

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

ARBITRATION APPEAL NO.9 OF 2013

M/s. Richardson and Cruddas (1972) Ltd.
a Company incorporated under the
Companies Act, 1956, (a Government of
India Undertaking) having its Registered
Office at Byculla Iron Works, Sir J.J. Road,
Mumbai – 400 008. Appellant

V/s

- 1 Shri Vighnagar Sahakari Sakhar**
Karkhana Ltd.
Post Shirolu Budruk, Tal. Junnar,
District Pune, Pin 410 511.
- 2 Director of Sugar,**
Maharashtra State,
Near PMT Building,
Shankarshet Road,
Pune – 411 042. Respondents

Ms. Dipti Panda with Ms. Megha Martin i/b M/s. Purnanand & Company
for Appellant.

Mr. Vijay Patil with Mr. Nitin Dhumal for Respondent No.1.

CORAM : A.A. SAYED, J.

DATED : 10 MARCH 2015

JUDGMENT:

1 This Arbitration Appeal impugns an order dated 18 August 2012
passed by Joint Civil Judge Senior Division, Pune, whereby
Miscellaneous Application No.131 of 1989 filed by the Respondent No.1
is allowed by granting the prayer of decree in terms of the Award.

2 The aforementioned Miscellaneous Application, filed on 15 February 1989, was taken out by the Respondent No.1 under the provisions of the Arbitration Act, 1940 (hereinafter referred to as '1940 Act'). The Miscellaneous Application contained two prayers which read as follows:

- “a) The Arbitrator i.e. Opponent No.2 be directed to file in this Hon'ble Court the award passed in Arbitration Proceeding No.DS/TC/DEV-III/Vighnahar/SSK/R&C/ Dispute matter/Sugar Directorate MS, Pune on 16-7-1988 with all records of him by the parties.*
- b) The further proceedings be taken accordingly after filing the same by Opponent No.2 and a decree be passed in terms of the said Award.”*

3 The Appellant had filed an Affidavit-in-Reply dated 15 January 1990 to the said Miscellaneous Application as also further Affidavit dated 19 July 2003 (in the same Miscellaneous Application) interalia contending that the Respondent No.2-Director of Sugar was never appointed as an Arbitrator and that he was merely mediating to settle the dispute between the parties and that the decision dated 27 June 1988 (served on 16 July 1988) of the Director of Sugar cannot be termed as an Award and the Director of Sugar has therefore acted without jurisdiction. It was asserted that the Award was not a valid Award in the eyes of law.

4 The Appellant and the Respondent No.1 had entered into an Agreement dated 19 July 1982 for supply of machinery/equipment. Disputes and differences arose between the parties. On 27 June 1988 (served on 16 July 1988) Award came to be passed by the Respondent No.2-Director of Sugar directing the Appellant to pay a sum of Rs.56.28 lacs to the Respondent No.1 within a fortnight.

5 During the pendency of the Miscellaneous Application No.131 of 1989, on 18 August 2001, the Award was filed in Court. In the circumstances, prayer (a) of the Miscellaneous Application No.131 of 1989 seeking the filing of the Award by the Arbitrator in the Trial Court under section 14(2) of the 1940 Act, did not survive. What remained was prayer (b) seeking a decree in terms of the Award under section 17 of the 1940 Act.

6 On 16 December 2002 Notice dated 13 December 2002 intimating the Appellant that the Award was filed, was served through Court upon the Appellant. On 21 January 2003 the Appellant appeared before the Court. On 19 July 2003 the Appellant filed their further Affidavit interalia objecting to the passing of the decree in terms of the Award. On 18 August 2012 the impugned order came to be passed by the trial Court in the Miscellaneous Application No.131 of 1989.

7 It is not in dispute that the present Appeal is filed under section 39(1)(vi) of the 1940 Act. It reads thus:

“39. Appealable orders.- (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order:

An order-

(i)

(ii)

(iii)

(iv)

v)

vi) *setting aside or refusing to set aside an award:*

...

