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HIGH COURT OF CHHATTISGARH, BILASPUR**M.A. No. 1784 of 1999**

South Eastern Coalfields Limited, Gevra Area, Through : Chairman-Cum-Managing Director, S.E.C.L., Seepat Road, Bilaspur, Tahsil & District Bilaspur.

---- Appellant**Versus**

1. Col. J.P.S. Yadav, Managing Director, M/s. AVJ (Ex-Service Men), Associates Pvt. Ltd., R/o. H-405, Somvihar, R.K.Puram, New Delhi – 110 022.
2. M/s. AVJ (Ex-Service Men), Associates Pvt. Ltd., Through Col. J.P.S. Yadav, Managing Director, M/s. A.V.J. (Ex-Service Men) Associates Pvt. Ltd., H-405, Somvihar, R.K.Puram, New Delhi. 110 022.

---- Respondents

 For Appellant : Mr. Vinod Deshmukh, Advocate

For Respondents : No representation

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****29.10.2018**

1. The instant appeal is against the order dated 01.05.1999 passed by the District Judge, Bilaspur, in Civil Suit No.20-A/94. By such order, the learned Court below has allowed the application under Section 30 of the Arbitration Act, 1940 and set aside the award dated 15.04.1994 passed by the sole Arbitrator Shri S.C.Khera.
2. The facts of this case are that Shri S.C.Khera, the Director Technical (P&P), S.E.C.L. Bilaspur passed an award dated 15.04.1994 for Rs.81,90,545.00 in favour of the claimant S.E.C.L. and against the respondents M/s. A.V.J. (Ex-Service Men) Associates Pvt. Ltd. and the Managing Director J.P.S. Yadav. The S.E.C.L. claimant filed an application under Section 17 of the Arbitration Act, 1940 for judgment in terms of the award which was

registered as Civil Suit No.20-A/94. The respondent filed an application under Section 30 & 33 of the Arbitration Act, 1940 for setting aside the award on the ground that the sole arbitrator had misconducted himself or the proceedings. The said application was separately registered as MJC No.30/99 but the Court ordered that the MJC to be decided along with the Civil Suit No.20-A/94 and accordingly it was decided.

3. This fact is not disputed that the claimant SECL and respondent have entered into a hire purchase agreement wherein initially the address of the respondent was shown as H-405 Somvihar R.K.Puram New Delhi. The said agreement contained an arbitration clause 21, under which all disputes arising out of or in any way relating to the contract shall be referred to the sole arbitrator of an officer not below the rank of a Director appointed by the Chairman-cum-Managing Director the SECL. Both the parties agreed that the provisions of Indian Arbitration Act, 1940 would be applicable and it also contained clause 19 that any letter, notice or other communication dispatched to the hirer whether through post or telegram at the address last notified to the owner by the hirer shall be deemed to have been delivered or served even if it is refused or undelivered.
4. The claimant SECL through their counsel gave a notice on 08.05.1992 whereby initially an amount of Rs.53,94,001.20 together with prevailing bank rate of interest was claimed, failing the payment further interest was claimed. The said notice further contemplated that if the amount is not paid then the SECL would be constrained to file the Civil Suit for recovery of the amount before the competent Court of jurisdiction. It is a fact that despite the

notice given to file a civil suit, the SECL instead of filing civil suit appointed an arbitrator without the intervention of the Court. The SECL appointed Shri S.C.Khera, the Director Technical (P&P) to be the sole Arbitrator to decide the dispute pursuant to the agreement dated 14.08.1987. The arbitrator prepared the schedule and thereafter issued the notice. It was stated by the respondent that the notices were not duly served and the notices were issued in the different address and that too not by the arbitrator but by the SECL. Further, it was contended that the statement of claim was also not served, therefore, there was no occasion for the respondent to reply. Despite that, the sole arbitrator in collusion with the SECL passed the award.

