

B.P.DAS, J

ARBA NO.17 OF 2002 (Decided on 24.06.2011)

**CAPITAL URBAN HOUSE BUILDING
CO-OPERATIVE SOCIETY LTD.**

..... .. Appellant.

. Vrs.

PHANI BHUSAN KANUNGO & ANR.

..... Respondents.

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF 1996) – Ss.16, 34.

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF 1996) – S.31.

For Appellant - M/s. Sanjit Mohanty, Sr. Advocate
P.K.Muduli, N.Sahoo & S.Patnaik
For Respondents - M/s. S.K.Sanganeria, P.C.Patnaik,
A.K.Sahu (Respondent No.1)

B. P. DAS, J. This appeal has been filed by the appellant challenging the judgment dated 5.10.2002 passed by the District Judge, Khurda in Arbitration Misc. Case No. 458 of 2001, rejecting the application filed by the appellant under Section 34 of the Arbitration and Conciliation Act, 1996, herein after called as “1996 Act” for setting aside the arbitral award dated 23.4.2001.

2. The brief facts leading to the filing of this appeal are thus:-

The appellant-Capital Urban House Building Co-operative Society Ltd. is a society registered under the provisions of the Orissa Cooperative Societies Act, 1962 and is engaged in the business of construction of houses, buildings, colonies, etc. for residential purposes under Bhubaneswar Municipality. The appellant-society also engages contractors by inviting tender for carrying out the construction works. On 8.4.1993, the appellant-society floated a tender for execution of works such as land development, formation of roads, CD works for the project ‘Dumduma Plotted Scheme’ at Dumduma, Bhubaneswar. For the aforesaid work, respondent No.1, hereinafter to be called as ‘claimant’ submitted his tender paper, on acceptance of which, an agreement was executed between the appellant and the claimant on 18.6.1993 for execution of the said works for an amount of Rs.1,36,66,085/-. According to the appellant, the aforesaid agreement dated 18.6.1993 provides details with regard to the manner and mode of execution of the work, the mode of payment and also the forum for resolution of disputes arising between the parties through arbitration.

At this stage, it would be profitable to quote hereunder the arbitration clause, i.e. Clause-16 of the Agreement.

“Clause-16: Except where otherwise provided in this contract all questions and disputes relating to the meaning of specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used in the work or as things whatsoever in anyway arising out of or relating to this contract, designs, drawings, specifications, estimates, schedule of rates, instructions, orders or these conditions or otherwise concerning the work or execution or failure to execute the same whether arising during the progress of work or after completion or abandonment thereof, shall be referred to the sole Arbitration of a Civil Engineer not below the rank of Superintending Engineer, Un-connected with this work at any stage, to be nominated by the Board of Directors of the Employer’s Society. There shall be no objection of the Arbitrator so nominated is a Government Servant. All request for appointment of the Arbitrator shall be made to the President of the Board of Directors of the Employer’s Society. If there shall be no such Engineer or in the event of failure of the Board of Directors to nominate an Arbitrator within the stipulated time according to the Arbitration Act, 1940, the parties may each nominate one Arbitrator of their choice. The arbitrators of each party will jointly nominate one umpire in accordance with the Arbitration Act, 1940 and the arbitration shall proceed according to the said Act. The award filed by the sole Arbitrator/ Arbitrators/Umpire shall be binding on all the parties. Subject as aforesaid in the provisions of the Arbitration Act, 1940 or any statutory modification or reenactment thereof and the rules made there under for the time being in force shall apply to the arbitration proceeding under this contract.”

According to the appellant-society, after issuance of the work order, the claimant , who had to complete the execution of work within 4 months from 7.10.1993, failed to do so, for which the appellant vide its letter dated 13.2.1997 requested the claimant to discontinue the work and attend the final measurement. Before final measurement was done and during execution of the work, the claimant had submitted running bill Nos.1 to 7, which were paid to him. Thereafter the claimant attended the final measurement and the works executed by him were measured in his presence and the final bill was prepared. The claimant also accepted the final bill amount on 4.9.1999 towards full and final settlement without any objection.

