

Haji Hafiz Tanwar Ahmed

Vs

Union of India

Civil Appeal No. 138 of 1967

(J. M. Shelat, C. A. Vaidialingam, P. Jagmohan Reddy JJ)

24.11.1970

JUDGMENT

SHELAT, J. -

1. This appeal, by special leave, arises out of a writ petition filed by the appellant under Article 227 of the Constitution in the High Court of Calcutta for quashing an Arbitrator's award for compensation in respect of certain premises belonging to him which were requisitioned for the period between March, 1942 to November, 1947, under Rule 75-A of the Defence of Indian Rules, 1939. The award granted compensation to the appellant at the rate of Rs. 475/- per month for the said period during which the premises remained under requisition as against the appellant's claim for Rs. 6 lakhs and odd.

2. Certain disputes having arisen early as 1944, the appellant entered in to an agreement, dated January 27, 1944, with the Governor General in Council. Under clause (i) of the said agreement the appellant agreed to accept Rs. 475/- per month "for the said property in full settlement of the construction for structure" from March 15, 1942, till the Government remained in possession and the requisitioning thereof continued. Clause (5) of the said agreement provided for arbitration by an arbitrator to be appointed by the Government in case of any dispute or difference arising out of concerning the said requisitioned property. It further provided that such arbitration would be governed by the Arbitration Act, 1940.

3. It is not in dispute that although the said agreement was signed by the appellant it was not executed by any one on behalf of the Governor General in Council or the Government of West Bengal which had requisitioned the said property on behalf of the Central Government. Even so, the Government paid and appellant received Rs. 475/- as monthly compensation. According to the appellant, he accepted the compensation at the rate of Rs. 475/- per month under protest. According to him, that was the rent he used to receive from his tenant for one of the building and the compensation for other structures and premises had not been taken into account.

4. The said property was derequisitioned with effect from November 28, 1947. In 1948 the appellant filed an application under Section 20(i) of the Arbitration Act in the Court of the 5th Subordinate Judge, Alipore, which was numbered as Suit No. 169 of 1948, requiring the Government of West Bengal to appoint an arbitrator as provided under clause (5) of the said agreement. The parties to the said application were the appellant (the plaintiff) and the Province of Bengal, but not the Governor General in Council. A number of contentions were raised on behalf of the Province of Bengal including waiver, estoppel and acquiescence, but no question was at that time raised that the said agreement was not valid and binding as it has not been signed by any one on behalf of the

Government of West Bengal or the Governor General in Council. By its order, dated September 13, 1949, the Court allowed the said suit No. 169 of 1948 and ordered that the said agreement be filed by the Government of West Bengal. In passing the said order the learned Judge observed that the monthly compensation of Rs. 475/- mentioned in clause (1) of the said agreement was in respect of the structures standing on the said property only and that no compensation had been agreed upon in respect of the lands, tanks, loss of fishery rights and other rights, and, therefore, disputes regarding compensation in respect of them has arisen, which required arbitration as provided by clause (5) of the said agreement. The learned Judge set out the items of differences to be decided by the arbitrator to be appointed in terms of clause (5) of the said agreement.

5. Although the said order required the arbitrator to submit his award by September 11, 1950, no steps were taken to proceed with the arbitration until February 9, 1955, when the Government of West Bengal, in exercise of the power conferred by Section 6 of the Requisitioned Land (Continuance of Powers) Act (XVII of 1947), Section 6 of the general Clauses Act, 1897 and Government of India, Defence Department Notification No. 1365-OR-42, dated September 19, 1942, appointed one D. N. Chakravarty, Additional District Judge, 24-Parganas, as the Arbitrator. The said Chakravarty not having been able to complete the arbitration, the Government of West Bengal, by its order, dated September 19, 1955, appointed his successor, one G. S. Chatterji as the Arbitrator.

