

CASE NO.:
Appeal (civil) 2350 of 2008

PETITIONER:
Mahipatlal Patel

RESPONDENT:
Chief Engineer & Anr

DATE OF JUDGMENT: 01/04/2008

BENCH:
TARUN CHATTERJEE & HARJIT SINGH BEDI

JUDGMENT:
J U D G M E N T
NON-REPORTABLE

CIVIL APPEAL NO 2350 OF 2008.
(Arising out of SLP (C) No.8500 of 2006)

1. Leave granted.
2. This appeal is directed against an order passed by the Chief Justice of the High Court of Orissa at Cuttack dated 20th of May, 2005 on an application under Section 11 of the Arbitration and Conciliation Act, 1996 (in short 'the Act') for appointment of an arbitrator and for referring the dispute between the parties to him for adjudication. By the impugned order, the Chief Justice of the High Court on consideration of Clause 50 of the agreement entered into by the parties which provides for arbitration and in view of Section 85 of the Act, held that no appointment could be made under Section 11 of the Act and further held that the appellant in terms of Clause 50 of the agreement had to approach the arbitration tribunal and, accordingly, the application for appointment of arbitrator was rejected. Feeling aggrieved, the appellant has come up by way of a special leave petition which on grant of leave was heard in the presence of the learned counsel for the parties.
3. The core question involved in this appeal relates to the interpretation of Section 85 of the Act. In order to appreciate the question, it is appropriate to refer to Section 85 of the Act which runs as under :-
"85. Repeal and saving \026 The Arbitration (Protocol and Convention) Act, 1937 (6 of 1937), the Arbitration Act, 1940 (10 of 1940) and the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) are hereby repealed.
(2) Notwithstanding such repeal. \026
(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;
(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

4. The High Court, by the impugned order, while interpreting Section 85 of the Act has given a construction to the language of Section 85 of the Act and held that the provisions of the repealed Act 1940 in the present case would apply. Before we proceed further, we may consider the arbitration clause as entered into by the parties in the agreement. Clause 50 of the agreement contains provisions for arbitration which provides, inter alia, that except as otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions mentioned therein before and as to the quality of the workmanship or materials used in the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders of these conditions concerning the work or the execution or failure to execute the same with or arising during the progress of the work after completion of or abandonment thereof shall be referred to the arbitration by the Arbitration Tribunal constituted by the State Government which shall consist of three members of whom one shall be chosen from among the officers belonging to Orissa Superior Judicial Service (Sr. Branch), one from Engineers in the active service of Government not below the rank of a Superintending Engineer and the remaining member shall be chosen from officers belonging to the Orissa Finance Service not below the rank of Class-I officer.

5. It was held by the High Court in the impugned order that in view of clause 50 of the agreement, it was only the arbitration tribunal before which the disputes and differences could be referred and, therefore, no appointment could be made under Section 11 of the Act. The High Court in the impugned order while rejecting the application for appointment of an arbitration under Section 11 of the Act further held that the arbitration clause 50 clearly provides that if the contractor did not make any payment for arbitration in respect of any claim in writing within 90 days after receiving intimation from the Government that the bill was ready for payment, that claim of the contractor shall be deemed to have been waived and absolutely barred and the government shall be discharged and released of all the liability under the contract in respect of such claim.

6. Having heard the learned counsel for the parties and after considering the impugned order rejecting the application for appointment of arbitrator and the provisions under Section 85 of the Act and Clause 50 of the agreement in detail, we are of the view that the order of the High Court is not sustainable in law. An order of the Orissa High Court on the question of existence of an arbitration tribunal was brought to our notice by the learned counsel for the parties from which it clearly appears that the arbitration tribunal created under the Arbitration Act, 1940 does not exist for deciding the disputes which had arisen out of an agreement entered into after the Arbitration Act, 1940 was repealed. Accordingly, it has been held that the arbitration tribunal set up by the Arbitration Act, 1940 does not exist as on date and the present dispute between the parties cannot be referred to the said tribunal which is not in existence in the eyes of law. It has also been accepted by the learned counsel for the parties that against this order of the High Court, no appeal was filed or steps taken by either of the parties, that is to say, that it has now been accepted that there is no existence of any arbitration tribunal. On the basis of the aforesaid judgment of the Chief Justice of the High Court, it has been accepted that no arbitration tribunal is in existence. Therefore, without going into the

merits and in view of the aforesaid decision of the Orissa High Court, we are of the view that in the absence of existence of any arbitration tribunal, it is only the High Court to exercise its power under Section 11 of the Act to appoint an arbitrator to go into the disputes and differences between the parties. Accordingly, we set aside the order of the High Court. We now request the High Court to decide the application under Section 11 of the Act on merits. It is expected that the said application shall be decided and dispose of within three months from the date of supply of a copy of this order to it. This appeal is thus allowed to the extent indicated above. There will be no order as to costs.

JUDIS