

Supreme Court of India

Dodsal Private Ltd vs Delhi Electric Supply ... on 19 July, 1996

Bench: Kuldip Singh, M.M. Punchhi, N.P. Singh, M.K. Mukherjee, S. Saghir Ahmad

CASE NO. :

Appeal (civil) 2372-74 of 1987

PETITIONER:

DODSAL PRIVATE LTD.

RESPONDENT:

DELHI ELECTRIC SUPPLY UNDERTAKING OF MUNICIPAL CORPORATION OF DELHI

DATE OF JUDGMENT: 19/07/1996

BENCH:

KULDIP SINGH & M.M. PUNCHHI & N.P. SINGH & M.K. MUKHERJEE & S. SAGHIR AHMAD

JUDGMENT:

JUDGMENT 2001(9)SCC 339 = 1996(7)SCALE SP1

1. The appellant entered into a work contract with the respondent. A dispute having arisen, the matter was referred to arbitration. The proceedings before the arbitrator commenced in the year 1971 and were completed in 1975. The two arbitrators gave the award dated 9-8-1975 in favour of the appellant and awarded a sum of rupees ten lakhs. Before the court the Delhi Electric Supply Undertaking (DESU), respondent in the appeal herein, filed objections and challenged the award on several grounds including that the contract was void being in violation of Sections 201-203 of the Delhi Municipal Corporation Act, 1957 (the Act) read with the bye-laws made under the Act inasmuch as it was not signed by the appropriate statutory authority on behalf of DESU. The learned Single Judge of the High Court accepted the objection based on Sections 201-203 of the Act and allowed the objection petition filed by DESU. The appeal filed by the appellant before the Division Bench of the High Court was dismissed.

2. This appeal came for hearing before this Court on 14-2-1996. B.L. Hansaria, J. speaking for the Bench referred the matter to a Constitution Bench on the following reasoning: (SCC pp. 577-79, paras 1-8) "I. An absolutely inequitable stand taken by the respondent (Delhi Electric Supply Undertaking) has led us to examine some fundamental questions of law. We have opened with this observation inasmuch as the respondent has challenged the award of the arbitrators made in favour of the appellant on the ground that the contract, which contained arbitration agreement, is void, because of which there is no agreement to refer the dispute to arbitration; and so, the arbitrators had no jurisdiction to pass the impugned award. Such a stand flies on the face of the respondent inasmuch as of the two arbitrators, one, namely Shri K.L. Vijh, had been appointed by the respondent itself. But as the award ultimately went in favour of the appellant, it raised the question of jurisdiction. We have no doubt in our mind that such a stand is inequitable, indeed highly inequitable. Question, however, is whether the law permits such a question to be raised.

2. The High Court accepted the contention that the contract was void inasmuch as Sections 201 and 203 of the Delhi Municipal Corporation Act read with Bye-law 3(1)(a) were violated. Dr Singhvi, appearing for the respondent has urged that the contract being void, along with it fell the arbitration agreement contained in the contract, because of which the arbitrators had no jurisdiction to pass the award in question.

3. It is further submitted that in such a case appearance of the respondents in the proceeding, i.e., its acquiescence, would not alter the situation in view of what has been held by a Constitution Bench of this Court in *Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) (P) Ltd.* AIR 1960 SC 90 in para 21 of which it was stated that:

'... an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests, and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties in those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction.

4. The aforesaid stand brings to the fore the following fundamental questions of law:

(1) Whether the present was a case of contract being void or voidable?

(2) Whether a mandatory provision cannot at all be waived?

5. As we are proposing to refer the matter to a Constitution Bench, we may not dilate on the questions, except stating that a perusal of *Administrative Law* by Wade and Forsyth (7th Edn., pp. 339 to 344) would show that in *Ridge v. Baldwin* [1964] A.C. 40 (HL) some of the dissenting Judges of the House of Lords suggested that even ultra vires action might be merely voidable. Reference has also been made to what was held in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147 (HL) which has dealt with the question whether there are degrees of nullity. As to the question of waiver of a mandatory provision, we may refer to a recent decision of this Court in *Krishan Lal v. State of J & K* (1994) 4 SCC 422 : 1994 SCC (L & S) 885 : (1994) 27 ATC 590 1994 in which this aspect has been dealt with in paras 16 to 25. It has been pointed out that even a mandatory provision can be waived, if the provision be intended for the benefit of the person concerned, as distinguished from one which serves 'an important purpose' in which case there would be no waiver.

6. In this connection we may also refer to the provision contained in Section 4 of the Arbitration and Conciliation Ordinance, 1996, which is on the subject of 'waiver of right to object'. It has laid down that a party who knows (a) any provision of this part from which the parties may derogate, or (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object.

7. Another legal aspect is also involved in the present case. The same is whether an arbitration agreement can be read dehors what was contained in the contract. The respondent having itself appointed one of the arbitrators in writing, an examinable question arises whether this act cannot be said to constitute an implied agreement to refer the matter to arbitration. It may be pointed out that Section 7(2) of the aforesaid Ordinance recognises a separate agreement also.

8. Though the aforesaid questions were not examined in *Waverly Jute Mills* case¹ and it would have been open to us to decide the same ourselves, we do not propose to do so, lest it be thought that we are overreaching the decision by a larger Bench. Instead, we desire that a five-Judge Bench - *Waverly* AIR 1960 SC 90 being a rendering by such a Bench -should decide whether in the context of the legal aspects mentioned by us above, it is open to a person like the respondent to raise the question of lack of jurisdiction of the arbitrator(s) and thereby deny the fruits (to the other side) of a long-fought-and-won battle, involving huge expenditure of time, money and energy, and thereby cause serious damage to equity also, which is an equally important facet to be borne in mind by the courts when seized with deciding a lis between parties."

3. We are of the view that it is not necessary to go into the question referred to the Constitution Bench. The reference to arbitration was in the year 1971 and the award was given in the year 1975. The parties have been litigating for over two decades. Keeping in view the facts and circumstances of this case, we are of the view that the ends of justice would be met if DESU is directed to pay the principal amount which was awarded by the arbitrators in the year 1975. As stated above, the arbitrators awarded a sum of rupees ten lakhs. We are not inclined to pay any interest. Dr Singhvi, the learned counsel appearing for DESU states that the payment shall be made to the appellant within three months from today.

4. We leave the question of law referred to us open to be decided in some other appropriate proceedings.

5. The appeals are disposed of accordingly.