5. The learned District Judge took notice the factual aspect and the conduct of the proceeding carried out by the arbitrator and came to a finding that neither the notices were properly served nor opportunity of hearing was given to the objector thereby it defeated the principles of natural justice. The Court further held that the arbitrator in connivance with the SECL has passed the award and colluded with him thereby set aside the award. The said order is under challenge.
6. Learned counsel for the appellant would submit that the learned Court below failed to take into notice that the respondent was duly served and requested for extension of time at different point of time, which would show that notice of hearing was within it's knowledge. It is contended that when the notice of the proceeding are within knowledge of the respondent then repeated notice would not have been required for appearance in proceeding. It is contended that the learned District Judge failed to take into notice

of those facts of notice and intervened in the order as an appellate forum, which could not have been done, therefore, the order cannot be held good and required to be set aside.

7. No representation is made on behalf of the respondents despite publication of the notices.
8. Perused the order and the reasons stated in the order. The factual aspect has not been disputed by the appellant which are contained in the order, however, arguments have been advanced that the respondents have given the notice of adjournment of the proceeding to the arbitrator on 09.09.1993, therefore, it would be deemed that the knowledge of the proceeding was with them.
9. Admittedly, when the dispute which was governed by the Arbitration Act, 1940 the party may either filed an application under Section 20 before the competent Court for filing the agreement in Court whereupon the Court after noticing the parties to the agreement shall order the agreement to be filed and make an order of reference to the arbitrator appointed by the parties. The other course is open that the parties do not concur about appointment of an arbitrator, the dispute can be referred to an arbitrator to be appointed by the Court. Section 8 & 20 of the Arbitration Act, 1940 would be relevant, which are quoted hereunder :

“8. Power of Court to appoint arbitrator of umpire :- (1)

In any of the following cases.--

- (a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments ; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy ; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointment or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

20. Application to file in Court arbitration agreement :-

(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any or them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct

notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

10. Reading of the aforesaid Section 8 & 20 of the Arbitration Act, 1940 together would show that the concurrence of the parties would be required in appointment of the arbitrator when both agreed for the arbitration under the agreement. The order as records and it is not in dispute that the SECL initially by its notice through his counsel A.S.P. Rao on 08.05.1992 had given the option of resorting to filing of civil suit. Therefore, making a deviation apparently it appears that the appointment of Shri S.C.Khera unilaterally by the claimants was against the notice dated 08.05.1992. It is also clear that the recourse under Section 8(2) of the Arbitration Act 1940 was also not resorted too, therefore very initially appointment of S.C.Khera the sole arbitrator raises a doubt.
11. The Court further referred that the arbitrator had sent a notice on 01.09.1993. The Court referred to a notice No.583 dated 01.09.1993 whereby the date was fixed for 03.09.1993 for filing of written statement/ counter claim before arbitrator and the date was fixed for 10.09.1993. It is obvious that if the date was fixed for

03.09.1993 issuing the notice itself on 01.09.1993, when the notice was to be delivered at Delhi, the factual aspect makes it impossible to serve it on 03.09.1993 at Delhi. As against this, J.P.S. Yadav contended that they received the notice on 07.09.1993 appears to be plausible, therefore, the summon to appear was not reasonable itself. The order also reflects that notice though was sent at the address of Gevra, but the notice remained undelivered. Further, the order reflects that notice was sent by the respondent to the arbitrator on 20.09.1993 and 28.10.1993 which was received by the arbitrator. In last notice, the respondent contended that the claim statement were not sent along-with summons therefore they were unable to file their written statement, apart from it the authority of arbitrator to adjudicate was also under challenge. Therefore, the appointment of arbitrator S.C.Khera was not accepted by the respondent. The Court further observed that both the notice dated 20.09.1993 and 28.10.1993 do not find place in the proceeding of the arbitrator, but while the arbitral proceedings were concluded the arbitrator recorded that respondent did not send any communication for extension of time. The finding therefore was arrived at that the arbitrator suppress the letters and falsely mentioned the fact that the respondent did not send any communication explaining the reasons for their absence. On the contrary, it appears that the arbitrator resorted to falsehood while recording that despite extension of the time, the parties did not appear.

12. The Court further observed that a notice bearing No.444 dated 28.06.1993 and 611 dated 28.09.1993 to M/s. AVJ (Ex-Serviceman) Associates Pvt. Ltd. was sent at H-405 Somvihar R.K.Puram, New Delhi whereas the claim statement reflected that

the address of the office of respondent was shown as T-24-A, Green Park Extension, New Delhi. The Court further observed that the said notices though were claimed to be sent by the arbitrator but it do not reflects so that it was sent by the arbitrator instead the finding is there that the SECL one of the party to the litigation had sent it. It is a common feature when the arbitrator is acting he has to act as impartially and the party interested for the arbitrator cannot act in a fiduciary capacity that of arbitrator or otherwise arbitrator cannot hold a brief on behalf of the litigating parties.

