**(2001) 11 DEL CK 0085**

**Delhi High Court**

**Case No:** Suit No. 11-A/93 and is 2215/93

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| International Data Processing Company Pvt. Ltd. | | APPELLANT |
| | Vs | |
| Municipal Corporation of Delhi | | RESPONDENT |

**Date of Decision:** Nov. 28, 2001

**Acts Referred:**

- Arbitration Act, 1940 - Section 20, 30, 33
- Constitution of India, 1950 - Article 226, 32

**Citation:** (2002) 96 DLT 13

**Hon'ble Judges:** Vinod Sagar Aggarwal, J

**Bench:** Single Bench

**Advocate:** George Thomas, for the Appellant; Ajay Jha, for the Respondent

**Judgement**

V.S. Aggarwal, J.
Shri P.S. Sawhney had been appointed as the arbitrator. The learned arbitrator had submitted the award. In pursuance thereto objections have been filed u/s 30 read with Section of the Arbitration Act, 1940. The same have been filed on behalf of the objector (Delhi Electric Supply Undertaking).

2. It has been pleaded that the arbitrator has misconducted the proceedings because principles of res judicata have been ignored. The applicant (M/s International Date Processing Company Pvt. Ltd) had filed civil writ No. 3302/90 before this court. The relief claimed were basically the same as were claimed in the arbitration proceedings. The said writ petition had since been dismissed. Since the earlier writ petition had been dismissed Therefore the principles of res judicata would apply. It has further been alleged that the arbitrator had no jurisdiction to go into the legality of the agreement, which is outside the scope of the reference. The award otherwise is also claimed to be self-contradictory because on one hand the arbitrator has held in paragraph 8.2 that Clause 20 of the agreement is valid for five

years from the date of the commencement of the supply and could be terminated only after 12 months notice. On the other hand arbitrator has held in paragraph 8.4 that objectors letter dated 10.4.1989 is intended to satisfy the requirements of notice. In that view of the matter it is asserted that award is liable to be set aside.

3. In the reply filed it is denied that the arbitrator has misconducted himself. It is denied that the principles of res judicata have been ignored. So far as dismissal of the writ petition No. 3302/90 is concerned, it has been pointed that it was dismissed at admission stage without going into the merits. It was after dismissal of the writ petition that present reference was made to the arbitrator. It is denied Therefore that principles of res judicata would be attracted. According to the applicant arbitrator has considered the whole material before him and he is the final judge with respect to the facts. He had considered the factors available and come to a right conclusion. On 30th March, 1995 this court had framed the following issues:

1. Whether the award is liable to be set aside on the objections raised in this petition

2. Relief.

4. Issue No. 1: The main stress on behalf of the objector was that the present proceedings are barred by the principles of res judicata and Therefore the award of the arbitrator is liable to be set aside.

5. The principle is not in dispute that if the arbitrator ignores particular facts in that event it would be taken to be a misconduct. u/s 30(a) of the Arbitration Act, 1940 an award could be set aside when the arbitrator misconduct himself or the proceedings. Misconduct is not contemplated as a moral lapse. It can be a legal misconduct. If the arbitrator arrives at a total erroneous findings that would be taken to be a legal misconduct. Reference in this connection can then be made to the decision of the Supreme Court in the case reported as K.P. Poulose Vs. State of Kerala and Another, . In the cited case the Supreme Court held that if the arbitrator has not considered the relevant document it can well be taken to be a misconduct. In other words, if a relevant question or the material question is not considered, it must be taken to be a legal misconduct.

6. Before proceeding further some of the facts which are not in controversy can be delineated. The applicant had filed an application u/s 22 of the Arbitration Act for referring the disputes between the parties to the arbitrator. While the said petition had been filed and was pending in this court applicant preferred a writ petition No. 3302/90 in which the applicant claimed the following reliefs:-

(a) that the power connection through meter No. 9100083 from the DESU to the petitioner be restored forthwith.

(b) that the Hon''ble Court may be pleased to issue a writ of mandamus or any other appropriate writ order to the respondents to raise the bills in accordance with the tariff applicable to connected load up to 100 K.W. retrospectively and the petitioner

be charged on that rates for the power consumed by them.

(c) to cancel all the bills raised by the respondent on H.T. tariff and raise fresh bills on L.T. tariff in their place.

(d) pending disposal of the matter the petitioner may be allowed to draw power from DESU by making payments of the bills to the DESU on the basis of L.T. tariff applicable to connected load up to 100 K.W. and

(e) pass such other order or further orders as this Hon''ble Court may deem fit and proper in the circumstances of the case.

