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STATE BANK OF INDIA

v.

RAM DAS AND ANR.

OCTOBER 29, 2003

B

[V.N. KHARE, CJ. AND S.B. SINHA, J.]

Arbitration Act, 1940 :

C *s. 30—Umpire—Misconduct—Umpire filing award in civil court and appointing a lawyer to conduct the proceedings—Held, if the umpire was advised to file the award in civil court and appoint a lawyer to conduct the proceedings, he did commit a mistake wherefor adverse comments were made by High Court, but the same cannot be said to be an act of bias—No such act would amount to misconduct within the meaning of s.30.*

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International Airports Authority of India v. K.D. Bali and Anr., [1988] 2 SCC 360, held inapplicable.

Bihar State Mineral Development Corporation and Anr. v. Encon Builders (I) (P) Ltd., [2003] 7 SCC 418, referred to.

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Arbitration :

F *Plea of bias against umpire—Raised for the first time before Supreme Court—Maintainability of—Umpire filing award in civil court and appointing a lawyer to conduct the proceedings—Award made rule of court—Appeal before High Court—Plea of bias against umpire not raised before civil court nor before High Court—High Court, in view of amendment made in s. 17 of Arbitration Act, 1940, by A.P. Amendment Act 1 of 1990, did not find sufficient the reasons assigned by the umpire for his award, set it aside and remitted the matter back to the umpire for giving reasons—*
G *High Court also adversely commented on the conduct of the umpire for himself filing award in court and appointing a lawyer for conducting the proceedings—Appeal before Supreme Court—Appellant for the first time taking the plea of bias against the umpire for himself filing the award in civil court—Held, High Court did not set aside the award on the ground*
H *of any misconduct on the part of the umpire—Therefore, the observations*

made by High Court must be held to have been made only for future guidance of arbitrators—Appellant never questioned the conduct of umpire during arbitration proceedings—No case of personal bias was made out against arbitrator—Where a party despite knowledge of the defect in the jurisdiction or bias or malice of an arbitrator participated in the proceedings without any kind of objection by his conduct it disentitles itself to raise such a question in the subsequent proceedings—The appellant despite numerous opportunities made available to it, although it was aware of the defect in the award of the Umpire, at no stage made out any case of bias against the Umpire—The appellant cannot be permitted to raise question of bias for the first time before Supreme Court—Arbitration Act, 1940—ss. 14(1) and 17—A.P. Amendment Act 1 of 1990.

S. Pratap Singh v. The State of Punjab, [1964] 4 SCR 733, cited.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4542-4544 of 1998.

From the Judgment and Order dated 12.3.98 of the Andhra Pradesh High Court in C.R.P. Nos. 5383, 5367 and C.M.A. No. 1805 of 1994.

WITH

C.A. Nos. 4545-4547 of 1998.

Dr. Rajeev Dhawan, Sanjay Kapur and Rajiv Kapur for the Appellant in C.A. Nos. 4542-44/98.

M.L. Verma, S.V. Deshpande, Mrs. Anuradha Rastogi for the Appellant in C.A. Nos. 4545-4547/98.

R.F. Nariman, S.V. Deshpande, Mrs. Anuradha Rastogi for the Respondents in C.A. No. 4542-44/98.

The Order of the Court was delivered :

Before us there are two sets of appeals, one, C.A. Nos. 4542-4544/1998 at the instance of State Bank of India and other, C.A. Nos. 4545-4547/1998 at the instance of the respondent-Contractor.

- A On 6th of October, 1978, the State Bank of India entered into an agreement with the respondent herein (Contractor) for constructing Local Head Office building at Hyderabad. Clause 36 of the agreement provided for resolution of disputes by arbitration. It is not disputed that in the year 1982 the Contractor completed the constructions in terms of the contract.
- B However, certain disputes arose between the parties as a result whereof the matter was referred to arbitration. Mr. MU Hattikuddur was chosen by the Arbitrators as an Umpire. On 8.8.1984 the Umpire gave an award wherein four claims of the Contractor were allowed in full, seven claims were allowed in part and 15 claims were rejected. A total sum of Rs. 15.85 lacs were found to be payable by the appellant to the Contractor under the said award.
- C The Umpire, however, also rejected the counter-claim of the appellant.

- D It is not disputed that the umpire in the year 1985 himself filed the award in the City Civil Court, Hyderabad for making the award the rule of Court. It is also not disputed that the Umpire appointed a lawyer for prosecuting the proceedings. The said suit was numbered as Original suit No. 191/1985. The appellant herein filed an objection before the City Civil Court for setting aside the award under Sections 30 & 33 of the Arbitration Act. The respondent filed his counter affidavit to the objections of the appellant herein. The Umpire also filed an affidavit to the objection filed by the appellant. It is furthermore not disputed that the appellant did not raise any plea in its objection as regards bias against the Umpire.