8 The impugned order, however, does not set aside or refuse to set aside the Award. In these circumstances, I do not see how the present Appeal would be maintainable. Even otherwise, it is an admitted position that during the pendency of the Miscellaneous Application, the Award was filed in Court on 18 August, 2001 and the Notice of filing of the Award was served upon the Appellant on 16 December 2002. It is also an admitted position that there was no separate Application filed by the Appellant for setting the Award under sections 30/33 of the 1940 Act. What was filed by the Appellant after the aforesaid Notice being served, was only a further Affidavit objecting to the passing of decree in terms of

the Award in the Miscellaneous Application No.131 of 1989 itself and interalia reiterating the contentions in the Affidavit-in-Reply dated 15 January 1990. The said further Affidavit dated 19 July 2003, was filed after 30 days, which is the period prescribed under Article 119-B of the Limitation Act, 1963 for making an Application under sections 30/33 of the 1940 Act.

9 Learned Counsel on behalf of the Appellant however submitted that the Appellant had filed a Reply dated 15 January 1990 and further Affidavit dated 19 July 2003 to the Miscellaneous Application of the Respondent No.1 wherein the Appellant had questioned the Award on merits also, however, there is no finding by the trial Court on the objections raised in that Reply and/or further Affidavit. Learned Counsel for the Appellant submitted that it is the substance which is required to be seen and not the form. She submitted that the Trial Court ought to have considered the objections which were raised in this Reply and further Affidavit and that merely on technicalities, this Court ought not to decline to entertain the present Appeal. She placed reliance upon the following judgments:

- i) Trailokhya Nath Benerjee vs. Sukumar Bose, AIR 1941 Cal. 202, of Single Judge of Calcutta High Court;
- ii) Mathulla Mathulla vs. Thomas George, AIR 1962 Ker 320, of Division Bench of Kerala High Court;

- iii) Ram Alam Lal vs. Dukhan, AIR 1950 All 427, of Division Bench of Allahabad High Court.

10 Learned Counsel for the Respondent No.1 on the other hand submitted that it is an admitted position that after the Award was filed on 18 August 2001 and the Notice being served upon the Appellant through Court on 16 December 2002, the Appellant has not filed any Application for setting aside the Award under sections 30/33 of the 1940 Act. The further Affidavit (after service of the Notice upon the Appellant of filing of the Award) was filed by the Appellant on 19 July 2003 cannot substitute the requirement of making an Application for setting aside the Award. In any event, the further Affidavit was filed beyond the period of limitation of 30 days prescribed under Article 119-B of the Limitation Act, 1963. He submitted that the objections which were filed earlier by the Appellant vide Reply dated 15 January 1990 in the Miscellaneous Application No.131 of 1989 were premature and the same were even prior to the filing of the Award and the same cannot be treated as valid objection. Learned Counsel for the Respondent, in support of his contentions, has also relied upon the following judgments:

- i) Union of India vs. Neelam Engineering and Construction Company, (2010) 3 SCC 642;
- ii) Nilkanta Sidramappa Ningashetti vs. Kashinath Somanna Ningashetti, AIR 1962 SC 666;

- iii) Smt. Savitribai wd/o Diwanchand Bhutani vs. M/s. Krishnakumari wd/o Rupllal Bhutani (First Appeal No.444 of 2006) dated 11 July 2014 of Division Bench of this Court (Nagpur Bench);
- iv) L. Madan Lal Haveliwala vs. L. Sunder Lal, AIR 1964 ALL 38 (V 51 C 16), of the Division Bench of Allahabad High Court;
- v) Zaheer Bin Saleh vs. Mohan and Mohan Financers, 1998 (5) ALT 389 = 1998(2) ARBLR 544 of Single Judge of Andhra Pradesh High Court.

11 I have considered the rival contentions and perused the judgments cited by the parties.

12 As indicated earlier, It is not in dispute that there was no separate Application filed by the Appellant for setting aside the Award under sections 30/33 of the 1940 Act. In **Nilkanta Sidramappa Ningashetti** (supra), a Bench of four learned Judges of the Supreme Court held in para 13 as follows:

“13. The second question is whether the order of the Civil Judge amounted to an order refusing to set aside the award and, therefore appealable to the High Court. The High Court held that it was not such an order and we agree. When no party filed an objection praying for the setting aside of the award, no question of refusing to set it aside can arise and therefore no appeal was maintainable under S. 39(1)(vi) of the

Arbitration Act which allows an appeal against an order refusing to set aside an award.”

