

HIGH COURT OF CHHATTISGARH, BILASPUR

Misc. Appeal No. 446 of 2004

State of Chhattisgarh & another

Versus

N. Jeevanlal

CAV JUDGMENT

Post for 31 /03/2017

Sd/-
R.C.S. SAMANT
Judge

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Miscellaneous Appeal No. 446 of 2004****Judgment Reserved on 02/01/2017****Judgment Delivered on 21/03/2017**

1. State of Chhattisgarh through Chief Secretary, State of Chhattisgarh, Raipur (C.G.)
2. Secretary, Government of Chhattisgarh, Ministry of Forest Raipur, District Raipur (C.G.)

---- Appellants

Versus

N. Jeevanlal, Chemical Industries Pvt. Ltd., Administrative Office, Rawat Manjil, IInd Floor, 50 Samaldas Gandhi Marg, Princes Street, Mumbai – 400 002 (Maharashtra) and Company Industrial Estate, Jagdalpur, District Bastar (C.G.)

---- Respondent

For Appellant/State : Shri Avinash Mishra, P.L. and Shri Neeraj Sharma, Dy. Govt. Advocate
 For Respondent : Shri B.D. Guru, Advocate

Hon'ble Shri Justice Rajendra Chandra Singh Samant**C A V Judgment**

1. This miscellaneous appeal is brought against the order dated 12/01/2014 passed by II Additional District Judge, Bastar at Jagdalpur in Civil Suit No. 8-A/2002, by which the award dated 24/05/2001 passed by sole arbitrator was approved and judgment and decree was passed on the terms of award.
2. Facts of the case are these, that in pursuance of the newly formulated industrial policy of the State, establishing of a new manufacturing unit for production of Oxalic Acid from Saja Bark and

Arjuna Bark was under contemplation. Respondent-company expressed its willingness to establish such industrial unit. It was assured that there shall be no lack of supply of Arjuna Bark, which was available in abundance in Bastar district. One agreement dated 28/11/1979 was drawn up between the respondent and appellant, in which a clause of assurance was incorporated that respondent shall be supplied 5000 tonnes of Arjuna Bark and 5000 tonnes of saja bark per annum for a period of 12 years. Cost of supplied material was agreed between them. Clause 25 of the agreement provided for arbitration, according to which in case of any dispute, that shall be resolved by the Secretary of the Government of Madhya Pradesh, Forest Department, Bhopal, as sole arbitrator.

3. Respondent arranged for the financial assistance and established the industrial unit which started functioning from 15/07/1983, which had the capacity to process 5000 tonnes of Saja Bark and 5000 tonnes of Arjuna Bark per annum. Appellant undertook the responsibility for uninterrupted supply of Arjuna Bark and Saja Bark, but could not fulfill the same. Because of scanty and inadequate supply of raw material for production, respondent suffered losses for which the appellant was directly responsible and liable to compensate the respondent. The respondent suffered losses to the tune of Rs.26,88,91,455/-. On the basis of these events the dispute arose between the parties.

4. Referring to the clause 25 of the agreement, the respondent approached Secretary, Forest Department for redressal of his

grievances but he was not responded. Respondent then filed an application dated 05/03/1994 under Section 20 read with Section 5, 8 and 11 of the Arbitration Act, 1940 before the Court of District Judge, Bastar with prayer to refer the dispute to an impartial and independent arbitrator. By order dated 10-03-1998, Secretary, Forest Department, Govt. of M.P. was appointed as sole Arbitrator on the basis of consent of parties. Sole Arbitrator, Secretary, Forest Department, Govt. of M.P. filed award dated 17-12-1999. The Respondent challenged this award under Section 30 of the Act, 1940. The District Judge, Bastar by order dated 25/11/2000 allowed the application of respondent by setting aside the award dated 17-12-1999 and by appointing justice Shri S. Awathy (Retired) as Sole Arbitrator for resolution of dispute.

5. Sole Arbitrator appointed by District Judge, Bastar passed the award dated 22/05/2001 which was taken on record, according to which the appellant was directed to pay Rs.3,49,60,560/- with 10% annual interest accrued from 01/12/2000. The objections to this award by the sole arbitrator appointed by the Court were decided by order dated 12/01/2004 by which the prayer of appellant for setting aside the awards were dismissed and judgment was passed on the terms of award, accordingly the decree was drawn.

6. Aggrieved by the order, the grounds raised in this appeal are these, that the order dated 12/01/2004 passed by the Additional District Judge is an order without jurisdiction. The appointment of arbitrator was challenged in appeal before this High Court and the award dated 24-05-2001 passed by the arbitrator whose



appointment was subject to decision in this appeal, hence the arbitrator had no authority to pass this award. Respondent was not entitled to file any fresh claim before the Arbitrator whose appointment was under challenge and that he already had filed his claim before the Principal Secretary, Forest Department who was the 1st Arbitrator. The learned Arbitrator declared that clause 4 of the agreement was null and void which was an order beyond his jurisdiction and void *ab-initio*. Further the learned Arbitrator passed the order which was not in terms of reference made. Learned trial Court has not considered neither appreciated the grounds of objection under Sections 30 and 33 of the Arbitration Act 1940, hence the order is bad in law. The fact that claim was presented time barred was not given any consideration by the trial Court the assessment of damage by learned Sole Arbitrator is without basis and without any support of evidence. For these reasons, the rejection of objections filed by the appellants had been improper it is prayed that the appeal be allowed. The order of trial Court be set-aside and the award passed by Principal Secretary, Forest dated 17/12/1999 be restored.

