

CASE NO.:
Appeal (civil) 1398-1399 of 2002

PETITIONER:
INDER SAIN MITTAL

Vs.

RESPONDENT:
HOUSING BOARD HARYANA AND OTHERS

DATE OF JUDGMENT: 21/02/2002

BENCH:
M.B. Shah & B.N. Agrawal

JUDGMENT:

B.N.AGRawal, J.

Leave granted.

These appeals by special leave are directed against judgment rendered by the High Court of Punjab & Haryana at Chandigarh in Civil Revision Applications whereby the same have been allowed, orders passed by the appellate court upholding orders of the trial court disallowing the objections under Section 30 of the Arbitration Act, 1940 (hereinafter referred to as 'the Act') have been set aside, objections allowed and awards set aside.

The Housing Board, Haryana-respondent No.1(hereinafter referred to as 'the Board'), filed two separate money suits against the appellant in the Court of the Senior Sub Judge, Sonapat, which were transferred to the Court of Addl. Civil Judge (Sr. Divn.), Sonapat, who, by separate orders dated 19th March, 1997, as agreed to by the parties, appointed Superintending Engineer, A.D.B. Branch Circle, P.W.D.(B & R) Br. Faridabad, as Arbitrator for settlement of certain disputes between the parties pertaining to the works of construction of Houses in the Housing Board Colony at Sonapat. On receipt of the references, the Arbitrator entered thereupon and fixed 6th May, 1997 as the date for hearing the parties in the arbitration proceedings, on which date the Contractor attended the proceedings whereas the Executive Engineer, who was representing the Board, absented himself. On the next date of hearing, i.e., on 13th May, 1997, while the Executive Engineer made a prayer for adjournment for filing the written reply, the Contractor attended the proceedings and filed documents and his counsel almost concluded the argument. The matter was, however, adjourned to 8th June, 1997. In the meantime, on 2nd June, 1997, Shri R.K. Jain, Superintending Engineer, A.D.B., Branch Circle, P.W.D. (B & R) Branch, Faridabad, who was the Arbitrator, was transferred and posted as Superintending Engineer, Construction Circle No.1, Union Territory Chandigarh, but he continued with the arbitration proceedings in spite of his transfer. On the next date of hearing, i.e., on 8th June, 1997, the Contractor attended the arbitration proceedings with his counsel whereas Executive Engineer representing the Board though attended the proceedings but without counsel and did not file written reply but requested for adjournment. Accordingly the arbitration proceedings were adjourned to 18th June, 1997, on which date, an affidavit was submitted on behalf of the Board in support of its case and after evidence was adduced on behalf of the parties, counsel appearing on behalf of the Contractor resumed further argument and concluded the same whereafter, counsel appearing on behalf of the Board also concluded his argument on that day itself.

The Arbitrator thereupon gave the awards on 28th June, 1997. Applications under Section 14(2) of the Act were filed on behalf of the Contractor for summoning the original awards from the Arbitrator and, upon receipt of the same and after hearing the parties, making the awards rule of the Court. On the other hand, on behalf of the Board, objections were filed under Section 30 of the Act on grounds, inter alia, that the awards in question were without authority and jurisdiction as the Court appointed Superintending Engineer, A.D.B., Branch Circle, P.W.D. (B & R) Branch, Faridabad, as Arbitrator and upon the transfer of the Arbitrator, Shri R.K.Jain, as Superintending Engineer Circle No.1, Union Territory, Chandigarh, on 2nd June, 1997, he had no authority and jurisdiction to further continue with the arbitration proceedings which should have been taken over from that stage by the successor Superintending Engineer, A.D.B., Branch Circle, P.W.D.(B & R) Branch, Faridabad, who succeeded Shri R.K.Jain upon his transfer.

The trial court after due consideration rejected the objections under Section 30 of the Act and directed the awards to be made rule of the Court which order was affirmed in appeal. When the matter was taken to the High Court of Punjab & Haryana at Chandigarh in Civil Revision Applications filed under Section 115 of the Code of Civil Procedure (hereinafter referred to as 'the Code'), the same have been allowed, orders passed by the appellate court as well as the original court set aside, objections allowed and awards set aside. Hence, these appeals by special leave.