6. It appears that these appointments were made not under the Arbitration Act, 1940, but under Section 19 of the Defence of India Act, 1939. That being so, the Arbitrator was not bound by the terms of the said order of the Court and the question which the Court had framed for adjudication by the Arbitrator of the date fixed for making the award. The arbitration case was registered by the said Chakravarty as Arbitration Case No. 5 of 1955. When the said Chatterji took it over, he continued the said arbitration proceedings under the said number, namely No. 5 of 1955.

7. During the pendency of the said arbitration proceedings before the said Chatterji, the Government of West Bengal applied on December 6, 1955, for amendment of its written statement filed on July 12, 1955. By that amendment it submitted that the appellant's claim was un-enforceable as (a) the said agreement, dated January 27, 1944, was not executed by the Governor General in Council or any one on his behalf and (b) the Governor General in Council was not a party to the said Suit No. 169 of 1948, nor to the instant reference. On December 23, 1955, the said Chatterji allowed the said amendment application.

8. The said Chatterji also could not conclude the arbitration. Consequently, the Government of West Bengal, by its order, dated December 16, 1957, appointed one G. Kumar as the Arbitrator. It is important to bear in mind that the said order did not mention or refer to Section 19 of the Defence of India Act, but on the other hand recited the said agreement, dated January 27, 1944, the said Suit No. 169 of 1948 and the order passed therein by the learned Subordinate Judge, Alipore.

9. The said G. Kumar started the arbitration proceedings afresh on December 19, 1955, substituting the Union of India in place of the State of West Bengal and also registered them under a new number, namely, No. 280 of 1957 and issued notices both under Section 20 of the Arbitration Act and Section 19 of the Defence of India Act. The parties also filed their statements afresh, adopting the statements filed by them previously, the Union of India adopting the statement filed earlier by the State of West Bengal. The said G. Kumar also did not complete the arbitration and thereupon the Governor of West Bengal successively appointed N. G. Ganguli, P. M. Lahiri and lastly, W. Basu Mazumdar as arbitrators on January 2, 1958, January 21, 1959, and November 10, 1960,

respectively. It was the last names arbitrator who ultimately completed the arbitration and whose award, dated March 18, 1961, had been challenged in the present proceedings.

10. We may note that all the arbitrators appointed after the said G. Kumar continued the arbitration proceedings under the number given to them by him, namely, No. 280 of 1957. As in the case of the said G. Kumar, Ganguli and Lahiri, the order, dated November 10, 1960, appointing the said W. Basu Mazumdar was passed in the name of Governor of West Bengal and recited the requisitioning and the derequisitioning of the said property, the said agreement, dated January 27, 1944, and its principal terms, the said Suit No. 169 of 1948 and the said order passed therein by the sub-ordinate Judge, Alipore. No reference whatsoever was made therein of Section 19 of the Defence of India Act or any other provision thereof. Thus, it is clear that whereas the first two appointments of the said Chakravarty and Chatterji were made under Section 19 of the Defence of Indian Act, the rest of the orders, it would appear, were issued under Section 20(4) of the Arbitration Act and in pursuance of the order passed in the said Suit No. 169 of 1948.