Four months after receipt of the final bill, the claimant vide his letter dated 10.1.2000 raised a further claim of Rs.39,24,426/- with interest. Thereafter, without approaching the President of the Board of Directors of the Society in terms of Clause-16 of the Agreement for appointment of Arbitrator, the claimant vide his letter dated 27.1.2000 unilaterally appointed Shri Nilakantha Mishra, a retired Chief Engineer of Irrigation Department of Government of Orissa as the Arbitrator. According to the appellant, the claimant having not followed the procedure prescribed under Clause-16 of the agreement for appointment of arbitrator, the appointment of Shri Mishra as the Arbitrator made by the Claimant was illegal. The said Arbitrator illegally assumed his jurisdiction and issued notice dated 3.3.2000 to the appellant to attend the preliminary hearing, which was fixed to 18.3.2000 at his residence.

In response to the said notice, the appellant appeared before the Arbitrator on 18.3.2000 and sought time for filing objection. The claimant filed his statement of claim before the Arbitrator on 17.4.2000. Since the appointment of the Arbitrator was illegal, the appellant instead of filing written statement, on 13.5.2000 filed a petition under section 16 of the 1996 Act challenging the constitution of the arbitral Tribunal, the maintainability of the arbitration proceeding and the jurisdiction of the Arbitrator. The Arbitrator by order dated 19.7.2000 rejected the petition filed by the appellant on 13.5.2000 holding that the appellant-society had lost its right of objection for not challenging the constitution of the arbitral Tribunal within 15 days from the date of receipt of the arbitral notice and by participating in the proceeding without any murmur till 6.5.2000, the appellant has accepted the jurisdiction of the Arbitrator.

Being aggrieved by the order dated 19.7.2000 of the Arbitrator, the appellant filed an application under Section-9 of 1996 Act, being Misc. Case No. 341 of 2000, before the learned District Judge, Khurda praying for grant of interim injunction restraining the arbitrator from proceeding with the arbitral proceeding. The said application was dismissed by the learned District Judge vide his order dated 16.10.2000 with the following observations:-

“The case is posted to-day for hearing on admission. Admittedly there is an arbitral proceeding between the parties. It is open to the petitioner to raise the question of lack of jurisdiction of the arbitrator in the Arbitration proceeding. Therefore, the application U/s.9 of the Arbitration and Conciliation Act, 1996 to grant interim injunction restraining the arbitrator from proceeding with the Arbitration proceeding is not maintainable in view of Sec.5 of the Act.

In the result, the memorandum of the application (Misc. Case No.341 of 2000) for grant of interim injunction U/s.9 of the Act restraining the arbitrator from proceeding with the Arbitration proceeding is rejected as not maintainable.”

Thereafter the appellant filed MJC No.295 of 2000 before this Court challenging the constitution and jurisdiction of the arbitral Tribunal as well as the order dated 16.10.2000 passed by the learned District Judge, Khurda in Misc. Case No. 341 of 2000.

During pendency of MJC No. 295 of 2000 before this Court, the Arbitrator passed an ex-parte award on 23.4.2001 by awarding a sum of Rs.19,53,670/- in favour of the claimant with regard to the claim vide item nos. 1, 2, 4, 6, 8, 9, 11, 12, 13, 16,17,18 and 19. The said award, according to the appellant, was perverse and based on no evidence and in view of full and final settlement of the claim, no dispute subsisted between the parties.

3. On 18.9.2001, this Court dismissed MJC No.295 of 2001 as withdrawn as by then the award had been passed ex-parte on 23.4.2001.

4. It is alleged by the appellant that though the award was passed on 23.4.2001, the same was not communicated to it. The appellant only came to know about the award passed by the Arbitrator after receipt of the letter dated 9.8.2001 from the claimant. Challenging the award dated 23.4.2001, the appellant filed an application under Section 34 of the 1996 Act before the learned District Judge, Khurda, which was registered as

Arbitration Misc. Case No. 458 of 2001, for setting aside the award dated 23.4.2001 on the ground that the constitution of the arbitral Tribunal was contrary to the procedure prescribed under the arbitration agreement and the same was beyond the scope of the agreement and the Arbitrator had no jurisdiction to arbitrate the dispute. Furthermore, the claimant having received the final bill without any objection, there was no arbitrable dispute subsisting between the parties for invocation of the arbitration clause.

5. The learned District Judge unilaterally dismissed the aforesaid Arbitration Misc. Case No. 458 of 2001 on 5.10.2002 and refused to set aside the award holding that the award did not suffer from any infirmity and had been validly made and none of the grounds enumerated under section 34 of the 1996 Act to set aside the award existed either.

6. The appellant challenging the rejection of its application under section 34 of 1996 Act, has filed the present appeal under section 37 thereof to set aside the judgment passed by the District Judge in Arbitration Misc. Case No. 458 of 2001 so also the ex parte award passed by the Arbitrator.

