

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO(OS) 163/2009**

Reserved on : May 01, 2009

Date of Decision : May 06, 2009

VAISH BROTHERS Appellant

Through : Mr. Sandeep Sharma, Advocate.

versus

UOI Respondent

Through

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment? No.
2. To be referred to the Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest? Yes.

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J U D G M E N T

: MUKUL MUDGAL,J.

1. This is an appeal filed under Section 39 of the Arbitration Act, 1940 (hereinafter referred to as 'the Act') read with Section 10 of the Delhi High Court Act against order dated 10th September, 2007 and 26th March, 2009 passed by the learned Single Judge in Suit No. 340/1993. The order dated 26th March, 2009 arose from IA No. 11993/2007 which sought the appointment of any person as an Arbitrator for adjudication of the

claims set aside by the learned Single Judge on the objections filed by the respondent-Union of India in respect of the Award dated 19th January, 1993.

2. The learned Single Judge noted the following facts: -

a. Upon a reference of disputes, an arbitration award dated 19th January, 1993 was passed.

b. In respect of the said award, objections under Section 30 and 33 of the Arbitration Act, 1940 were filed by the respondent and which were partly allowed by a judgment dated 10th September, 2007, also belatedly challenged in this appeal, claims no.1, 2, 9 and 10 were made rule of the Court whereas award in respect of claims no.6 and 7 were set aside and the objections in respect of the said claims by the respondent were sustained.

3. Before the learned Single Judge, reliance was placed on Section 16 of the Act which reads as under: -

“16. Power to remit award.- The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit-

(a) Where the award has left undetermined 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 face 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.”

4. The learned Single Judge has held that the Award in respect of claims no.6 and 7 having been set aside upon objections by the respondent, there was no scope for application of Section 16 and 17 of the Act.

5. The learned Single Judge also held that by the said application, the appellant was in effect seeking the review of the judgment dated 10th September, 2007 qua claims no.6 and 7. It was also noted that the decree had already been passed in terms of the judgment dated 10th September, 2007 and there was no warrant for modifying the decree.

6. The learned counsel for the appellant, Mr. Sandeep Sharma, has again relied upon Section 16 to contend that the award with respect to claims no.6 and 7 ought to have been remitted back to the Arbitrator.

7. The only relevant portion of the application which can be said to be containing the cause of action under Section 16 is paragraph 4 of the application which reads as under :

“The petitioner submits that this Hon’ble Court vide order dated 10th September, 2007 set aside claims No.6 & 7. However the same were not remanded and no arbitrator was appointed for fresh consideration of those claims. The petitioner submits that as the Ld. Arbitrator has misconducted in view of the findings recorded by this Hon’ble Court and it is respectfully prayed that the Arbitrator may be appointed for adjudication of those claims.”

There is therefore absolutely no cause of action pleaded for seeking remission of the matter back to the Arbitrator for fresh adjudication, even assuming such application could have been filed.

8. Furthermore, the plea of the appellant is wholly fallacious as it was not as if the award had left any of the matters referred to the Arbitrator undetermined, as required by Section 16, sub-

Section (a), but in fact, the decision was rendered and the claims based on the said award were set aside by a learned Single Judge of this Court. Similarly, the objections in respect of the award being indefinite and incapable of execution and *ex facie* illegality of the award cannot be applied in the present case.

9. Reliance by the learned counsel for the appellant has been placed on the judgment reported in **Goa, Daman & Diu Housing Board v. Ramakant v. P. Darvotkar, AIR 1991 SC 2089**, and in particular para 9 which reads as follows:

“9. The learned counsel on behalf of the appellants has contended that the High Court acted illegally in not considering at all that the arbitrator did not record any reasons for making awards allowing the claims each of which exceeds Rs.50,000/- as provided under clause 25 of the arbitration agreement and as such the arbitrator has misconduct himself in the proceedings and instead of sending the awards made by the arbitrator to him for recording his reasons ought to have set aside the awards under section 30 of the Arbitration Act. It has also been contended that the High Court though it held that the arbitrator was guilty of misconduct and the awards made by him were liable to be vitiated on that ground yet in spite of setting aside the awards they were sent to the arbitrator for recording reasons which is totally unwarranted by law.”