- E The State Legislature of Andhra Pradesh, however, by amending Act 1 of 1990 inserted provisos to both Sections 14(1) and 17 of the Arbitration Act, 1940 (hereinafter referred to as "the Act") which are in the following terms :

Section 14(1) :

- G "provided that the arbitrators or Umpire shall give reasons for any award made under this section and no award shall be valid unless the reasons therefore are given as aforesaid."

Section 17 :

- H "provided that where an award pending in the court at the commencement of the Arbitration (Andhra Pradesh Amendment)

Act, 1990, or an award filed in the court, thereafter does not contain reasons therefor as required by the proviso to sub-section (1) of section 14 the Court shall not proceed to pronounce the Judgment according to the Award, but shall remit the award to the Arbitrators ...”

The aforesaid provisos were inserted with retrospective effect providing for giving the reasons by the Arbitrator or the umpire in the award. By reason of the said Amending Act, thus, assignment of reasons by the arbitrators or umpire while making an award, not only was made imperative but by reason thereof provisions were made for remitting the unreasoned awards back to the arbitrators. In terms of the provisions of the Arbitration Act, 1940, the question as to whether the arbitrators or the umpires are required to pass a reasoned award depends upon the nature of the arbitration agreement. In terms of the said Amending Act, therefore, the arbitrators became liable to assign reasons in support of their awards irrespective of any agreement to the contrary by the parties to the arbitration agreement.

It appears that in pursuance of the said legislative development the appellant herein moved an I.A. in the year 1990 for setting aside the award on the ground that it did not contain the reasons. In this I.A. also the appellant did not raise any objection as regards bias of the Umpire. The City Civil Court, in view of the said amendment in Sections 14 and 17 of the Act, set aside the award and remitted back the matter to the Umpire for giving reasons in the award. The umpire, thereafter, passed a purported reasoned award. Thereafter, the Contractor filed the award for being made the Rule of the Court under Sections 14 and 17 of the Act in the year 1993.

On 7.10.1994, by a common judgment, the First Addl. Judge, City Civil Court made the award the rule of the Court and further awarded 18% interest on the awarded amount. The objection filed by the appellant herein was dismissed. It is further relevant to mention that even before the learned District Judge the appellant did not raise any contention as regards bias on the part of the Umpire.

Aggrieved by and dissatisfied with judgment of the City Civil Court, the appellant filed CRP No. 5383 and 5367/1994 and CMA No. 1805/1994

A before the High Court of Judicature Andhra Pradesh at Hyderabad. On 26/9/1995, the High court granted interim stay subject to the condition that the appellant deposits 50% of the amount awarded and costs within six weeks. It is stated that in pursuance of that order the appellant deposited the said amount and it is also not disputed the said money was withdrawn by the respondent herein. Subsequently, the matter came up before the High Court and it by its impugned judgment dated 12th March, 1998; found that the Umpire did not assign sufficient reasons for giving his award and in view of the said amendment in Section 17 of the Act it was set aside and the matter was remitted back to the Umpire for giving reasons. The High Court also in the impugned judgment, adversely commented on the conduct of the Umpire so far as he himself filed the award in the court and appointed a lawyer for conducting the proceedings before the City Civil Court. It is against the said judgment, the aforesaid two sets of appeals have been filed.

D When this matter was taken up, Mr. R.F. Nariman, learned senior counsel for the respondent-Contractor in CAs 4542-4544/98 and Mr. ML Verma, learned senior counsel for the said appellant-Contractor in CAs 4545-4547/98 raised a preliminary objection that since impugned order under challenge has been acted upon therefore this appeal has rendered E infructuous and this Court need not go into the merits of the matter.

Dr. Rajeev Dhavan, learned senior counsel appearing for the appellant urged that since the plea taken by the appellant that the Umpire was biased goes to the root of the matter and this plea will not be available to the appellant in case if it challenges the award given by the Umpire in F pursuance of the judgment and therefore the appeal has not been rendered infructuous and is required to be decided on merits.

In view of the submissions made by Dr. Dhavan, we proceeded to hear the appeal on merits. Dr. Dhavan urges that the conduct of the umpire G to the effect that he himself filed the award in City Civil Court for being made Rule of the Court and appointed a lawyer to prosecute the proceeding and in view of the fact that the said conduct of the Umpire was adversely commented upon by the High Court, it ought not to have remitted back the matter to the same Umpire and ought to have referred the same to some H retired High Court Judge.

Shri R.F. Nariman, the learned senior counsel appearing on behalf of the respondent would, on the other hand, contend that the purported act on the part of the Umpire which has adversely been commented upon by the High Court would not amount to bias nor the same can be construed to be a *malafide* act on his part. In any event, the learned senior counsel would contend that such a question having not been raised by the appellant at any stage whatsoever, should it be allowed to be raised before this Court.