7. Mr. Sanjit Mohanty, learned Senior Counsel for the appellant, basing upon the notes of submission filed, submitted that the sole Arbitrator illegally assumed the office and though the appellant had filed a petition under Section 16 of the 1996 Act, challenging the constitution of the arbitral Tribunal, maintainability of the arbitration proceeding and the jurisdiction of the Arbitrator, the said application was rejected illegally. He further submitted that the award passed by the Arbitrator was illegal in view of the fact that the final settlement had been made between the parties and the claimant had accepted the final bill without any objection.

8. Learned counsel for the appellant placing reliance on Clause-16 of the Agreement, which has been quoted in the foregoing paragraph, submitted that the said arbitration clause provided the procedure for appointment of the arbitrator and all questions shall be referred to the sole Arbitration of a Civil Engineer not below the rank of a Superintending Engineer, un-connected with the work at any stage, to be nominated by the Board of Directors of the Employer's Society and in the event of failure of the Board of Directors to nominate an Arbitrator within the stipulated time according to Arbitration Act, 1940, the parties may each nominate one Arbitrator of their choice.

According to Mr. Mohanty, Section 11 (4)(a) of the 1996 Act stipulated 30 days' time for appointment of Arbitrator by the employer, failing which the claimant may take recourse to the procedure prescribed under the agreement and the provisions of 1996 Act for appointment of Arbitrator. According to him, there was no request by the claimant to the Board of Directors for appointment of Arbitrator, rather the claimant had unilaterally appointed the Arbitrator, which was illegal and without jurisdiction.

It was further argued that even if the appellant had failed to appoint the Arbitrator on its part as per Clause-16 of the agreement, the claimant could only resort to the procedure mentioned in Section-11 of the 1996 Act by filing an application before the Hon'ble Chief Justice of the High Court for appointment of Arbitrator.

9. So, the questions raised by the appellant before this court for adjudication are: (i) whether the appointment of the Arbitrator by the claimant is legal ? (ii) whether the ex-parte award passed by the said Arbitrator in the absence of any objection filed by the appellant is valid ? and (iii) whether the ex-parte award passed by the single Arbitrator is against the public policy and is liable to be set aside under Section 34 of the Act ?.

10. According to learned counsel for the appellant, the learned District Judge has also committed illegality in not setting aside the award passed by the Arbitrator on 23.4.2001. Further, the application filed by the appellant before the arbitral Tribunal was under Section-16 of the Act, but the Arbitrator wrongly construed the same to be an application under Section 13(2) of the Act.

Section 16 (2) of the 1996 Act speaks thus:-

“A plea that the arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence, however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.”

Section 13 (2) of the 1996 Act speaks thus:-

“Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral Tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral Tribunal.”

Section 13 (2) is a procedure to challenge which comes within the scope and ambit as envisaged in the procedure therein.

Section 16 is a challenge to the Tribunal which has no jurisdiction.

11. Here is a case where on the first date of appearance of both the parties before the Tribunal, the following order was passed.

“Order No.1, dt. 18.3.2000

Both the parties appeared. The respondent has no objection of my appointment of sole arbitrator. The respondent files an application praying for two months time as their Engineer is absent. Time allowed for one month. The next date of hearing is fixed on 17.4.2000 at the same venue at 11 a.m. for preliminary hearing and filing of the claim statement by the claimant. “

From the aforesaid order, it appears that both the parties appearing before the Tribunal on unequivocal term agreed to the appointment of Sri N.K. Mishra as Arbitrator and submitted to his jurisdiction and accordingly arbitration proceeded.

12. The principle settled in the case of **Konkan Railway Corporation Ltd –vrs.- Mehul Construction**, AIR 2000 SC 2821, as relied upon by the appellant is a distinction between applicability of Section-13 and 16 of the Act.

13. Section-13 (1) provides that parties are free to agree on a procedure for challenging an arbitrator. Section 13(2) provides that failing any agreement referred to in

sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral Tribunal or after becoming aware of any circumstances referred to in sub-section (3) of Section 12, send a written statement of the reasons for the challenge to the arbitral Tribunal

14. Section-16 empowers the arbitral Tribunal to rule on its own jurisdiction as well as on any objections with respect to the existence or validity of the arbitration agreement. Conferment of such power on the arbitrator under the 1996 Act indicates the intention of the Legislature and its anxiety to see that the arbitral process is set in motion.

