

Keshavsinh Dwarkadas Kapadia, Etc.

Vs

Indian Engineering Company

Civil Appeals Nos. 2441-2442 of 1969

(CJI S. M. Sikri, A. N. Ray, D. G. Palekar JJ)

10.09.1971

JUDGMENT

RAY J.

1. These two appeals are by special leave against the judgment, dated October 17, 1968 of the High Court at Bombay determining under Section 33 of the Arbitration Act that the umpire rightly entered upon reference and further extending the time till December 31, 1968 for making an award thereof by the umpire.

2. Two questions arise for consideration in these appeals. First, whether there can be any valid appointment of umpire by arbitrators without obtaining consent of the appointee to be an umpire. Second, on the construction of the arbitration agreement in the present case was the operation of Paragraph 4 of schedule I of the Arbitration Act excluded with the result that the umpire could enter upon the reference only in the event of a difference arising between the arbitrators.

3. On April 26, 1967, there was an arbitration agreement between the partnership firm of Indian Engineering Company and Keshavsinh Dwarkadas Kapadia. Kapadia had appointed M/s. Chetan Trading Company as the sole selling agent of Kapadia's several products including aluminium and copper wire by an agreement, dated September 16, 1963. Chetan Trading company in their turn appointed Indian Engineering Company as their sole selling agent in respect of aluminium and copper wires. Chetan Trading Company terminated their agreement with Indian Engineering Company, Kapadia also terminated the sole selling agency with Chetan Trading Company. Indian Engineering Company contended that on the termination of the sole selling agency between the themselves and Chetan Trading Company, Indian Engineering Company becomes the sole selling Agent of Kapadia in terms of the agreement, dated September 16, 1965, Indian Engineering Company. Disputes arose between the parties. These disputes were referred to arbitration in accordance with the agreement, dated April 26, 1967.

4. There was a similar arbitration agreement between Chetan Trading Company and Indian Engineering Company on June 5, 1967, in respect of their disputes and claims against each other. The arbitration agreement and the arbitrators were identical in both the cases.

5. Clause 1, 2, 5, and 6 of the arbitration agreement which are relevant for the purposes of the present appeals are as follows :

Clause (1) : All the disputes and differences arising out of or in relation to the said Sole Selling Agency Agreement be and they are hereby referred to the arbitration of

the said Shri H. G. Advani and Shri J. M. Gandhi.

Clause (2) : That the arbitration shall be governed by the provisions of the Arbitration Act, 1964.

Clause (5) : The Arbitrators shall make and publish their award within four months from the date of their entering upon the reference and they are hereby authorised to extend the said time from time to time as may be required with the previous written consent of both the parties hereto.

Clause (6) : The said arbitrators shall before proceeding with the arbitration appoint an umpire and in the event of any difference arising between them, they shall refer the matter to the umpire for his decision and award.

The arbitrators Messrs. Advani and Gandhi held their first meeting on September 12, 1967. At the said meeting before entering upon the reference the arbitrators appointed an umpire in the following terms :

"Mr. Porus Mehta failing him Mr. Murzhan Mistry appointed umpire."

6. On January 11, 1968, the time laid down by clause (5) of the agreement for making the award expired. On January 14, 1968, the respondents wrote to the appellants to obtain the necessary extension of time for making the award. The appellants did not comply with the request and on March 6, 1968, wrote to the arbitrators that Mr. Advani one of the arbitrators would be biased in favour of the respondents. Thereafter, the respondents through their solicitors called upon the arbitrators to refer the matter to the umpire and also by a separate letter called upon the umpire Mr. Porus A. Mehta to enter on the reference as umpire appointed by the arbitrators. Mr. Mehta fixed a meeting on May 27, 1968. The appellants raised certain objections. The meeting was adjourned. Another meeting was fixed on June 17, 1968 for hearing. The appellants by letter, dated July 12, 1968, addressed to Mr. Mehta contended that the consent of the umpire was not obtained before his appointment and therefore there was no valid appointment of the umpire. Mr. Mehta fixed the meeting on July 13, 1968 and decided to proceed with the arbitration and adjourned the meeting to July 20, 1968. The appellants obtained an adjournment on the ground that the appellants wanted to file a petition challenging the appointment of Mr. Mehta as an umpire. Mr. Mehta adjourned the matter till July 30, 1968.

7. In this context of events the appellants filed applications under section 33 of the arbitration Act which resulted in the order appealed against.

8. Three contentions which had been advanced in the High Court were repeated here. First, that the arbitrators before proceeding with the reference did not obtain consent of the umpire to his appointment as umpire, and, therefore there was no appointment of umpire. Secondly under clause (6) of the arbitration agreement operation of Paragraph 4 of Schedule I of the Arbitration Act was excluded and the umpire could enter upon the reference only in the even of a difference arose between the arbitrators on their disagreement. No difference arose between the arbitrators in the present case but only time for making the award expired. Therefore, the umpire had no right to enter upon the reference. Thirdly, under clause (6) of the arbitration agreement, the umpire had no right to enter upon the reference unless the arbitrators referred the matter to the umpire. The High Court relied on the decision of the Judicial Committee in *Mirza Sadik Husain v. Musammat Kaniz Zohra*

Begum and Another (38 IA 181) and held that the umpire signified the consent by taking up the office and the umpire rightly entered on the reference. The High Court held that the contingency provided for in Paragraph 4 of Schedule I to the Arbitration Act was not excluded, expiry of time to make an award could not be regarded as a disagreement between the arbitrators. The third contention of the appellants was also rejected by the High Court on the ground that clause (6) of the arbitration agreement in the present case did not apply when the arbitrators did not make an award within time.