The High Court while passing the impugned judgment did not set aside the award on the ground of any misconduct on the part of the Umpire. Before the High Court, an appeal in terms of Section 39 of the Act as also a revision were filed. The appeal of the appellant related to that part of the order of the learned Addl. Judge, City Civil Court whereby and whereunder it rejected the objections filed by the appellant under Sections 30 and 33 of the Arbitration Act. The other part of the order which was the subject matter of the civil revision application was refusal to remit the matter back to the Umpire, *inter alia*, on the ground that the award was a reasoned one. The jurisdiction of a civil court under Sections 30 and 33 of the Act is a limited one. In terms of the said provisions, an award can be set aside *inter alia*, on the ground that the arbitrator has misconducted himself or the proceedings or there exists an error apparent on the face of the records. In the event the award is a reasoned one, non-application of correct principles of law may also be a ground for setting aside the same.

The Additional Judge, City Civil Court and consequently the High Court while determining the objections filed by the respondent herein under Sections 30 and 33 of the Arbitration Act were, therefore, entitled to arrive at a conclusion that the Umpire had misconducted himself or the proceedings as a result whereof the award was liable to be set aside.

Once the High Court did not choose to do so, in our opinion, the said observations must be held to have been made only for future guidance of the arbitrators and by reason thereof the High Court did not intend to set aside the award.

Furthermore, concedely the appellant had never questioned the conduct of the Umpire during pendency of the arbitration proceedings. No

A case of personal bias had been made out as against the Umpire either during the arbitration proceedings or otherwise.

Dr. Dhavan, however, would submit that the aforementioned objection had been taken in the Memo of Appeal filed before the High Court which is in the following terms :

“The Court below should have rejected the OS 191/85 filed by the Umpire to pass a decree in terms of his award. An Umpire is not competent to present such a petition. The same is not maintainable.”

A bare perusal of the aforementioned ground would clearly go to show that what was contended by the appellant was that the Umpire was not competent to present such a petition and, therefore, it was not maintainable.

No plea as regards bias or malice on the part of the Umpire had specifically been taken. Learned counsel would then contend that the appellant is entitled to raise the aforementioned question having regard to the disclosures made by the respondent in their counter affidavit in paragraph 5 of the counter affidavit filed in this Court which reads as under :

“On 15.8.1984 the respondent herein addressed letter to the Umpire requesting him to file the award in the court. The umpire thereafter had taken assistance of a counsel Mr. Y. Raja Reddy, Advocate, sending him the original award with all other documents and requested him to file the award in the court. The said counsel has thereafter filed O.S. 191/85 before the Court of the First Additional Judge. The petitioner bank filed written statement in the said suit, copy of which is also annexed herewith. It is noteworthy that the petitioner bank had not raised any issue of bias against the umpire as is sought to be done in the present Special Leave Petition.”

According to Dr. Dhavan from the aforementioned statements it is clear that the Umpire was acting at the behest of the respondent herein.

Our attention has further been drawn to para 4 of the award dated 7th

August, 1998 for raising a contention that despite the aforementioned adverse remarks, the Umpire acted through his lawyer. The said para is as follows :

“As per the order dated 12th March, 1998 of the Hon’ble High Court of Judicature of Andhra Pradesh at Hyderabad, the Award was remitted back to me for giving reasons in the light of the observations made in the said Judgment. The Award along with all records has been returned to me through K. Hanumantha Rao, Advocate, who is appearing on my behalf in the matter, in a sealed packet on 24.7.1998 with a request to file the Award after giving the reasons in the light of the observations made in the said Judgment.”

We do not agree with the said submission.

It is one thing to say that the Umpire has misconducted himself but it is another thing to say that under certain misconception of law he filed a suit through a lawyer at the first instance or filed the award in the court at the behest of the respondent. So long the award is not vitiated by reason of any act of misconduct on the part of the Umpire, the same cannot be set aside. As would appear from the discussions made a little later, it would appear that the said fact was known to the appellant. The respondent was entitled to request the Umpire to file the award in court. In what manner he would do it, was a matter which was left to the Umpire. If he was advised to file such a award by filing a suit by appointing a lawyer, he did commit a mistake wherefor the adverse comments were made by the High Court, but the same cannot be said to be an act of bias. No such act would amount to a misconduct under the meaning of Section 30 of the Act.

