

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ EFA(OS) 8/2009

Reserved on: 14th September, 2009

Pronounced on: 17th September, 2009

UOI Petitioners

! Through: Mr Sachin Datta, Advocate

Versus

\$ NAVBHARAT NIRMAN CO

..... Respondents

^ Through: Mr. Phool Chand Aggarwal,
Sole Proprietor

CORAM:

HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether Reporters of Local newspapers may be allowed to see the Judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the Judgment should be reported in the Digest? YES

V.K.Jain, J.

This is an Appeal against order of the learned Single Judge dated 22.01.2009 whereby objections filed by Appellant, to execution of decree dated 12.10.2007 have been dismissed.

2. Certain disputes, that he arisen between the parties, were referred for arbitration to Shri N.H. Chandwani, who at that time was working as Arbitrator in the Ministry of Urban Development. Pursuant to repatriation of Shri Chandwani to his parent department, he was relieved of his duties with effect from the afternoon of 30.11.1990 vide office order No. 15011/2/85-UD-I dated 29th November, 1990. The office order also stipulated that in respect of Arbitration Cases which had been heard and were ripe for giving award, Shri Chandwani should give award within 10 days. The award in this case was made by Shri Chandwani on 11th December, 1990. The respondent filed petition under Sections 14 and 17 of Arbitration Act, 1940, for making the award Rule of the Court. The appellant filed objections to the award under Sections 30 and 33 of Arbitration Act, 1940. The objections were allowed and the award was set aside by Additional District Judge, vide his judgment dated 9.9.91. The respondent preferred appeal against the judgment passed by the Addl. District Judge. The appeal filed by respondent being FAO No. 251/91 was allowed and the award was made Rule of the Court on 12th October, 2007. On execution being filed by respondent, the appellant filed objections under Section 47 read with Section 151 of Code of Civil Procedure, claiming that the award and decree passed thereupon were null

and void as the award was passed 11 days after the Arbitrator had relinquished the office. The objections having been dismissed, the appellant has come by way of this appeal against the order of Ld. Single Judge.

3. It was not disputed before us that Shri N.H. Chandwani who was on deputation in Ministry of Urban Development, was repatriated vide office order no. 15011/2/89-UD-I dated 5th November, 1990 and pursuant thereto he was relieved with effect from afternoon of 30.11.1990 vide an office order of even number dated 29.11.1990.

4. The contention of learned counsel for the appellant is that the Arbitrator was not competent to pass the award after he was relieved in the afternoon of 30.11.90. As regards 10 days time given to the Arbitrator to give award in the arbitration cases which had already been heard by him, the learned counsel for the appellant submitted that since 10 days time was given from the date of office order, the award having been delivered on 11.12.90 was without jurisdiction.

Per Contra, the respondent through Mr. Phool Chand Aggarwal, Sole proprietor of the respondent firm submitted that since the parties had, by mutual consent, extended the time for

making the award up to 31.3.91, as is recorded in the award, the Arbitrator had the jurisdiction to make the award on 11th December, 1990.

5. In *Union of India v. M/s. Jagat Ram Trehan & Sons*, 61 (1996) Delhi Law Times 779, which is a judgment delivered by a Division Bench of this court, the very same Arbitrator, Shri Chandwani passed the award on 5th December, 1990. During execution proceedings, objections under Section 47 of the Code of Civil Procedure were filed by Union of India for declaring the decree as null and void, on the ground that the award had been passed after Mr. Chandwani had already relinquished his office as Arbitrator. After noting that Mr. Chandwani was stated to have passed more than 60 awards after 30.11.1990, the date on which he ceased to be an Arbitrator, the Division Bench held that upon relinquishment of the office on 30.11.1990, as Arbitrator, Mr. Chandwani could not have passed any award, as he did on 5.12.1990. It was held that the award was null and void as Mr. Chandwani lacked inherent jurisdiction.

6. An appeal was filed by the Decree Holder, against the above referred judgment of the Division Bench. The decision of the Hon'ble Supreme Court is reported as *Union of India v M/s. Jagat Ram Trehan & Sons* 2001(3) Arb. LR 41 (SC). The Hon'ble

Supreme Court noted that the Arbitration clause stipulated that the Arbitration shall cease upon the person (who is appointed as Arbitrator) being transferred or vacating his office. It was further noted that the Arbitration Clause envisaged arbitration by a person holding office as Arbitrator in the department. It was contended before the Hon'ble Supreme Court that the award having been made within 10 days from the date of issue of officer Order, relieving Mr. Chandwani, was within the time allowed to the Arbitrator to pass the award. The contention was rejected by the Hon'ble Supreme Court holding that the period of 10 days has to be counted from the date on which the order was issued and not from the date on which Mr. Chandwani was actually relieved.

The Hon'ble Supreme Court also rejected the contention that the Arbitrator having been appointed by name, question of any resignation by him would not arise. The Hon'ble Apex Court did not find any fault with the view taken by this court to the effect that upon relinquishment of office on 30.11.1980, the Arbitrator Mr. Chandwani could not have passed any award on 5th December, 1990 and the award was therefore null and void.

7. In view of the above referred decisions, in respect of the award passed by the very same Arbitrator, after 30.11.90, we have no hesitation in holding that the award delivered in this case on

11.12.1990 was null and void, having been given 11 days after Mr. Chandwani relinquished his office.