15. Hence, the present case is totally different, as in this case both the parties are subjected themselves to the jurisdiction of the Tribunal and during the proceeding of the Tribunal, the appellant had approached the District Court as well as this Court, but failed to get any relief.

16. In the circumstances, as the appellant-society himself submitted to the jurisdiction of the Arbitrator treating him as the sole Arbitrator, the question of challenging his jurisdiction at the subsequent stage is not permissible in law. The circumstances under which Shri N.K. Mishra was appointed as the sole Arbitrator, as indicated above was due to the sphinx like silence on the part of the appellant, even after receipt of notice for appointment of such Arbitrator. The aforesaid facts have not been disputed either before the lower Court or before this Court.

17. So, in my considered opinion, so long as the composition of the arbitral Tribunal or the arbitral procedure is in accordance with the agreement of the parties, Section-34 does not permit challenge to an award. The decision in **Konkan Railway Corporation Ltd. v. Rani Construction Pvt. Ltd**, AIR 2002 SC 778, relied upon by the appellant, does not in any manner come to help the appellant because in the said case it has been held that Section 16 enables the arbitral Tribunal to rule on its own jurisdiction.

In this case, instead of examining the question whether the Tribunal has dealt with the application of the appellant treating it to be an application filed under Section 13 of the Act instead of under Section 16 of the Act, this Court is of the view that the Tribunal could not have done better except rejecting the application as there was existence of a valid arbitration agreement, which was not in dispute.

That apart, when both the parties were subjected to the jurisdiction of the Arbitral Tribunal, the appellant's attack to the award of the Tribunal as well as the order passed under Section 34 of the 1996 Act, on the above ground is not tenable. Hence, the contention of the appellant that the Arbitrator lacks jurisdiction stands rejected.

18. The next question is whether the ex-parte award is in any manner against the public policy. The common law doctrine of public policy can be invoked wherever an action affects/ offends the public interests or where harmful result of permitting the contract in terms of injury to the public at large is evident and undisputable as such contract is hit by Section 23 of the Contract Act and is void (see **Union of India v. Gopal Chandra Mishra**, AIR 1978 SC 694). In the case of **Oil & Natural gas Corporation Ltd v. Saw Pipes (P) Ltd.**, (2003) 5 SCC 705, it has been held that any

award, which is patently illegal or against any statutory provision, is violative of the public policy of India and is liable to be struck down.

19. The contention advanced by the learned counsel for the appellant that the unilateral appointment of the Arbitrator by the claimant and the award passed by him are against public policy, cannot be accepted. The appointment of the sole Arbitrator by the claimant cannot come within the arena of violation of public policy.

20. It is true that an Arbitrator is to be appointed only by an agreement and not unilaterally. Until and unless the parties agreed to the common Arbitrator, any award rendered by the Arbitrator appointed unilaterally or without consent or agreement or concurrence of the parties is rendered null and void.

21. In the case at hand, the Arbitrator was appointed by the claimant under the circumstances as stated above, merely due to failure on the part of the appellant-society to act in accordance with the arbitration agreement. Further, the appointment of Shri N.K. Mishra as Arbitrator had been concurred and consented by the appellant as transpires from the order dated 18.3.2000 of the Arbitrator. For the reasons stated above, the appellant has waived its right of objection to the appointment of Arbitrator at a later stage, as with the full knowledge of the consequence, the appellant agreed to the continuance of the Arbitrator, Shri N.K. Mishra, and subjected itself to his jurisdiction. Hence, the objection raised by the appellant to the award, on this score is rejected.

22. So far as the allegation of the appellant that the arbitration proceeding had been initiated after full and final settlement of the bill, there is nothing on the record to show that the claimant had ever made any endorsement of full and final settlement of the bill in question.

23. The award passed by the Arbitrator on 23.4.2001 is a award giving reasons for each of the items of claim. There is also nothing on record to disagree with the judgment of the learned District Judge dated 5.10.2002 passed in Arbitration Misc. Case No. 458 of 2001 as the learned District Judge has rightly held that none of the grounds enumerated under Section 34 of the Act did exist to set aside the award.

24. The judgment dated 5.10.2002 passed by the learned District Judge, Khurda in Arbitration Misc. Case No. 458 of 2001 is upheld and the arbitral award dated 23.4.2001 passed by the sole Arbitrator Shri N.K. Mishra is confirmed.

The appeal is accordingly dismissed, but without any order as to cost.

Appeal dismissed.