11. Such a conclusion appears to be borne out by an application made on behalf of the Union of India on February 8, 1961, before the said W. Basu Muzumdar. It appears the appellants contended that it was necessary to obtain an order from the subordinate Judge, Alipore, for extension of time for making the award as the order of the Court in Suit No. 169 of 1948 had fixed time within which the award has to be made, i.e. by September 11, 1950. Counsel for the Union of India, no doubt, argued that no such order was necessary as the said order of the Court as Alipore was not binding on the Union of India as the Union of India was not a party to that suit. It is true that the Arbitrator accepted the submission made on behalf of the Union and passed an order to the effect that there was no necessity of obtaining an order for extension of time. It is significant, however, that counsel for the Union of India did not argue that an order for extension of time was unnecessary because the arbitration proceedings were under the Defence of India Act and not under Section 20 of the Arbitration Act, nor did the arbitrator so rule in his said order, nor did he rule that his appointment was under Section 19 of the Defence of India Act and, therefore, the order of the learned subordinate Judge fixing the time for making the award was not binding on him. It is true that Section 19 of the Defence of Indian Act was referred to by counsel of the Union of India, but that was done with a view to assert that if the award was made under Section 19 which provided for payment of compensation, the award would not have to be filed before the Alipore Court as under the rules framed by the Government on March 30, 1943, the award would by itself operate as a decree. What is important is that it was never contended at that time that the arbitrator was appointed under Section 19 of the Defence of India Act and not under Section 20(4) of the Arbitration Act, therefore, the Alipore Court's order was not binding on the arbitrator or that that Court had no jurisdiction to fix the time for making the award or extend it. Besides, if the appointment of the said G. Kumar and following him that of the said Ganguli, Lahiri and Muzumdar, had been made under the Defence of India Act, 1939, or understood to be so, as were the appointments of the first two arbitrators, namely, Chakravarty and Chatterji, there was on need for the said G. Kumar to start the arbitration proceedings afresh, register a new number to the proceedings, namely No. 280 of 1957 (which number was continued by his successors, including the present Arbitrator, W. Basu Mazumdar) and for the parties to file afresh their claims and counter-statements. Furthermore, in Para 13 of the writ petition the appellant expressly averred that the appointments, beginning, from that of the said G. Kumar and ending with that the present arbitrator, the said Muzumdar, were all made under the Arbitration Act pursuant to the said order passed in Suit No. 169 of 1948. Neither the Union of India nor the State of West Bengal contradicted or denied the said averments. Indeed, neither of them filed any counter-affidavit at all.

12. In these circumstances, the contention of counsel for the appellant is that the appointment of W. Basu Mazumdar was under Section 20(4) of the Arbitration Act and not under Section 19 of the Defence of India Act, 1939. That being so, the argument proceeded, no such appointment under Section 20(4) could be made as, on the contention raised by the Union of India and the State of West Bengal, the said agreement dated January 27, 1944, was not valid and binding as it was never executed by or on behalf of the Governor General in Council or the Province of West Bengal and that, therefore, the said award was without jurisdiction.

13. This very contention was raised by the appellant before the High Court. But the High Court rejected it relying on a Memorandum, No. LA VIII/50 of 1941-42, dated November 18, 1960, by the office of the Land Acquisition Collector, Alipore, in which it was stated that the reference to arbitration was under Section 19 of the Defence of India Act. The High Court concluded that in view of this Memorandum "it cannot be said that Shri Basu Mazumdar was not appointed an Arbitrator under the Defence of India Act. Therefore, the argument of Mr. Sen Gupta that the impugned order was passed without jurisdiction cannot be accepted".

14. But the appointment of the said Basu Mazumdar as the arbitrator was surely not made by or under the said Memorandum. That was done by the Government order bearing No. 16516 Reqn., dated November 10, 1960. That order, as already stated, recited the said agreement, dated January 27, 1944, the said Suit No. 169 of 1948 and the said order passed therein by the learned subordinate Judge, Alipore. There was no reference in the order of appointment passed in the name of the Governor to Section 19 of the Defence of India Act, 1939, or to any other provision thereof, nor did it have any reference to any notification under which the Governor of West Bengal had been authorised to appoint an arbitrator on behalf of the Union of India in arbitration proceedings against it. Obviously, the order of appointment was, like the previous three orders appointing the said G. Kumar, Ganguli and Lahiri, under the Arbitration Act pursuant to the said order of the Court of the subordinate Judge, Alipore, in Suit No. 169 of 1948 not the footing of the said agreement which, according to the case of the Union of India and the State of West Bengal, was never executed by or on behalf or either of them.

