

## NIROD BARAN BANERJEE

v.

DY. COMMISSIONER OF HAZARI BAGH

February 14, 1980

[S. MURTAZA FAZAL ALI AND A. D. KOSHAL, JJ.]

*New Plea—A point not taken either before the trial court or before the High Court when the appeal was not taken, cannot be allowed to be raised for the first time either in the Supreme Court or in the application given before the High Court for granting a certificate of fitness—Civil Procedure Code Order VI Rule 8 and Order VIII Rule 2.*

In respect of the lands acquired by the State of Bihar, the appellant was awarded a sum of Rs. 9665-35 which along with solatium and other charges totalled to a sum of Rs. 20,231-67. The appellant claimed a sum of Rs. 2,80,000/- as the market value of the land acquired. Before the District Magistrate could take up the hearing on a reference made under s. 18 of the Land Acquisition Act, the matter was agreed by the parties to be referred to a Board of Arbitration consisting of three persons of whom one was appointed by the appellant. The Board so constituted gave an award confirming the compensation given by the Collector. The appellant moved the District Court for setting aside the award. The said application was dismissed by the Court and an appeal to the High Court thereon was also dismissed. Thereafter, the appellant approached the High Court for granting a certificate of fitness for appeal to the Supreme Court and it was at that stage that for the first time the appellant raised the point that the arbitration agreement was not in accordance with the provisions of Article 299 of the Constitution and that there being no arbitration agreement in the eye of law, the award was invalid and liable to be set aside. The High Court accepted the contention and granted leave as prayed for.

Dismissing the appeal, the Court,

HELD : 1. The question whether or not there was an agreement which fulfilled the requirements of Art. 299 is not a pure question of law but is a question which depends on investigation of facts. [1046C]

2. In view of the provision of Order VI Rule 8 and Order VIII Rule 2 of the Code of Civil Procedure, the appellant would be debarred from raising a point for the first time before this Court or even before the High Court. It is well settled that no evidence can be looked into by the Court for which there is no foundation in the pleadings. [1047B]

In the instant case, the appellant cannot be allowed to raise the plea for the first time in the Supreme Court, in as much as :

(a) the appellant contented himself by relying on the resolution by the Government, treated it as a valid arbitration agreement and never raised the question that the said resolution was hit by Art. 299 of the Constitution of India. [1047C]

(b) he fully participated in the arbitration proceedings and having taken the benefit of a decision by the Board in his favour made a complete somersault only when the decision went against him, by taking the plea now under examination, which doubtless required investigation of facts. [1047D]

- A** (c) Even that plea he took neither before the Additional Sub-Judge nor in the High Court when the appeal was heard on merits but only for the first time in the application which he gave for granting leave to appeal to this Court. Had he raised the plea before the Trial Court that the arbitration agreement was not in consonance with Art. 299 of the Constitution of India, the respondent may have been in a position to rebut the plea by producing evidence and circumstances to show that an agreement for arbitration was authenticated in the form required by Art. 299 of the Constitution. [1047E]

*Kalyanpur Lime Works Ltd. v. State of Bihar and Anr.*; [1954] S.C.R. 958 @ 969; followed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1105 of 1970.

- C** Appeal by Certificate from the Judgment and Order dated 13-5-1968 of the Patna High Court in Misc. Appeal No. 178 of 1963.

*Dr. Y. S. Chitale, K. N. Choubey and B. P. Singh* for the Appellant.

- D** *Lal Narain Sinha Attorney General and S. N. Jha* for the Respondent.

The Judgment of the Court was delivered by

- E** FAZAL ALI, J.—This appeal by certificate is directed against a judgment of the Patna High Court dated 13-5-1968 dismissing the appeal filed by the appellant before the High Court.

- F** The case arose out of land acquisition proceedings taken by the Government in respect of the land in dispute which comprised 84.31 acres. On 21-9-1980, the Collector by his award allowed a compensation of Rs. 9666.35 which along with solatium and other charges totalled to a sum of Rs. 20,231.67. The appellant claimed Rs. 2,80,000/- as the market value of the land acquired. On 11-10-1960, a reference was made to the District Judge under S. 18 of the Land Acquisition Act. Before the District Judge could take up the proceedings for hearing, the matter was agreed by the parties, to be referred to a Board of Arbitrators consisting of three persons of whom one was appointed by the appellant. Accordingly, a joint petition for referring the case to the arbitrator was made on 19-12-1961 and on the next day, dated 20-12-1961 the case was referred for arbitration to the Board. On 22-5-1962, the Board gave an award confirming the compensation given by the Collector. Having thus lost his case before the Board, the appellant moved the District Court for setting aside the award. His application was dismissed by the Additional Sub-Judge to whom
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the case was transferred in the meantime and hence an appeal was filed by him before the High Court which was also dismissed. Thereafter the appellant approached the High Court for granting a certificate of fitness for appeal to this Court and it was at that stage that for the first time he raised the point that the arbitration agreement was not in accordance with the provisions of Article 299 of the Constitution and that thus there being no arbitration agreement in the eye of law, the award was invalid and liable to be set aside. The High Court appears to have been impressed by the point raised before it and granted leave as prayed for. Hence this appeal before us.