Dr. Vikas Vashishth, learned counsel appearing on behalf of the appellant, in support of the appeals submitted that as the Executive Engineer representing the Board not only attended the arbitration proceedings with his counsel even after transfer of the Arbitrator, Shri R.K. Jain, but also consciously participated therein by filing affidavit in support of claims of the Board, adduced evidence and counsel appearing on behalf of the Board argued the matter, the Board would be deemed to have acquiesced to the continuance of the Arbitrator, Shri R.K. Jain, with the arbitration proceedings and making of the awards even after his transfer and after the awards having gone against the Board, it was not open to it to challenge the same on the ground that the arbitration proceedings were continued and concluded by Shri R.K. Jain after he ceased to be the Superintending Engineer, ADB Branch Circle, PWD(B&R) Branch, Faridabad in view of the fact that the Arbitrator was not appointed by name but by designation. On the other hand, Shri Mahabir Singh, learned counsel appearing on behalf of the Board, submitted that as the appointment of Arbitrator was by designation, the Arbitrator could not have continued with the arbitration proceedings and given the awards after his transfer and the same could have been continued from that stage and awards rendered by the successor only.

We find that the point raised in this case is no longer res integra as the same has been considered by this Court times without number. Reference in this connection may be made to a decision of this Court rendered in the case of N. Chellappan vs. Secretary, Kerala State Electricity Board & Anr., 1975 (2) SCR 811, in which case the dispute, which had arisen between the parties, was referred by them for decision of two Arbitrators who appointed an Umpire, but as the award was not made by the Arbitrators within the time limit which was extended from time to time, a petition was filed in Court for revoking authority of the Arbitrators on the ground that they did not make the award within the prescribed time limit and further prayer was made that the Umpire may be appointed as a sole Arbitrator in place of two Arbitrators and he be directed to enter upon the reference. The prayer was granted by the Court and after revoking authority of the two Arbitrators, Umpire was appointed as the sole Arbitrator with the consent of the parties and he was directed to enter upon the reference and make the award. Parties thereupon participated in the proceedings before the Umpire without demur and ultimately the award was given to which one of the parties filed objections whereas the other filed a petition for making the award rule of the Court. The objection was disallowed and prayer for making the award rule of the Court was granted. When the matter was taken in appeal to the High Court of Kerala the objection was allowed and award set aside on the ground that the order revoking authority of the Arbitrators to pass the award and

appointing the Umpire as the sole Arbitrator was bad in law, as such the Umpire as a sole Arbitrator had no jurisdiction to enter upon the reference and pass the award. When the said matter was brought to this Court, objection to the award was disallowed as Umpire was appointed by the Court, with consent of the parties, to act as the sole Arbitrator after revoking authority of the Arbitrators already appointed and no endeavour was made to have that order vacated by filing a review inasmuch as the parties participated in the proceedings before the Umpire without any demur to his jurisdiction from which conduct of the parties only inference that can be drawn is that the party, who was objecting to the award, by his conduct had no objection to the order revoking the authority of the Arbitrators. Therefore, by acquiescence such a party was precluded from challenging the jurisdiction of the Umpire by filing an objection to the award. Similarly, in the case of Chowdhri Murtaza Hossin v. Mussumat Bibi Bachunnissa, 3 I.A. 209, which is a decision of the Privy Council and referred to in the case of N. Chellappan (Supra) with approval, it has been laid down that a party having a clear knowledge of the circumstances on which he might have founded an objection to the Arbitrators proceedings to make their award, did submit to the proceeding going on; that he allowed the Arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself; and that it is too late for him, after the award has been made, and on the application to file the award, to insist on his objection to the filing of the award.

In the case of Prasun Roy vs. Calcutta Metropolitan Development Authority & Anr., (1987) 4 SCC 217, on an application made under Section 20 of the Act, the Court appointed another Arbitrator in place of the arbitrator named in the arbitration agreement on the allegations of bias and the parties participated in the proceedings before the new Arbitrator without any objection for long, which was raised at a later stage to the arbitration award on the ground that the appointment of Arbitrator was bad. In that case it was laid down by this Court that on the principle of waiver and estoppel a party would be precluded from challenging the award as by participating in the arbitration proceedings without any objection it would be deemed to have acquiesced.

