

SUKALU RAM GOND
v.
STATE OF MP AND ORS.

AUGUST 5, 1994

[K. RAMASWAMY AND N. VENKATACHALA, JJ.]

Arbitration Act, 1940—Sections 8, 21 & 30—Arbitration—Jurisdiction of arbitrator to make award against a non-party to contract—A person not a party to a reference—Participation in award proceedings with objection & under protest—Whether bound by award—Held, No—Acquiescence does not confer jurisdiction.

In a pending criminal petition, by consent of parties, this Court made a reference to an arbitrator to adjudicate the disputes between parties. The Arbitrator filed the Award in this Court with notice to the parties. The petitioner and Respondent No. 5 filed their objections. Respondent objected to the Award u/s 30 of the Arbitration Act contending that the Award was without jurisdiction and patent error of law had crept in, since respondent No. 5 was not a party to the reference; that the award was devoid of jurisdiction to make him liable to the petitioner in the Award, and that the reference was only to adjudicate the disputes between the petitioner and the second respondent, of their respective liabilities.

It was contended by the petitioner that when the issues were settled by the Arbitrator with consent of parties including respondent No. 5, and he was found liable to pay the amount under the hire purchase agreement and that, therefore, the Arbitrator was justified in granting the amount against the respondent 5.

The question for consideration was, when the reference was confined only to the petitioner and respondent No. 3, whether the Arbitrator, without the order of reference being amended, could have gone into the liability of the 5th respondent.

Disposing of the matter, this Court

HELD : 1.1. There should exist an agreement showing consent to refer a dispute for settlement by the arbitrator. In cases where the Ar-

- A** bitrator enters into the consideration of the matters which are not referred to him or over which he has no jurisdiction to try, the question is not one of waiver or estoppel but of authority. A person, not a party to a reference but who participated in the award proceeding with objection and continued to participate in the proceeding under protest is not bound by the award, as being without authority. After taking objection to the authority of the arbitrator and making protest, unless a proper reference was made by this court, the arbitrator does not get the authority and jurisdiction to make the award against a non-party to the contract. [424-C-D-E]

- C** 1.2. It is settled law that acquiescence does not confer jurisdiction. The jurisdiction cannot be assumed by the Arbitrator on the basis of either acquiescence of the parties or consent to the adjudication of the dispute without any reference. [424-E; G-H]

D CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Crl.) No. 1971 of 1990.

From the Judgment and Order dated 13.7.90 of the Madhya Pradesh High Court in Misc. Crl. Case No. 1054 of 1990.

C.L. Sahu for the Petitioner.

- E** Sudarsh Menon, (NP), R. Sasiprabhu, (NP) Randhir Jain, for Uma Nath Singh for the Respondents.

S.P. Singh, Rajeev Singh and Anil Singh for the Respondent No. 5.

- F** The following Order of the Court was delivered :

- G** The Petitioner has challenged the Order dated July 13, 1990 of the High Court of Madhya Pradesh at Jabalpur in Misc. Crl. Case No. 1054/90 passed under Section 482 of the Code of Criminal Procedure 1973 quashing the proceedings of the Judicial Magistrate, First Class, Dhamtari, dated September 7, 1989 in Crl. Case No. 943/89 registered under section 397 read with s. 34 I.P.C. While S.L.P. (Crl.) No. 1971/90 is pending, by consent of parties, this Court on August 1, 1991 made a reference to Justice Shiv Dayal (retired Chief Justice of the Madhya Pradesh High Court and a Senior Advocate of this Bar) to adjudicate the disputes thus :

- H** "x x x x x x x x may be appointed as an Arbitrator, by consent,

to go into the question as to the amounts due, if any, by the petitioner to the second respondent or *vice versa*, in respect of Truck No. MKS 9311." A

(The other clauses of reference are not material, hence omitted.)