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Dr. Y. S. Chitale, learned counsel appearing for the appellant submitted that on the admitted facts there was no separate arbitration agreement, that the resolution of the Government incorporating the agreement of both the parties that the matter be referred to the Board of Arbitrators would be deemed to be the arbitration agreement, that the resolution not having been authenticated in accordance with the provisions of Article 299 of the Constitution of India was invalid and that therefore the award which followed it would also be invalid. In support of his argument the learned counsel relied on a decision of this Court in the case of *Mulamchand v. State of Madhya Pradesh*(<sup>1</sup>) where this Court while considering the scope and the ambit of Article 299 observed as follows :—

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“It was held by this Court that the provisions of s. 175(3) were mandatory and the contracts were therefore void and not binding on the Union of India which were not liable for damages for breach of the contracts. The same principle was reiterated by this Court in a later case—*State of West Bengal v. M/s. B. K. Mondal and Sons* [1962] 1 Supp. SCR 876. The principle is that the provision of s. 175 (3) of the Government of India Act, 1935 or the corresponding provisions of Art. 299(1) of the Constitution of India are mandatory in character and the contravention of these provisions nullifies the contracts and makes them void. There is no question of estoppel or ratification of such a case.”

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It was argued by Dr. Chitale that in view of the constitutional provisions of Art. 299, this Court held that the agreement was void, and that there could be no estoppel against a statute or constitutional provisions. To the same effect are the decisions in *Laliteshwari*

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(1) [1968] 3 S.C.R. 214, 221.

**A** *Prasad Sahi v. Baseshwar Prasad & Ors.*<sup>(1)</sup> and *Bihar Eastern Gangetic Fisherman Co-operative Society Ltd. v. Sipahi Singh and Ors.*<sup>(2)</sup>. Great reliance was placed by the learned counsel for the appellant on the decision of this Court in *The Marine Cooled (Bengal) P. Ltd. v. Union of India*<sup>(3)</sup> which was also a case of an arbitration agreement.

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The Attorney General while repelling the arguments of the appellant submitted that there can be no dispute with the propositions laid down by this Court regarding the interpretation of Art. 299 of the Constitution of India but that the question whether or not there was an agreement which fulfilled the requirements of Art. 299 is not a pure question of law but is a question which depends on investigation of facts. He added that as the appellant did not plead this point either before the Trial Court or before the High Court when the appeal was heard on merits the appellant cannot be allowed to raise it for the first time either in this Court or in his application given before the High Court for granting a certificate of fitness. It was argued by the Attorney General that if the point had been pleaded at the initial stage, the respondent might have been in a position to show that an agreement conforming to the provisions of Art. 299 of the Constitution of India existed. We are of the opinion that the contention raised by the Attorney General is sound and must prevail. In the case of *Kalyanpur Lime Works Ltd. v. State of Bihar and Another*<sup>(4)</sup> a similar situation arose and this Court refused to entertain the point relating to the applicability of s. 30 of the Government of India Act 1915 which corresponds to Art. 299 of the Constitution or s. 175(3) of the Government of India Act, on the ground that the party concerned did not raise the same in their pleadings. In this connection this Court observed as follows :—

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“The first question which arises in this connection is whether the contract was to be executed by a formal document or whether it could be spelt out from the correspondence in which the negotiations were carried on by the parties. We do not think it necessary to go into this question, for assuming that a formal document was necessary, the plea of section 30, it is to be noted, was not raised in the pleadings. Objection is taken on behalf of the appellant that

(1) [1966] 2 S.C.R. 63, 70.

(2) [1978] 1 S.C.R. 375, 381.

(3) [1964] 2 S.C.R. 859.

(4) [1954] S.C.R. 958, @ 969.

the point not having been raised in the written statement it was not incumbent upon the plaintiff to show that the contract was executed according to the provisions of section 30, before it could be specifically enforced and reliance was placed upon the provisions of order VI, rule 8, and Order VIII, rule 2 of the Civil Procedure Code.”

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This Court pointed out that in view of the provisions of Order VI Rule 8 and Order VIII Rule 2 of the Code of Civil Procedure, the appellant would be debarred from raising the point for the first time before this Court or even before the High Court. The facts of the present case appear to be on all fours with facts of the case in the decision cited above. In the instant case also, the appellant contented himself by relying on the resolution by the Government, treated it as a valid arbitration agreement and never raised the question that the said resolution was hit by Art. 299 of the Constitution of India. On the other hand, the appellant fully participated in the arbitration proceedings and having taken the benefit of a decision by the Board in his favour made a complete somersault only when the decision went against him, by taking the plea now under examination, which doubtless required investigation of facts. Even that plea too he took neither before the Additional Sub-Judge nor in the High Court when the appeal was heard on merits but only for the first time in the application which he gave for granting leave to appeal to this Court. In these circumstances it is manifest that if the appellant had raised the plea before the Trial Court that the arbitration agreement was not in consonance with Art. 299 of the Constitution of India, the respondent may have been in a position to rebut the plea by producing evidence and circumstances to show that an agreement for arbitration was authenticated in the form required by Art. 299 of the Constitution. It is well settled that no evidence can be looked into by the Court for which there is no foundation in the pleadings. We cannot therefore allow the appellant to raise the plea for the first time in this Court and the High Court also ought not to have entertained it at the stage of the application for a certificate of fitness to be granted for leave to appeal to this Court. No other point was pleaded before us.

The appeal fails and is accordingly dismissed. In the circumstances of this case however, there will be no order as to costs.

V.D.K.

*Appeal dismissed.*

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