

*** HON'BLE THE CHIEF JUSTICE
SRI THOTTATHIL B. RADHAKRISHNAN**

+ ARBITRATION APPLICATION No.131 OF 2015

% Date: 02-11-2018

J.K.Cold Tyre Retraders

.. Applicant

v.

\$ United India Insurance Co., Ltd., & another

.. Respondents

! Counsel for the Applicant : Sri J.Prabhakar

^ Counsel for respondents : Sri Ravi Shankar Jandhyala

< **GIST:**

> **HEAD NOTE:**

? CASES REFERRED:

1. (2006) 11 SCC 181
2. (2008) 1 Gau LR 324
3. 2010 (5) Mh.LJ 739
4. AIR 2018 SC 1549

THE HON'BLE THE CHIEF JUSTICE SRI THOTTATHIL B. RADHAKRISHNAN

ARBITRATION APPLICATION No.131 OF 2015

ORDER:

This is an application under Section 11(5) and (6) read with Section 15(2) of the Arbitration and Conciliation Act, 1996; hereinafter referred to as 'the A&C Act'. Heard the learned counsel for the parties.

2. The respondent is an insurer. It is impleaded through its Managing Director and also through its Senior Divisional Manager in this Application.

3. The applicant is a proprietary concern, which is stated to be an S.S.I. Unit. It had insurance policies whereby the respondent insurer provided insurance cover. Those policies have arbitration agreements.

4. The applicant raised claims with the insurer following a fire accident in the applicant's premises. That led to arbitration proceedings on the basis of the arbitration clause in insurance policies. The Arbitrator entered on reference and passed a final Award on 21.05.2003. That was set aside by the III Additional District Judge, Kakinada in Arbitration O.P.No.247 of 2003 on 25.03.2009. Though the District Court was dealing with an Application challenging the Award under the A&C Act of 1996, that Court also passed an Order by limiting the Award amount and thereby limiting the compensation due to the applicant. Dealing with the applicant's Appeal, namely, C.M.A.No.806 of 2009, the High Court, through Order, dated 10.03.2014, held that the Civil Court committed an error in limiting the compensation to Rs.22,10,330/- while setting aside the Award. Resultantly, that C.M.A., was dismissed confirming

the Order of the District Judge totally setting aside the Award, dated 21.04.2003. This Court also gave opportunity to both parties to go for arbitration afresh, if advised. Paragraphs 50 and 51 of the Judgment, dated 10.03.2014 in C.M.A.No.806 of 2009, and last paragraph of that Judgment recording the result of that adjudication read as follows:-

“50. Undoubtedly in view of the principles laid down in the decision in **McDermott International Inc v. Burn Standard Company Limited**¹, the role of the Civil Court is only supervisory to the minimum level. If the Civil Court finds an illegality in the award or it is against the public policy, it can set aside the award and permit the parties to start fresh arbitration proceedings, if advised, but the Civil Court cannot sit in appeal against the award passed by the arbitrator to decide the legality of the award unlike in Civil Court proceedings. But, in the instant case on hand, the Civil Court slightly transgressed its power, that alone will not form the basis for setting aside the impugned order passed by the Civil Court. The Civil Court also committed an error in limiting the award to a sum of Rs.22,10,310/- as the petitioner-Insurance Company offered to pay the same, but this approach of the Civil Court in limiting the Award to the amount offered by the Insurance Company is erroneous and the same is liable to be set-aside.

51. In view of our foregoing discussion, we are of the considered view that the sole arbitrator is guilty of legal misconduct, thereby the award is liable to be set aside. Thus, the Civil Court did commit no error in setting aside the award but committed an error while setting-aside the award limiting compensation to Rs.22,10,330/-.

In the result, the Appeal is dismissed confirming the impugned order dated 25.03.2003, passed in Arb.O.P.No.247 of 2003 by the III Additional District Judge, East Godavari District, Kakinada, totally setting aside the Award dated 21.04.2003, passed by the sole arbitrator-second respondent, giving opportunity to both the parties to go for arbitration, afresh, if advised.”

¹ (2006) 11 SCC 181

Special Leave Petition carried to the Hon'ble Supreme Court of India by the applicant against the aforesaid Judgment of this Court in the Civil Miscellaneous Appeal was dismissed.