7. The said writ petition came up for hearing before this court. Admittedly, a show cause notice was issued to the respondent. This court permitted the reply to be filed by Delhi Electric Supply Undertaking. In presence of both the parties after hearing them it appears that following order was passed dismissing the said writ petition on 2nd May, 1991.

2.5.1991: CW 3302 of 1990 and CM 4995/1990

On the application of the petitioner, 180 KW HT load was sanctioned to the petitioner. Counsel for the petitioner states that in view of the new machinery installed by the petitioner his requirement is reduced to only 86.50 KWs. If it is so the petitioner shall make a fresh application to DESU and get the proper load sanctioned.

There is no merit in the petition and the same is dismissed.

Sd/-S.B. Wad, J.

2nd May, 1992 Sd/-Md. Shamim, J.

8. Meanwhile, the petition u/s 20 of the Arbitration Act, 1940 was still pending in this court. It appears that it was not brought to the notice of the bench that the earlier writ petition had been dismissed. On 4th December, 1991 this court referred the disputes to the arbitrator and the said order reads:-

4.12.91

Present: Mr. C.V. Francis, for the petition.

Ms. Rekha Aggarwal, for the respondent.

I.A. 12255/91

By order dated 3rd October, 1991, disputes between the parties were referred to Mr. P.S. Sahni, Retired A.G.M. (Technical). In the present application the petitioner raised further disputes. Accordingly, the matter/disputes raised in the application are also referred to the arbitration of Mr. P.S. Sahni. It will be open to the parties to file claim and counter-claims before the Arbitrator. dusty.

I.A. stands disposed of.

9. It is on the strength of this order of 4th December, 1991 that the arbitrator had proceeded to decide the controversy and passed the award.

10. It is well known that application of constructive res judicata is confined to civil action and civil proceedings. The filing of a writ petition is also a civil proceeding and consequently if on the same controversy a writ petition is dismissed principles of constructive res judicata would come into play. The Supreme Court in the case of Union of India (UOI) Vs. Nanak Singh, had considered this question. It was held that decision in the writ petition would operate as res judicata and in paragraph 5 of the judgment the Supreme Court held:-

This Court in Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat), observed that the provisions of Section 11 of the CPC are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit, and on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. There is no good reason to preclude such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matter in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest. The Court in Gulabchand Chhotalal Parikh Vs. State of Bombay (Now Gujarat), left open the question whether the principle of constructive res judicata may be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding but was not so raised therein, must still be deemed to have been decided.

11. The Supreme Court even in the subsequent decision referred in the case of Har Swarup Vs. The General Manager, Central Railway and Others, further held that where relief claimed by the petitioner in his writ petition filed earlier in the High Court of Bombay were exactly the same as in the later petition before the Supreme Court, in that event it would not be entitled to any relief and it would be barred by the principles of res judicata.

12. That being the legal position one can conveniently refer to the next controversy. On behalf of the applicant it was pointed that the earlier decision of a Division Bench of the court referred to above should not operate as res judicata because the writ petition had been dismissed in liming. It is a settled principle of law it is not in controversy that if the earlier petition is dismissed in liming or on the ground that

because of latches no relief is to be granted, in that event principles of res judicata will not apply.

13. What is the position in the present case? As referred to above the earlier petition had been dismissed after giving notice and considering the reply. When such was the position and the petition was dismissed by passing speaking order finding that there is no merit in the claim of the petitioner then it must be taken that it is not a dismissal without considering the merits of the matter. It cannot be termed in the facts of the present case Therefore that it will not operate as res judicata. The earlier decision of this court referred to above Therefore barred the arbitrator from considering the same controversy.

14. The learned counsel for the applicant urged while the arbitrator has also found that once the matter has been referred by this court to the arbitrator principles of res judicata will not apply. The said argument has simply to be stated to be rejected. Reasons are obvious. The same being that if the principles of res judicata apply then by making a reference to the arbitrator the same have been ignored. If this court had considered the same and recorded that principles of res judicata are not applicable, in that event such an argument would be frivolous. In the present case it was simply referred for adjudication and once it is so referred the arbitrator should have considered as to whether principles of res judicata were attracted or not. Unfortunately, it was not done. Therefore, keeping in view the above reasons it must follow that the award is liable to be set aside because questions had already been adjudicated by virtue of the writ petition that had been dismissed. The questions involved were the same and same relief indirectly had been claimed. Issue is decided in favor of the objectors.

15. Relief:- For these reasons given the objections are accepted. Award is set aside and instead it is held that the applicants are not entitled to the claim that was laid before the arbitrator.