7. It is submitted by counsel for appellant that the appointment of sole arbitrator by the learned trial Court was under challenge before the High Court, for this reason the learned Sole Arbitrator should not have proceeded with the arbitration proceeding. This being a fact that previous arbitrator who was appointed arbitrator by the Court below as per clause 25 of the agreement dated 28/11/1979 had already passed award dated 17/12/1999. By



preference of appeal before the High Court the things were not settled finally, hence the award of Sole Arbitrator appointed later on is affected by principle of *res judicata*. The trial Court had no authority to go beyond the arbitration clause. The award passed by the Sole Arbitrator is contrary to the terms of Section 73 of the Contract Act.

8. Counsel for the respondent has submitted that order of appointment of Sole Arbitrator was challenged by Miscellaneous Appeal No. 135/2001, which has been dismissed as infructuous on 11/08/2011 by this High Court. There had been no order of stay on the operation and effect of the order passed by District Judge, Bastar regarding appointment of Sole Arbitrator and also there was no order of stay of the proceedings before the Sole Arbitrator appointed by the Court, hence there had been no illegality in passing of award by the learned Sole Arbitrator. It is submitted that vide Section 2A of M.P. Civil Court Act and Section 7 of the same Act, it is defined that the District Judge includes Additional District Judge as well. Hence there is no illegality in the impugned order passed by the Additional District Judge who has exercised the power of District Judge.

9. The only question is pertaining to the validity of the whole procedure adopted before the passing of order dated 12/01/2004.

10. As per the agreement dated 28/11/1979 clause 25 of this agreement is as under :-

"25. In the event of any dispute or difference arising



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between the parties to this agreement on any of the provisions herein contained or anything arising hereto except in respect of any matter on which the decision is hereinbefore declared to be final and bindings it shall be referred to the secretary to Govt. of M.P. Forest Department, Bhopal whose decision thereon shall be final and binding on the parties."

11. The application under Section 20 read with Section 5 and 11 of the Arbitration Act, 1940 was filed before the Court of District & Sessions Judge, Bastar at Jagdalpur, on 05/03/1994 by the respondent. After the appearance of appellant/defendant and on the basis of submission of appellant and consent of both the parties, order dated 10/03/1998 was passed, in which, in accordance with clause 25 of the agreement Secretary M.P. Government, Forest Department, Bhopal was appointed as Arbitrator and the dispute between the parties was referred to him for arbitration. It was by order of the Court below that Secretary, Forest Department, Govt. of M.P. was appointed as Arbitrator who conducted the arbitration proceeding and filed the award dated 17/12/1999 before the Court below.

12. After filing of the award respondent/plaintiff filed an application under Section 30 of the Arbitration Act, 1940. This application and the application initially presented under Section 20 of the Act were decided by the order dated 25/11/2000, in which the award passed by sole arbitrator Principal Secretary, Forest Department, Govt. of M.P. dated 17/11/1999 was set-aside by allowing the application under Section 30 of the Act. Further the original application by which the proceeding was initiated under



Section 20 of the Act was allowed and another Sole Arbitrator Shri Justice S. Awasthy (Retd.) was appointed to conduct the arbitration proceeding. On submission of arbitration award dated 24/05/2001 by Sole Arbitrator, Retired Justice Shri S. Awasthy again the objections were called and the final order dated 12/01/2004 has been passed by the Court below, which is under challenge here.

13. As per the chronology of the events the legality of the proceeding is under question. The original application filed by the respondent/plaintiff was with prayer to appoint arbitrator to resolve the dispute between the parties. The order dated 10/03/1998 passed by the Court below has to be referred specifically. Section 8 of Arbitration Act 1940 empowered the Court to appoint Arbitrator is as follows :-

“Section 8. Power of Court to appoint arbitrator or 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;

(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."

14. Order dated 10/03/1998 is very clearly an order passed invoking the powers under Section 8 of the Act, Section 20 of the Act is just procedure for bringing an application before the Court for appointment of Arbitrator, which is not a separate provision separately empowering the Court to appoint an Arbitrator for the dispute.