5. This Application is filed for appointment of arbitrator on the strength of the arbitration agreement in view of the decision in C.M.A., leaving open the opportunity for the parties to go for arbitration. The applicant also seeks an Order under Section 15(2) of the A&C Act since the mandate of the Arbitrator Sri C.J.Rao, who passed the earlier Award stood terminated and a substitute Arbitrator is to be appointed by replacement in terms of that provision of the A&C Act.

6. The respondent has filed a counter affidavit asserting that the arbitration clause is no more in existence and it has perished with the contract owing to the finality of the decision in C.M.A.No.806 of 2009, which has been affirmed by the dismissal of the Special Leave Petition. The counter affidavit also proceeds as if the provision in the last paragraph of the Judgment in C.M.A.No.806 of 2009 "giving opportunity to both the parties to go for arbitration, afresh, if advised", depends upon whether or not the respondent is advised to go for arbitration afresh. The plea taken by the respondent that it is not advised to go for arbitration afresh; and, nor is it interested to go for arbitration. According to the counter affidavit, the contract being an outcome of an agreement between the parties, it is also open to the parties to agree to bring it to an end or treat it as if it never existed. Reference is made to Section 62 of the Contract Act in an attempt to state that the arbitration clause has perished.

7. The fact that the insurance policies stood with arbitration agreements, which were part of the insurance policies, is not in dispute. It is also the fact that in terms of such arbitration agreements, the parties had taken recourse to arbitration. The arbitral award passed by Sri C.J.Rao was set aside. That was affirmed by this Court in C.M.A.No.806 of 2009 with the clarification that limiting the claim of compensation imposed by the Civil Court, while adjudicating the Application to set aside the Award, does not stand. The Special Leave Petition carried by the applicant against it was dismissed. Therefore, for all intents and purposes, the Award passed by Sri C.J.Rao no more stands. It does not bind the parties on any issue. It is *non est* in law. Formidable support to this proposition can be had from the order of the Gauhati High Court in **M/s.B.K.Gupta & Co., v. Union of India**², which has been profitably referred to by the learned counsel for the applicant in support of this proposition. The decision of the Bombay High Court in **Associated Constructions v. Mormugoa Port Trust**³ is also issue specific on the commencement of arbitration again after an Award is set aside and matters to be considered in such cases. It was held that an assumption that, after the Award is set aside, a fresh arbitration can begin again only with the consent of both the parties is based on the erroneous presumption that the exercise of the right to begin the arbitration again, is dependent upon a fresh arbitration agreement. It was held that an arbitration agreement, once entered into, may be invoked by any of the parties unilaterally and if one of the parties refuses to abide by the arbitration agreement, the other party is entitled to invoke or enforce it under A&C Act. The learned Judge

² (2008) 1 Gau LR 324

³ 2010 (5) Mh.LJ 739

went on holding that where an award is set aside, the commencement of the arbitration again is pursuant to and under the existing arbitration clause and is neither based on, nor dependent upon, a fresh arbitration agreement between the parties. I am in complete agreement with the said principle stated in **Associated Constructions** (supra), rendered taking note of the decision of the Hon'ble Supreme Court in **Mc.Dermott International Inc.**, (supra), which laid down that the A&C Act makes provision for such role of Court as could only result in quashing the Award, leaving the parties free to begin the arbitration again, if so advised. This is how the earlier Award passed *inter partes* by Sri C.J.Rao and it being set aside, has to be understood.

8. The learned counsel for the respondent referred to the Judgment of the Apex Court in **Board of Control for Cricket in India v. Kochi Cricket Private Limited**⁴ and argued for the position that arbitration clause no more survives and there could be no arbitration without consent afresh, as between the parties, to go for arbitration. This plea is wholly misconceived. The said precedent also does not lay down any principle to that effect. The ratio of that precedent does not have bearing on the issues to be decided in the case in hand and which have been dilated upon in the preceding paragraphs. The objection raised by the respondent to this Application is overruled.

9. This Application is eligible to be allowed taking requisite measure under Section 11(5) and (6) read with Section 15(2) of the A&C Act.

⁴ AIR 2018 SC 1549

10. In the result, this Arbitration Application is allowed appointing an Arbitrator.

11. Accordingly, Sri Ch.K.Durga Rao, Retired District Judge is appointed as Arbitrator to arbitrate on the disputes between the applicant and the respondent, including the claims and counter claims of both sides. The said Arbitrator shall enter on reference and proceed with, as enjoined by the Arbitration and Conciliation Act. No order as to costs.

THOTTATHIL B. RADHAKRISHNAN, CJ

02.11.2018

Note: LR copy be marked.
(By order)
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