Even in the Reply of the Appellant dated 15 January 1990 to the Miscellaneous Application of the Respondent No.1 there is no prayer seeking to set aside the Award. There is no such prayer even in the further Affidavit filed on 19 July 2003. In these circumstances, it cannot be expected of the Trial Court to suo moto set aside the Award. The Reply dated 15 July 1990 raising objections was filed much prior in point of time (11 years earlier) to the Award being filed in Court on 18 August 2001. In **Neelam Engineering & Construction Company** (supra), the Supreme Court has held that filing of an objection prior to the filing of the Award in Court was premature and the objection could not be treated as valid objection and the filing of an objection against something which did not exist on the date when objection was filed is unacceptable and must be rejected. The further Affidavit raising objections was filed on 19 July 2003 which was beyond 30 days from the service of Notice (of filing the Award) upon the Respondent No.1 on 16 December 2002 and thus time barred under Article 119-B of the Limitation Act, 1963. In **Smt. Savitribai** (supra) the Division Bench of this Court (Nagpur Bench) has held in para 7 as follows:

“7. From the impugned judgment and decree, one can clearly see that the objections were filed by only two

defendants, namely defendant no. 2 Mukundlal and defendant no. 7 Kulwansh, after expiry of period of 30 days from the date of service of notice prescribed under Article 119-B of the Limitation Act, 1963. These objections were not accompanied by any application for condonation of delay and, therefore, they were rightly rejected by the learned trial Court. The impugned judgment and decree further shows that some legal representatives of defendant no. 3 Ashok Kumar had also filed their objection under Section 30 of the Arbitration Act and it was too beyond the period of limitation and, therefore, was rightly rejected by the trial Court. Barring these objections filed under Section 30, there were no other objections. Thus, the situation as obtained before the trial Court was that there was no objection validly filed and praying for setting aside of the Award, and if that was so, there was no question for the learned Civil Judge to refuse to set aside the Award. As such, no appeal under Section 39(1)(vi) of the Arbitration Act, muchless appeal against the order refusing to set aside the Award, would be maintainable. In the case of Nilkanta Sidramappa Ningashetti v. Kashinath Somanna Ningashetti & ors. reported in AIR 1962 SC 666(1) the apex Court has held that when no party files an objection praying for setting aside of the award, no question of refusing to set it aside can arise and therefore no appeal is maintainable under Section 39(1)(vi) of the Arbitration Act which allows an appeal against an order refusing to set aside an award.”

13 The Trial Court has rightly held that the Appellant should have challenged the Award and that there was no hurdle in passing the decree in terms of the Award. Even otherwise, in absence of any Application to set aside the Award, the scope of powers of the Court under section 17 of the 1940 Act is very limited. The only ground on which even such a decree can be challenged in appeal is that “it is in excess of, or not otherwise in accordance with the Award” as provided in section 17. In view of the judgments of the Supreme Court in **Nilkanta Sidramappa Ningashetti** (supra), **Neelam Engineering & Construction Company** (supra) as also the Division Bench of this Court in **Smt. Savitribai** (supra), which follows the judgment of the Supreme Court in Nilkanta Sidramappa Ningashetti (supra), the judgments cited on behalf of the Appellant of the Kerala, Calcutta and Allahabad High Court would not be any of assistance to the Appellant, which judgments are in any event distinguishable on facts.

14 In the circumstances, the Appeal is dismissed as non-maintainable as there was no Application filed by the Appellant under sections 30/33 of the 1940 Act for setting aside the Award and as there were no objections as such validly filed before the Trial Court. There shall be no order as to costs. It is clarified that this Court has expressed any opinion so far as merits of the Award is concerned.

15 The interim stay granted by this Court vide order dated 11 March 2013 shall continue for a period of eight weeks from today. The opposition to the continuation of the stay by the learned Counsel for the Respondent is recorded.

(A.A. SAYED, J.)

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