15. It is clear that at the time of the appointment of the said Basu Mazumdar as arbitrator the Land Acquisition Department (Requisition Branch) of the Government of West Bengal and the Land Acquisition Collector, Alipore, were acting at cross-purposes, the former thinking that the appointment had to be made under the Arbitration Act, 1940, pursuant to the said order in Suit No. 169 of 1948 and the latter thinking that the order of appointment was made under Section 19 of the Defence of India Act, 1939. But if the said appointment was under the Defence of India Act, surely the order of appointment would have said so, as it did when the first two arbitrators, viz., the said Chakravarti and Chatterji, were appointed.

16. Mr. Iyenger, appearing for the Union of India, candidly conceded that he was not in a position to support the judgment of the High Court on the basis of the said Memorandum of the Land Acquisition Collector. He, however, urged that even if the order of appointment under Section 20(4) of the Arbitration Act were to be found invalid, as the Union of India was not a party to the said Suit No. 169 of 1948, and the said agreement dated January 27, 1944, was not executed by any one on behalf of either of the two Governments, the appointment should still be upheld if the power of appointment were to be found under the Defence of India Act, 1939. He argued that the fact that the said G. Kumar substituted the Union of India as a party in place of the State of West Bengal and started the arbitration proceedings afresh giving a new number to them indicated that he was consciously acting under Section 19 of the Defence of India Act and breaking away from the

Arbitration Act. The fact that he issued notices under Section 19 of the Defence of Indian Act was another fact showing that he was acting under the Defence of India Act.

17. The difficulty which, however, faces us is that the appointment orders, right from the order of appointment of the said G. Kumar to that of the present arbitrator, were all made and continued to be made under Section 20(4) of the Arbitration Act and none of them referred to Section 19 of the Defence of India Act. The said G. Kumar substituted the Union of India and issued notice under Section 19 of the Defence of India Act because the liability to pay compensation arose under Section 19. The order-sheet of the arbitration proceedings shows that as early as February 8, 1961, the appellant had pointed out that an order for extending the time for making the award from the Court of the Fifth Subordinate Judge, Alipore, who had passed the order in Suit No. 169 of 1948 under Section 20 of the Arbitration Act, was necessary. As stated earlier he was overruled on the ground that that order was not binding on the arbitrator as the Union of India was not a party to the said suit. On being overruled, the appellant appeared before the Arbitrator under protest and his doing so was recorded. At that time at least a fresh order of appointment under Section 19 of the Defence of India Act could have been made. Instead, the Arbitrator went on with the arbitration proceedings under the order of his appointment in pursuance of the said order in Suit No. 169 of 1948. Once the said G. Kumar, on an application by the Government of West Bengal, had substituted the Union of India as the opposite party in the arbitration proceedings before him, a fresh order under the Defence of Indian Act ought to have been passed. In any event when his successors, including the said Basu Mazumdar were appointed, orders of their appointments could have been passed under the Defence of Indian Act. Surprisingly, all those orders uniformly recited the said agreement, the said Suit No. 169 of 1948 and the order passed therein under the Arbitration Act. When all these orders were so passed, it is difficult for us to uphold them as if they were passed under the Defence of India Act. Apart from that difficult, there is such a vast difference between the amount awarded and the claim made by appellant (into the merits of which we so not enter), that it would be hardly fair or just to stretch the language of the several orders of appointment of arbitrators and treat them as having been made under Section 19 of the Defence of India Act. Reluctant as we are, in view of the long time that has elapsed, we are compelled, in the circumstances and for the reasons earlier set out, to accept the contentions of Mr. Sen and order that the award was without jurisdiction as the appointment of the said W. Basu Mazumdar as the arbitrator was under Section 20(4) of the Arbitration Act, which did not apply and it was made in pursuance of the said order passed in Suit No. 169 of 1948 to which the Union of India was not a party and the said agreement, on the basis of which the said order was passed, was never executed by either of the two Governments. The delay in the appellant's recovering compensation due to him has primarily arisen because of the lapse of time between the time when the property was derequisitioned in 1947 and the time when the impugned award was at last made.

18. The consequence is that the High Court's order is set aside and the appeal is allowed with costs.

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