8. In the judgment by Hon'ble Supreme Court as well as in the judgment of the Division Bench of this Court, the relieving order of Mr. Chandwani has been referred as order dated 20.11.90, whereas the copy placed on our file shows its date to be 29th November, 1990. That, however, is of no consequence in the facts of this case, as the award, admittedly, having been given on 11.12.90, was beyond the period of 10 days stipulated in para 2 of the office order, which permitted giving of award, in the cases which had been heard and were ripe for giving award, within 10 days. The period of 10 days expired on 9.12.1990, if computed from the date of issue of the order and on 10.12.90, if computed from the date when Mr. Chandwani was relieved. In either case, the award is beyond 10 days time granted to Mr. Chandwani for passing awards in such cases.

9. It was contended by the respondent that the parties had, by mutual consent, extended the time for making the award and this has been noted by the Arbitrator on page 2 of the award itself. There is no document before us to show that the appellant had agreed to extend the time for making and publishing the award up to 31.3.91. But, accepting the statement contained in the award to

be correct, we are of the view that the respondent does not get any benefit from such an extension because the consent would be for extending time for making the award by a person who held the office of Arbitrator and therefore had the jurisdiction to do so and not by a person who had already ceased to be the Arbitrator and had vacated that office. After demitting office of Arbitrator by Mr. Chandwani, he became *functus officio* and another Arbitrator was to be appointed for proceeding further in the arbitration proceeding and he would have been competent to make the award at any time up to 30.3.91. Mr. Chandwani having ceased to be an Arbitrator on 30.11.90, he in any case, had no jurisdiction to make an award after 10th December, 1990.

10. In the case of *M/s. Jagat Ram Trehan & Sons* (Supra), the Division Bench also examined the question as to whether appeal under Section 10 of Delhi High Court was maintainable, against the order passed by the executing Court, refusing to declare that the award and decree, were nullities on the ground that Mr. Chandwani had ceased to be an Arbitrator by 30.11.90 and that he had no jurisdiction to pass the award on 5.12.90. The Division Bench, considering the decision of Hon'ble Supreme Court in *Shah Babulal Khimji's case* (AIR 1981 SC 1786), wherein the Hon'ble Supreme Court observed that even an order refusing the stay of

execution of decree and directing recovery of decretal amount is a judgment, held that the appeal is maintainable, as the impugned order, overruling the objections to the execution of decree and ordering execution, is a judgment within the meaning of Section 10 of Delhi High Court Act.

11. Another issue raised before the Division Bench was that the award should have been objected to under Sections 17, 30 and 33 or by appeal against the order rejecting the objections and if that was not done, it was not open to raise the question in execution proceeding. The contention was repelled by the Division Bench, holding that it is open to the executing Court under Section 47 of the Code of Civil Procedure to declare that the award is without jurisdiction and therefore the decree passed thereupon is also null and void and not executable.

12. The Division Bench also rejected the contention that since there was a remedy of directly attacking the award itself under Section 17, 30 and 33 of Arbitration Act, an appeal against order rejecting objections is not maintainable. The Division Bench held that a judgment and decree can be directly attacked by filing objections thereto or by filing an appeal against the order rejecting the objections but that does not preclude a collateral attack on the award and decree in execution proceeding and a

collateral attack is not barred because an opportunity to raise the same question by direct attack was not availed.

13. We have perused the order of learned Additional District Judge dated 9.9.91, whereby he allowed the objections filed by appellant Union of India, as well as the order of learned Single Judge dated October 12, 2007 whereby he allowed the appeal filed by the respondent. The learned Additional District Judge took the view that the Arbitrator had himself misconducted as despite having been transferred, he took medical leave and hastened to pass several awards in haste, without giving sufficient opportunity of hearing to the objectors. Neither the learned Additional District Judge nor the learned Single Judge who passed the order dated 12.10.2007 has gone into the question as to whether Arbitrator, having relinquished his office on 30.11.1990, had ceased to be an Arbitrator on that date and consequently had no jurisdiction to pass the award on 11.12.1990.

14. We are in full agreement with the Division Bench, which passed the order in the case of *UOI vs. Jagat Ram Rrehan* (Supra) on all the legal issues dealt with by it. In our view, since the arbitration was envisaged by an officer holding the post of Arbitrator in the Department and Mr. Chandwani, who held the office of Arbitrator only till the afternoon of 30.11.1990, had

thereafter become *functus officio* and he therefore could in no case have made award on 11.12.1990, the award made by him in this case was null, void and nonest in the eyes of law. The decree making such an award Rule of the Court, is also null and void and therefore incapable of execution.

For the reasons given in the preceding paragraphs, the appeal is allowed and the award as well as judgment and decree, whereby it was made Rule of the Court are set aside. A fresh Arbitrator will be appointed by the Competent Authority within four weeks to adjudicate upon the disputes which were referred for arbitration. He will make an appropriate award as per law, after hearing the parties. The award will be made within four months of appointment of new Arbitrator.

There shall be no orders as to cost.

(V.K. JAIN)
JUDGE

(VIKRAMAJIT SEN)
JUDGE

September 17, 2009/acm