10. The above judgment far from supporting the appellant's case in fact in para 12 holds as follows:

“12. Section 16 empowers the Court to remit the award to the Arbitrator for reconsideration only in three cases specified therein. Clause (c) of Section 16(1) provides that the award shall be remitted to the Arbitrator by the Court where an objection to the legality of the award is apparent on the face of it. Of course, the High Court has come to a finding that the Arbitrator was guilty of misconduct for his failure to give reasons as required. There is, however, nothing to show that the Arbitrator misconduct himself or the proceedings in any other manner nor there is anything to show that the awards have been improperly procured. There is no allegation, far less, any finding, that the Arbitrator was biased or unfair or he has not heard both the parties or he has not fairly considered the submissions of the parties in making the awards in question. In our opinion, it is evident from the four awards made by the Arbitrator that the Arbitrator has considered all the specific issues raised by the parties in the arbitration proceedings and came to the finding after giving cogent reasons. The above awards cannot under any circumstances be considered to be made by the Arbitrator without recording any reasons for the same. Therefore, in such circumstances, it is not proper to hold that the Arbitrator has misconducted himself or in the proceedings in the matter of giving the awards.”

Thus, since none of the sub clauses (a) to (c) of Section 16 are satisfied in the present case, the above judgment in fact is against the appellant. The facts of the said case before the Hon'ble Supreme Court were different in as much as the matter was remitted under S.16 in the said case as inspite of a contractual requirement of passing a reasoned award, a non-speaking award was passed. In the facts before us an award giving reasons not supportable in law were given by the Arbitrator and thus to the limited extent the Award on claims no.6 and 7 was set aside on merits by the learned Single Judge.

11. The counsel for the appellant has also relied on *Union of India vs. M/s. Pampassar Distillery, Bellary and another, AIR 1981 Delhi 399* and *The State Electricity Board, Tamil Nadu vs. The Sree Meenakshi Mills Ltd., Madurai and another AIR 1975 Madras 139*. The facts of these cases and the ratio do not apply to the facts of the present case. These cases do not apply to the present case as the learned Single Judge in the present case has after setting aside the findings of the Arbitrator has given his own reasons for setting aside the claims. It is not that the learned Single Judge has not given reasons and has made it a case for

remission to the arbitrator. There is, therefore, no scope for applying Section 16 in the facts of this case. If we accept the plea of the counsel for the appellant then it will mean repeated agitations of the claims and repeated remissions under Section 16 till the contractor is successful in getting an Award for his claims.

12. The only remedy available to the appellant would have been to file an appeal in respect of the judgment dated 10th September, 2007, which for the reasons best known to it, the appellant did not file, but in fact chose the circuitous method of filing an application seeking invocation of Section 16. Section 16 is not a method of revisiting the determination of claims no.6 and 7 in the present case, and consequently, no fault whatsoever can be found with the judgment of the learned Single Judge. The parameters for applicability of Section 16 of the Act being not even remotely available the resort to the above provisions was completely misplaced.

13. We also hold that no appeal lies against the order dated 26th March, 2009. The only appeals allowed under the Arbitration Act, 1940 are those as specified in S. 39 of the Act. There is no

provision for an appeal under S. 39 from an order refusing to remit the matter for decision to the arbitrator which is an order under S. 16. By various judgments this Court as also the Hon'ble Supreme Court has held that no appeal lies except against the orders specified in S. 39 of the Act. The appeal against the order dated 26th March, 2009 therefore does not lie to a Division Bench of this Court from an order of the learned single judge of this Court.

14. The appellant then urged that he has also challenged the order dated 10th September, 2007 along with an application for condonation of delay in view of his IA No. 11993/2007 having been filed within 30 days before the learned Single Judge. In our view, the application filed by the applicant in IA No. 11993/2007 was wholly misconceived and ill-advised as none of the grounds stipulated under Section 16 were attracted and consequently, filing of a misconceived application does not give a valid ground for condonation of delay as such exercise cannot be termed bonafide pursuit of another remedy. Consequently, we dismiss the application for condonation of delay of 564 days and thus the appeal itself. This exercise in futility by unnecessary wastage of time of the learned Single Judge should have normally invited an

order of substantial costs but since we have dismissed the appeal in limine without issuing notice to the respondents, we refrain from doing so.

15. The appeal stands disposed of accordingly.

(MUKUL MUDGAL)
JUDGE

(VALMIKI J. MEHTA)
JUDGE

May 06, 2009
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