In the case of M/s. Neelakantan & Bros. Construction vs. Superintending Engineer, National Highways, Salem & Ors., (1988) 4 SCC 462, according to the arbitration clause, the Superintending Engineer of the Circle for the time being was the named Arbitrator and accordingly one Thiru Mohan was appointed as Arbitrator, who entered upon the reference and before him evidence was adduced by the parties, but before the Arbitrator could conclude the arbitration, he was transferred and was succeeded by one Thiru J.R. Cornelius, who, after taking over charge from Thiru Mohan, concluded the arbitration proceedings and after giving opportunity of hearing to the parties gave the award, which was objected to on the ground that the successor officer had no jurisdiction to conclude the arbitration proceedings and give the award. The objection was overruled by the trial court and the said order was upheld by the High Court as well as this Court on the ground that since the party who was objecting to the award had knowledge of the alleged defect and had acquiesced in the proceedings before the successor, it would be precluded from objecting to the award on the ground that the same made by the successor officer upon transfer of his predecessor, who had entered upon the reference, was invalid, especially when taking over the arbitration proceedings and its conclusion by the successor would not be in disregard of any law.

Learned counsel appearing for the Board heavily relied upon a decision of this Court in the case of State of Punjab vs. Hardy, (1985) 2 SCC 629. In that case the parties participated in the arbitration proceedings, initiated with the intervention of Court, even after expiry of four months' period prescribed for submitting the award, as required by law, in the absence of extension of time granted by the Court, and an award was made. An objection was filed under Section 30 of the Act to the award on the ground that the Arbitrator had no jurisdiction to make the award after the expiry of prescribed period of four months in the absence of any order of extension. On these facts, this Court laid down that time to be fixed for making an award is initially one of agreement between the parties to the agreement, but if no time has been specified by the

parties in the arbitration agreement, then the award must be given within four months as prescribed in Section 3 read with clause 3 of the First Schedule to the Arbitration Act as time can be extended by the court and not by the parties at any stage inasmuch as since the Arbitrator is injuncted to give an award beyond the prescribed period of four months unless the same is extended by the Court, he had no jurisdiction to make an award after the expiry of specified time in the absence of any order of extension and in view of this the award made beyond time is ipso facto invalid, the same having been prohibited by law, and parties are not estopped by their conduct from challenging the same on the ground that it was made beyond time, merely because they participated in the proceedings before the Arbitrator after expiry of the prescribed period as established principle is that there can be no estoppel against a statute.

In view of the foregoing discussions, with reference to the provisions of the Act, we conclude thus:

(i) Grounds of objection under Section 30 of the Act to the reference made, with or without intervention of the Court, arbitration proceedings and the award can be classified into two categories, viz., one emanating from agreement and the other law.

(ii) In case the ground of attack flows from agreement between the parties which would undoubtedly be a lawful agreement, and the same is raised at the initial stage, Court may set it right at the initial stage or even subsequently in case the party objecting has not participated in the proceedings or participated under protest. But if a party acquiesced to the invalidity by his conduct by participating in the proceedings and taking a chance therein cannot be allowed to turn round after the award goes against him and is estopped from challenging validity or otherwise of reference, arbitration proceedings and/or award inasmuch as right of such a party to take objection is defeated.

(iii) Where ground is based upon breach of mandatory provision of law, a party cannot be estopped from raising the same in his objection to the award even after he participated in the arbitration proceedings in view of the well settled maxim that there is no estoppel against statute.

(iv) If, however, basis for ground of attack is violation of such a provision of law which is not mandatory but directory and raised at the initial stage, the illegality, in appropriate case, may be set right, but in such an eventuality if a party participated in the proceedings without any protest, he would be precluded from raising the point in the objection after making of the award.

In the case on hand, it cannot be said that continuance of the proceedings and rendering of awards therein by the Arbitrator after his transfer was in disregard of any provision of law much less mandatory one but, at the highest, in breach of agreement. Therefore, by their conduct by participating in the arbitration proceedings without any protest the parties would be deemed to have waived their right to challenge validity of the proceedings and the awards, consequently, the objections taken to this effect did not merit any consideration and the High Court was not justified in allowing the same and setting aside the award.

In the result, the appeals are allowed with cost, which is quantified at Rs. 10,000/-, and the impugned judgment passed by the High Court is set aside.

J.
[M.B. SHAH]

..J.
[B.N. AGRAWAL]

JUDIS