

Hind Constructions Ltd. Vs. Dwarika Nath Sen and ors.

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Court : Kolkata

Decided On : Nov-30-1950

Reported in : AIR1952Cal289,55CWN248

Judge : Das Gupta and ; P.N. Mookerjee, JJ.

Acts : [Arbitration Act, 1940](#) - Section 39(1)

Appeal No. : A.F.O.O. No. 44 of 1949

Appellant : Hind Constructions Ltd.

Respondent : Dwarika Nath Sen and ors.

Advocate for Def. : Hemendra Chandra Sen and ; Satya Charan Pain, Advs.

Advocate for Pet/Ap. : Hemendra Nath Das, ; Durga Charan Chatterjee and ; Monohar Saha, Advs.

Disposition : Appeal dismissed

Judgement :

P.N. Mookerjee, J.

1. This is an appeal by deft. 1 against a decree passed by the learned Subordinate Judge, 2nd Ct., Midnapore, in a suit brought for enforcement of an award. The facts giving rise to this appeal are briefly these :

The deft. 1 (Messrs. Hind Constructions Ltd.) is a firm of contractors who undertook the construction work of the Reservoir Tank of the B. N. Rly. Co. at Gidni. Of this work deft. 1 gave a subcontract to the pltfs. It is the pltf's case that they have done the work but have not been paid their dues in full. There was a dispute between the parties in relation to this sub-contract with regard to the amount of work done by the pltfs. & the dues payable to them under the terms of the subcontract. The dispute was eventually referred to the arbitration of one Mr. Tarapada Dey on 30-8-1945. A letter of reference which is Ex. 1 in the case, printed at p. 2, Part II of the paper book, was signed on behalf of deft. 1 by H. Bihani, & on behalf of the pltfs. by pltf. 1. Upon this reference an award followed. The award was given on 5-3-1946, & under the award the pltfs. became entitled to a sum of Rs. 12380/1/6. As the deft. 1 did not pay this amount to the pltfs., the pltfs. applied before the learned Subordinate Judge for enforcement of the award under the provisions of the Indian Arbitration Act giving rise to the suit out of which the present appeal has arisen. In the suit the defence of the deft. 1 was 'inter alia' that the award was invalid as the reference itself was not

valid under the law, Bihani having no authority to refer the matter to arbitration on behalf of deft. 1. It was also taken as a defence that the award was vitiated by misconduct on the part of the arbitrator, & thirdly, as it appears from the judgment of the learned Subordinate Judge, that the award was filed beyond time prescribed by law & as such also it was invalid.

2. The learned Subordinate Judge held against the deft. 1 on all these points & decreed the pltf's. suit. Against this decision the present appeal has been preferred. In this appeal Mr. Das the learned counsel appearing for the applt. has raised three contentions: (1) that there was no valid reference to arbitration as Bihani had no authority to refer the matter to arbitration on 'behalf of deft. 1, (2) that the award was Vitiated by misconduct on the part of the arbitrator, & (3) that the award was given after the time prescribed by law for such award had expired & as such also it was invalid.

3. Mr. Sen appearing on behalf of the pltfs. resps. has raised a preliminary objection to the maintainability of this appeal. His contention is that under the Arbitration Act there are two sections which provide for appeals, one is Section 17, & the other is Section 39, & this is a case which comes under neither, & therefore, the present appeal is not maintainable in law.

4. In answer to this preliminary objection, Mr. Das has not contended that this is a case where an appeal would lie under Section 17 but he has contended that it is substantially a case which comes under Section 39(1)(vi) & as such the present appeal is maintainable. Mr. Das has also contended that as in the present case one of the points is that there was no valid reference to arbitration, the appeal-ability of the decree will not be controlled by the provisions of the Arbitration Act but an appeal will lie under the general law, that is, it is not strictly an appeal against a decree on award under the provisions of the Arbitration Act as, in his submission, the reference being invalid, the award itself is a nullity & there is in the eye of law no award. In support of this position Mr. Das has relied upon the decision of the Judicial Committee in the case of 'Chhabalal v. Kallu Lal,' 73 I.A. 52.

5. I shall proceed to examine the validity of the contentions of the respective parties. I may at once state that as already noticed above, Mr. Das has not attempted to support the appeal under Section 17, Arbitration Act as it is not his case that the decree is in excess of, or not otherwise in accordance with, the award. If, therefore, the present appeal has to be supported by provisions of the Arbitration Act, the only section applicable would be Section 39.

6. As regards Section 39, Mr. Sen's contention is that this is not a case of setting aside or refusing to set aside an award, & therefore that section has no application. In the defence filed to the suit by a petn. of objection the deft. 1 expressly made a prayer that the award be set aside. In the face of this petn. it cannot be said that there was no prayer in the suit for the setting aside of the award & in that view of the matter the Ct.'s decree overruling the deft.'s objection & decreeing the pltfs'. suit is substantially one refusing to set aside an awards. In my opinion, therefore, this is a case which comes under Section 39(Vi) Arbitration Act; in that view the present appeal cannot be dismissed on the ground that it is not maintainable in law. If, however, the deft.'s objection before the trial Ct. be taken to be an appln. for setting aside the award & on the footing thereof the present appeal is held to be maintainable a further difficulty presents itself before the deft. That appln. was filed

on 21-9-1946. The notice of the filing of the award was given to the deft. on 7-8-1946. It is clear, therefore, that the appln. which the deft says was an appln. for the setting aside of the award, was not filed within 30 days from the service of the notice on him of the filing of the award. This appln. therefore was clearly time barred under Article 158, Limitation Act, & on that ground alone the appln. of the deft. must be dismissed.

7. With regard to the other contention of Mr. Das that this appeal can be maintained even apart from the provisions of the Arbitration Act, on the authority of the decision of the Judicial Committee in 73 I. A. 52, it is to be noted that that contention can succeed only if it could be established that the reference to arbitration was invalid. With regard to the question whether Bihani had any authority to refer the matter to arbitration on behalf of deft. 1, Mr. Das's contention is that under the Articles of Association of the deft. company only the Directors could have referred the matter to arbitration on behalf of the company. This contention does not appear to have been seriously pressed before the trial Ct. & it is noticed in the judgment of the learned Subordinate Judge that such a contention was attempted to be raised but was ultimately abandoned in view of Clause (12) of para 106 of the Articles of Association. In my opinion the materials on the record are sufficient to indicate that Bihani had authority on behalf of the company to refer the matter to arbitration, & that, in any event the reference was amply ratified by the Company by its participation in the arbitration proceedings. In this view of the matter, it must be held that the reference to arbitration was valid, & accordingly, Mr. Das can get no assistance from the decision of the Judicial Committee in 73 I. A. 52.

8. The true position therefore is that although the appeal might be maintainable under Section 39, Arbitration Act treating the deft.'s objection in the trial Ct. as an appln. for setting aside the award, that appln. itself must be held to have been filed beyond time & therefore liable to dismissal. Under Section 17, therefore, the Ct. had before it an award, & the appln. for the setting aside of the award must be treated as dismissed. The Subordinate Judge was therefore right in passing a decree on the basis of the award.

9. In the above view of the matter it is not necessary to discuss the other points raised by Mr. Das, & in my opinion the present appeal must fail.

10. The appeal is therefore dismissed but there will be no order for costs.

Das Gupta, J.

11. I agree.