The Arbitrator entered upon the reference within the time and given his award on December 31, 1992 holding thus : B

"Final answer to the Reference is Anoop Chand (Respondent No. 5 in the SLP) shall pay to Sukaluram and Basant Kumar (Partnership) or to Basant Kumar, Managing Agent a sum of Rs. 2,25,839 only as on August 1, 1991, the date of their Lordships order. C

B. x x x x x x x x"

The Arbitrator filed the Award in this Court with notice to the parties. Thereafter, the petitioner and Respondent No. 5, Anoop Chand Setia filed their objections. Since the proceedings are pending in this Court by operation of s.8 read with s.21 of the Arbitration Act 1940, for short the Act, reference could be treated to be a reference made in a pending suit. On that premise when the parties had consented to refer the dispute to the Arbitrator, the arbitrator had given the Award as indicated hereinbefore. The petitioner had not made any application for remittance of the Award to the arbitrator though claimed higher amount by way of objections nor is an application made to make the Award, a rule of the Court. Respondent No. 5, Anoop Chand Setia objected to the Award under s.30 contending that the Award is without jurisdiction and patent error of law has crept in, since respondent No. 5 was not a party to the reference. The award is devoid of jurisdiction to make him liable to the petitioner in the Award. Anoop Chand Setia's objection could be treated to be one under s. 30 of the Act. It is seen that the reference was only to adjudicate the disputes between the petitioner and Vinod Jain, the second respondent, of the respective liabilities and *vice versa*. D E F G

It is contended by Shri C.L. Sahu, learned counsel for the petitioner that when the issues were settled by the Arbitrator with consent of parties including Anoop Chand, they have agreed for reference of the specified issues as indicated in para 1.2. of the Award, to be decided including the additional issues, sought to be raised but given up, the Arbitrator found H

- A from the dispute as disclosed from the evidence placed before him that Basant Kumar was a Managing agent of the petitioner and that, they are entitled to the amount awarded under the Award. Anoop Chand was found liable to pay the amount under the hire purchase agreement and that, therefore, the Arbitrator was justified in granting the amount.
- B As seen, when the reference was confined only to the petitioner and Vinod Jain, whether the Arbitrator, without the order of reference being amended, could have gone into the liability of the 5th respondent, Anoop Chand Setia and made him liable to pay the amount indicated in the Award. An award derives its force from the original contract. Parties to
- C the contract, by consent, refer their dispute for settlement to a tribunal of their choosing, instead of to a court. Therefore, there should exist an agreement showing consent to refer a dispute for settlement by the arbitrator. In cases where the arbitrator enters into the consideration of the matters which are not referred to him or over which he has no jurisdiction to try, the question is not one of waiver or estoppel but of authority. The
- D question is whether a person, not a party to a reference but who participated in the award proceeding with objection and continued to participate in the proceedings under protest, as was done in this case, whether is bound by the award? Our answer is no. He is not bound by the award, as being without authority. After taking objection to the authority of the
- E arbitrator and making protest, unless a proper reference was made by this court, the arbitrator does not get the authority and jurisdiction to make the award against a non-party to the contract. In the Law of Arbitration by Justice Bachawat, p. 19, it is stated that "to constitute an arbitration agreement, there must be an agreement, that is to say, the parties must be
- F ad idem.....agreement must be made by the free consent of the parties". Admittedly, there is no such agreement or consent given by 5th respondent. His participation in the award at best after protest, would protect his interest or a witness and no more. It settled law that acquiescence does not confer jurisdiction.
- G This Court in *Tarapore Co. v. State of M.P.*, [1994] 3 SCC 521 specifically dealt with the aspect of acquiescence and we need not further elaborate it. It was held that the jurisdiction cannot be assumed by the Arbitrator on the basis of either acquiescence of the parties or consent to the adjudication of the dispute without any reference. Accordingly, we hold
- H that the Award of the Arbitrator is clearly without jurisdiction and

authority and is accordingly set aside. Parties in terms of the order of A
reference shall pay the fee of the arbitrator.

Since the main matter is pending, the Registry is directed to post the
main matter for final disposal according to law in due course.

A.G.

Petition disposed of.