13. The Court further held that despite discrepancies in sending of the notice to the known address, no notice was sent to J.P.S. Yadav, Managing Director of the AVJ (Ex-Servicemen) Associates Pvt. Ltd. at the address mentioned in the higher purchase agreement and the last notice dated 08.11.1993 which was bearing No.731 sent at H-405 Somvihar, R.K.Puram New Delhi was given but no reasonable time to file the written statement was given by the respondent as on 16.11.1993, when the notice was received, the proceedings were already concluded by the arbitrator. Therefore, no purpose would have been served to send the notice after the proceedings were concluded.
14. The Court below after evaluating the facts came to the finding at its judgment and this Court too concur with such finding of facts which are hereunder:

“(1) After giving notice dated 08.05.1992 to the respondents to seek redress through intervention of the Court, unilateral appointment of Shri S.K.Khera as the sole arbitrator by the claimants cannot be upheld.

(2) The respondents did not concur in the appointment of Shri S.C.Khera as sole arbitrator and opposed the

unilateral appointment by notice dated 20.09.1993 and 28.10.1993. However, the proceeding of arbitrator do not mention about receipt of those notice so the letter were suppressed.

(3) The notices sent by the sole arbitrator were in an envelope of the SECL to show that it was not send by arbitrator.

(4) The registered notice by arbitrator to the respondents were sent only address shown in the higher purchase agreement i.e. H-405 Somvihar R.K. Puram New Delhi 110 022, whereas the claim statement contained a different address T-24 A Green Park Extension New Delhi 110 022, therefore, for all practical purpose notice should have been sent there where it could have been served.

(5) Claim statements were never made available to the respondents so as to enable them to file written statement/ counter claim.

(6) The registered notices when were sent on different address very short time was given so that appearance of the respondents before the sole arbitrator is avoided.

(7) No notice was sent to respondent Col. J.P.S. Yadav, Managing Director M/s. AVJ (Ex-Servicemen) Associates Pvt. Ltd. At H-405 Somvihar R.K.Puram New Delhi. The notices No.444 dated 28.06.1993 and No.583 dated 01.09.1993 were sent to Shri J.P. Yadav, Director instead of Col. J.P.S. Yadav, Managing Director.

(8) No notice of hearing dated 15/16 Nov. 93 was sent to Col. J.P.S. Yadav, Managing Director M/s. AVJ (Ex-Servicemen) Associates Pvt. Ltd. New Delhi. Thus there was clear breach of Sec. 42 of the Arbitration Act, 1940.

15. Consequently, evaluating the facts, the finding that the notices were sent under the camouflage cover of SECL concealing the name of the sole arbitrator on 20.9.1993 and 28.10.1993 would be important. Further, the Court held that no service was affected to J.P.S. Yadav, the Managing Director and the claim statement were

also not supplied remains unrebutted. Further, it is held that the notice sent to J.P.S. Yadav at incorrect address at Gevra and not mentioning the name of the sole arbitrator appears to be also malafide. Further giving no time to the respondents to appear and file written statement/counter claim and would show that the claimant SECL and arbitrator S.C.Khera colluded with each other to pass the award. The arbitrator who decide the dispute between the parties has to be independent and any act of the arbitrator should not reflect that he was in the shoes of any of the parties, he has to be independent, impartial and conduct of the proceeding should also reflect the same. The bias of the arbitrator defeats the entire proceeding. The conduct of the arbitral proceeding should speak itself to draw inference of impartiality. Consequently, the award dated 15.04.1994 was improperly procured by the claimants in collusion with the sole arbitrator and further no substantial fact or legal question put forth for consideration and nothing is placed on record to rebut the strong suspicion of malafide of arbitrator.

16. In view of the above, after careful scrutiny of the evidences & documents, no interference can be made by this Court in exercise of the appellate jurisdiction. In the result, the appeal fails and is hereby dismissed.

Sd/-
(Goutam Bhaduri)
Judge