So far as the statements made in paragraph 4 of the award dated 7.8.1998 is concerned, suffice it to point out that thereby he merely stated that fact that the records were handed over to his lawyer by the High Court. We cannot read between the lines to arrive at a conclusion that the Umpire was biased. If the High Court was of the opinion that the Umpire should not have filed the suit, it ought not to have delivered the records to his lawyer. The very fact that the High Court handed over the records to the learned advocate appearing on behalf of the Umpire, is itself suggestive

A of the fact that even the High Court did not consider the same to be an act of misconduct on the part of the Umpire. It may further be noticed that same procedure was followed on an earlier occasion by the District Judge of the City Civil Court.

B The submission of Dr. Dhavan to the effect that the conduct of the Umpire was unbecoming of an arbitrator is stated to be rejected. Only because an arbitrator committed a mistake in presenting an application himself under a misconception, the same by itself cannot be said to be a biased attitude on his part nor his action can be attributed as *malafide*.

C The doctrines of bias and malice stand on different footing. How far a bias on the part of a party would vitiate a proceeding has been considered by this Court recently in *Bihar State Mineral Development Corporation and Another v. Encon Builders (I) (P) Ltd.*, [2003] 7 SCC 418. This case does not fall within any of the categories enumerated therein.

D Strong reliance has been placed by Dr. Dhavan on *International Airports Authority of India v. K.D. Bali and Another*, [1988] 2 SCC 360. The fact situation obtaining therein was absolutely different. It was sought to be urged in that case that the petitioner had lost confidence in the sole arbitrator and was apprehensive that the arbitrator was biased against the petitioner. In the facts and circumstances of the said case, this Court held as under in para 5 :

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F “.... It is well settled that there must be purity in the administration of justice as well as in administration of quasi-justice as are involved in the adjudicatory process before the arbitrators. It is well said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality just; arbitrator must not do anything which is not in itself fair and impartial.”

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The said decision has no application in the instant case.

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Reliance placed on *S. Pratap Singh v. The State of Punjab*, [1964] 4 SCR 733 by Dr. Rajeev Dhavan is also misplaced.

We in this case are not concerned with any act of malice on the part of the Umpire. Malice has to be specifically pleaded and proved. Neither there exists any pleading in that behalf nor would it appear from the discussions made hereinafter that at any stage such a contention has been raised.

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The appellants had four opportunities to raise the question of bias. The first opportunity was when the umpire filed the award in the court for being made rule of the Court and appointed a lawyer to prosecute the matter. It is not disputed the appellants were aware of the fact that the umpire did file the appeal himself in the City Civil Court and appointed a lawyer to prosecute the proceedings. Despite knowledge of the fact of filing objections under Sections 30 & 33 of the Act it did not raise the question of bias against the umpire. The second stage made available to the appellants when it filed an I.A. for setting aside the award on the ground that it did not contain reasons in view of the said amendment in the Act in Section 17 of the Act. Not only this, the appellants had third opportunity when the matter was remitted back to the umpire. It is relevant to mention here the appellants were cross-examined before the Addl. Judge, City Civil Court but no question as regard bias was put to him. The fourth opportunity arose when the proceedings were remitted back to the umpire and thereto also the appellants did not raise any question as regards bias.

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Again, when the aforesaid award was given by the umpire and same was filed in City Civil Court again the appellants did not raise any objection as regard bias and the appellants happily participated in the proceedings. Yet again when the award was made rule of the Court, the appellants filed an appeal before the High Court of Judicature at Hyderabad but no ground of bias was taken in the Memo of Appeal or in the Civil Revision Petition.

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It was only after the High Court adversely commented upon the conduct of the Arbitrator in the manner as noticed hereinbefore, that the

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A appellant became wiser and for the first time this objection has been taken before us. It is an established view of law that where a party despite knowledge of the defect in the jurisdiction or bias or malice of an Arbitrator participated in the proceedings without any kind of objection by his conduct it disentitles itself to raise such a question in the subsequent proceedings. What we find is that the appellant despite numerous opportunities made available to it although it was aware of the defect in the award of the Umpire at no stage made out any case of bias against the Umpire. We, therefore, find that the appellant cannot be permitted to raise question of bias for the first time before this Court.

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C Mr. M.L. Verma, the learned senior counsel appearing in the second set of appeals would urge that the High Court committed an error in setting aside the award and remitting the matter back to the Umpire for assigning fresh reasons despite the fact that the award dated 1993 contained sufficient reasons. Having regard to the subsequent events that the order of the High Court has been acted upon and the Umpire has made an award on or about 1998, we do not intend to go into the aforesaid question. For the self-same reasons, we also refrain from going into the question as to the parameters and extent of the reasons required to be assigned by an Umpire in a situation of this nature.

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E For the aforesaid reasons, we do not find any merit in the appeals. Therefore, they are dismissed. However, it will be open to the appellant to challenge the award, if it is so advised, before the appropriate forum.

R.P.

Appeals dismissed.