be contained in Law of Arbitration and Conciliation - Practice and Procedure by S.K. Chawla (Second Edition, 2004 at pp. 181-184) under the caption - "Whether the Court has suo motu power to set aside an Arbitral Award - " and the answer given in the discussion thereunder is in the affirmative.

30. Though it has been held in *The Union of India v. Shri Om Prakash* (1976 (4) SCC 32), that an objection on the ground of invalidity of a reference is not specifically covered by Clauses (a), (b) and (c) of Section 30, yet it is

included in the residuary expression "or as otherwise invalid" and could have been set aside on such an application being made. However, the above decision cannot be treated as an authority to hold that an award which is void ab initio and hence a nullity consequent upon an invalid appointment and an invalid reference in clear breach of the provisions contained in Sections 8, 9 and 20 of the Act, can still be held to be valid if not objected to through an objection preferred under Section 30 of the Act within the prescribed period of limitation.

31. Three types of situations may emerge between the parties and then before the Court. Firstly, an arbitration agreement, under examination from the point of view of its enforceability, may be one which expresses the parties' intention to have their disputes settled by arbitration by using clear and unambiguous language then the parties and the Court have no other choice but to treat the contract as binding and enforce it. Or, there may be an agreement suffering from such vagueness or uncertainty as is not capable of being construed at all by culling out the intention of the parties with certainty, even by reference to the provisions of the Arbitration Act, then it shall have to be held that there was no agreement between the parties in the eye of law and the question of appointing an arbitrator or making a reference or disputes by reference to Sections 8, 9 and 20 shall not arise. Secondly, there may be an arbitrator or arbitrators named, or the authority may be named who shall appoint an arbitrator, then the parties have already been ad idem on the real identity of the arbitrator as appointed by them before hand; the consent is already spelled out and binds the parties and the Court. All that may remain to be done in the event of an occasion arising for the purpose, is to have the agreement filed in the Court and seek an order of reference to the arbitrator appointed by the parties. Thirdly, if the arbitrator is not named and the authority who would appoint the arbitrator is also not specified, the appointment and reference shall be to a sole arbitrator unless a different intention is expressly spelt out. The appointment and reference - both shall be by the consent of the parties. Where the parties do not agree, the Court steps in and assumes jurisdiction to make an appointment, also to make a reference, subject to the jurisdiction of the Court being invoked in that regard. We hasten to add that mere inaction by a party called upon by the other one to act does not lead to an inference as to implied consent or acquiescence being drawn. The appellant not responding to respondent's proposal for joining in the appointment of a sole arbitrator named by him could not be construed as consent and the only option open to the

respondent was to have invoked the jurisdiction of Court for appointment of an arbitrator and an order of reference of disputes to him. It is the Court which only could have compelled the appellant to join in the proceedings."

Reference may be made to some observations in *Essar Constructions v. N.P. Rama Krishna Reddy* (2000 (6) SCC 94), where it was held that appeal is maintainable against the dismissal of objections on the ground of limitation. Similar views were expressed in *Union of India and Ors. v. Manager, M/s Jain and Associates* (2001 (3) SCC 277). Para 11, 12 and 19 read as follows:

"11. In view of the aforequoted Sections, it can be stated that--

(a) after receipt of an award, the Court can suo motu refuse to make award rule of the Court on the ground that (i) part of the award is upon a matter not referred to arbitration; and (ii) the award is imperfect in form or contains any obvious error. The Court can also remit the award to arbitrator in case (i) where the award has left undetermined any matter referred to arbitration; or (ii) where it has determined any matter not referred to arbitration; or (iii) the award is so indefinite as to be incapable of execution; or (iv) is on the face of it illegal. This is also provided under parenthesis clause of section 17 which provides "where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall .. proceed to pronounce judgment.." Therefore, it cannot be stated that in case where objections under Section 30 or 33 are not filed the Court is bound to pass decree in terms of the award. (b) Section 5 of Limitation Act gives discretion to the Court to extend the time for filing application under Section 30 or 33 raising objections to the award.

(c) The Civil Procedure Code including Order IX Rule 13 is applicable to the proceedings initiated by producing award before the Court for passing a decree.

(d) The power of the Court to modify the award under Section 15 or to remit the award to the arbitrator for reconsideration under Section 16 varies from the jurisdiction of the Court to set aside the award under Section 30 or to determine the validity of the arbitration agreement or an award under Section 33.

12. The result is--before pronouncing judgment, the Court has to apply its mind to arrive at the conclusion whether there is any cause to modify or remit the award. Further the phrase 'pronounce judgment' would itself indicate judicial determination by reasoned order for arriving at the conclusion that decree in terms of award be passed. One of the meaning given to the word "Judgment" in Webster's Comprehensive Dictionary [International Edition, Vol. 1 (1984)] reads thus: "the result of judging; the decision or

conclusion reached, as after consideration or deliberation". Further, Order XX Rule 4(2) C.P.C. in terms provides that 'Judgment' shall contain a concise statement of case, the points for determination, the decision thereon, and the reasons for such decision. This is antithesis to pronouncement of non-speaking order.

19. Further, large part of the controversy involved in this appeal is covered by the decision rendered by this Court in *Essar Constructions v. N.P. Rama Krishna Reddy* (2000 (6) SCC 94). The Court observed that because of the applicability of Section 5 of the Limitation Act, 1963, if the court has not pronounced judgment for whatever reason, although the time prescribed for making the application has expired and an application for setting aside the award is made with a prayer for condonation of delay, the court cannot pronounce judgment until the application is rejected. The Court also observed that even after a decree is passed under Section 17, an application under Section 30 can be entertained provided sufficient cause is established. In either case, the rejection of the application would be a refusal to set aside the award. In case where such application is rejected on the ground that it is delayed and no sufficient cause has been made out under Section 5 of the Limitation Act, it would be an appealable order under Section 39(1)(vi) of the Act".

The decision in *Popular Construction's case* (supra) did not deal with specific issues in this case. In that decision it was held that in respect of "sufficient cause cases" the provisions of Section 34(3) of the Act which are special provisions relating to condonation of delay override the general provisions of the Section 5 of the Limitation Act, 1963 (in short 'Limitation Act'). The position was reiterated in the *Western Builders case* (supra) and also in *Fairgrowth Investment Ltd. v. Custodian* (2004 (11) SCC 472). There can be no quarrel with the proposition that Section 5 of the Limitation Act providing for condonation of delay is excluded by Section 34(3) of the Act.

But the question in the instant case is not about the applicability of Section 5 of the Limitation Act, and question really is whether the appeal was maintainable. The High Court did not consider this aspect. The appeal is clearly maintainable. Therefore, the order of the High Court is set aside. The High Court shall deal with the matter and examine the respective stand on merits treating the appeal to be maintainable.

The appeal is accordingly disposed of with no order as to costs.