15. In ***Dharma Prathishthanam vs M/S. Madhok Construction Pvt. Ltd***, reported in ***2005 (9) SCC 686, 2005 AIR(SC) 214***, it was held by Apex Court in para 8 :

"Arbitration Act, 1940 consolidates and amends the law relating to arbitration. According to Clause (a) of Section 2 of the Act, "Arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. Under Section 3, "arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule insofar as they are applicable to the reference. The First Schedule consists of 8 paragraphs incorporating implied conditions of arbitration agreements. Para 1 of the First Schedule which only is relevant for our purpose provides "Unless otherwise expressly provided, the reference shall be to a sole arbitrator". The manner and method of choosing the sole arbitrator and making the reference to him is not provided. That is found to be dealt with



in Sections 8, 9 and 20 of the Act."

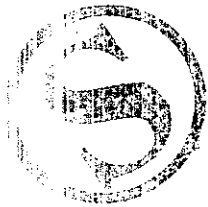
Thus, it is clear that Section 20 of the Act is not a separate provision empowering the Court for appointment of Arbitrator.

16. Thus, it is found that the Court below exercised the power of appointment of Arbitrator by order dated 10/03/1998 due to which the Court below became 'functus officio' to make appointment of Arbitrator again in the same matter.

17. After filing of award dated 17/12/1999 by the Sole Arbitrator appointed by the Court below invited objections and in the meanwhile respondent/plaintiff presented an application under Section 30 of the Act for setting aside the award. Under Section 15 of the Act, the Court was empowered to modify or to correct an award, under Section 16 of the Act, the Court had power to remit the award for reconsideration of the Arbitrator and under Section 17 of the Act the Court had power to pass judgment in terms of the award filed before it including the power of the Court under Section 30 of the Act to set-aside the award on the ground mentioned in this provision.

18. The Court below by passing the order dated 25/10/2000 did not invoke the powers under Sections 15, 16 or 17 of the Act but has invoked the provision under Section 30 of the Act for setting aside the award passed by the Sole Arbitrator Principal Secretary, Forest Department, Govt. of M.P.

19. By order dated 25/10/2000 the Court below has further passed an order under Section 20 of the Act appointing another



Sole Arbitrator for reconsideration of dispute by arbitration procedure was totally erroneous and contrary to the provisions of law in force at the relevant time. The only course open after passing of an order of setting aside the award of first Arbitrator by the Court of District & Sessions Judge, was to challenge that order in appeal under Section 39 of the Act, 1940 which reads as follows :-

“Section 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 decree of the Court passing the orders:- An order

- (i) superseding an arbitration;
 - (ii) on an award stated in the form of a special case;
 - (iii) modifying or correcting an award;
 - (iv) filing or refusing to file an arbitration agreement;
 - (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
 - (vi) setting aside or refusing to set aside an award;
- Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to 1 [the Supreme Court].”

20. Neither expressly nor impliedly the provision under Arbitration Act, 1940 empower the Court to appoint another Arbitrator for the second time after setting aside of such award given by the previously appointed Arbitrator. After passing the order of setting aside the award dated 25/10/2000 again the Court below became 'functus officio' again.



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21. According to Black's Law Dictionary FUNCTUS OFFICIO means; having fulfilled the function, discharged the office or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired, and who has consequently no further official authority; and also to an instrument, power, agency, etc. which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect.

22. Any Court derives authority to act proceed and adjudicate in accordance with the provisions of law. On the basis of the scrutiny made in the aforementioned paragraphs, it is very clear that once the Court below exercised its power under Section 8 of the Act in appointing Arbitrator for arbitration of the dispute between the parties by order dated 10/03/1998, the Court below became functus officio for appointment of another Arbitrator. It is only under circumstances the Act 1940 empowered the Court to remove an Arbitrator who failed to act or who misconducted himself under Section 11 of the Act. On such removal of Arbitrator, the Act 1940 empowered the Court under Section 12 to re-appoint the Arbitrator and fill the vacancies. Thus, the Court was vested only with these power under Section 11 and 12 of the Act to remove and re-appoint the Arbitrator that too before the completion of arbitration proceeding. There is no other provision in the Act 1940 empowering the Court to appoint another Arbitrator after setting aside the award given by the previously appointed Arbitrator.

23. Under these circumstances, repeat appointment of Sole Arbitrator by the Court below by order dated 25/10/2000 was totally

without authority and contrary to the provisions of Act, 1940. Further after setting aside the award of originally appointed Arbitrator by judgment dated 25/10/2000 the Court below had no authorization to call for filing of award by the subsequently appointed Arbitrator and pass the judgment in terms of award under Section 17 of the Act. Thus, the procedure adopted by the Court below had been totally misconceived. The proceeding before the Court below was lawful in part till the passing of order dated 25/10/2000, by which the award dated 17/12/1999 was set-aside. The proceeding before the Court below terminated at this juncture and no authority was left with the Court below to proceed any further. The only course open before the parties was to invoke Section 39 of the Act and file appeal before the proper Court. Hence, for these reasons, the order dated 12/01/2004 passed by the Court below is manifestly illegal. Hence, this Miscellaneous Appeal is allowed and the impugned order/judgment is hereby set-aside.

Sd/-
R.C.S. SAMANT
Judge