9. Counsel for the appellants contended that the words 'if any appointed arbitrator or umpire neglects or refuses to act' occurring in Section 8(1) of the Arbitration Act, 1940, mean that one can refuse to act only after one has accepted the appointment. This contention was supported by relying on the following observation in Russell on Arbitration 18th Edn. at p. 212 :

"Acceptance of office. - Acceptance of the office by the arbitrator appears to be necessary to perfect his appointment. It has been so decided in the case of an umpire, and it would seem to be only reasonable that an appointment should not be considered effective until the person appointed has agreed expressly or tacitly to exercise the functions of the office."

Two decisions are cited in Russell in support of the view expressed by the author. These decisions are : Ringland v. Lowndes ((1963) 15 CB (NS) 173 : 143 ER 749) and Tradax Export S. A. v. Volkswagenwerk A. G. ((1969) 2 QB 599) The decision in Tradax Export case (supra) has been affirmed by the court of Appeal as will appear in (1970) 1 AER 420.

10. It is important to notice the distinction between appointment and acceptance of office. The present appeals concern the appointment of an umpire. The questions of effectiveness or perfection of appointment are by the nature of things subsequent to appointment unless the agreement or the statute provides otherwise. Arbitrators and umpire too are often appointed by the parties. Sometimes an umpire is appointed by arbitrators. The constitution of the arbitral body and the manner in which the appointments are made are primarily dealt with in the arbitration agreement or else the arbitration act will apply. In some cases, the appointment of arbitrator may required to be appointed one by each party an appointment of arbitrator by a party is not complete without communication thereof to the other party. The reason in the words of Lord demand is this : 'Neither party can be said to have chosen an arbitrator until he lets the other party know the object of his choice' (See Thomas v. Fredericks ((1847) 10 QB 775)). Where each party was to appoint a valuer by May 31, 1847 and one of the parties nominated a reference late on May 31 and sent by that night's post a notice thereof to the defendant who received it on June 1, it was held that the plaintiff had not nominated a referee by May 31. (See Taw v. Harris). ((1848) 11 QB 7)

11. The necessity for communication of appointment of arbitrator to the parties as also to the appointee depends often on the language of the arbitration clause. In the Tradax Export case (supra f.n. 3) the arbitration clause was as follows :

"..... Any claim must be made in writing and claimant's arbitrator appointed within three months' of final discharge and where this provision is not complied with the claim shall be deemed to be waived and absolutely barred."

12. This is described as the usual Centrocon arbitration clause in character party agreement. It is noticeable that in the Centrocon arbitration clause the claimant is required to appoint an arbitrator

within three months of final discharge of cargo or else the claim is barred. An effective appointment of an arbitrator in such a clause is necessary to constitute arbitral authority within the stipulated time to prevent the claim from being barred. Therefore, in such a clause not only communication to the appointee but also the acceptance of office by the appointee is essential for effective appointment of arbitrator within the meaning of the clause. A mere nomination or appointment unknown to the appointee was held not to be an appointment for less an effective appointment of arbitrator within the meaning of that clause. The appointment will be effective only when the appointed arbitrator accepts office and is armed with the duty and authority of an arbitrator. Even in such a clause the stage of effective appointment will be when he has indicated his willingness to act in that matter.

13. In the Tradax Export case (supra f.n. 3) the charters gave notice of appointment to the arbitrator. Three months expired. The other side contended that there was no appointment of arbitrator within the stipulated time. The arbitrator was not set in motion. Neither was the arbitrator clothed with the mandate of arbitration nor was the machinery of arbitration invoked by the charters. The appointment of an arbitrator there had to be perfected and implemented by calling upon the appointee to act. In the Tradax Export, (1970) 1 AER 420, the Court of appeal observed that if an application under Section 27 of the English Arbitration Act, 1950 had been made, the Court would have granted relief as explained in Liberian Shipping Corporation 'Pegasus' v. A. King & Sons Ltd. ((1967) 2 QB 86) Section 27 of the English Arbitration Act is a special provision conferring power upon the court to extend the time for commencement of arbitration proceedings where in the circumstance of the case undue hardship would otherwise be caused. This aspect indicates that in the Centrocon clause commencement of proceedings by effective appointment is vital and that is why relief against rigour of time clauses is granted under Section 27 of the English Arbitration Act, 1950.

14. In the present appeals, the reference was to arbitrators and they were required to appoint an umpire. The appointment of an umpire by two arbitrators means that the arbitrators are to concur in appointing an umpire. There is no particular method of appointment of an umpire prescribed by the Act. The usual method of appointment of an umpire by the arbitrators is in writing. Arbitrators who are required to appoint an umpire are under no obligation to obtain the approval of the choice of the personnel by the parties who appointed the arbitrators. If any party is dissatisfied with the choice that will not affect the validity of the appointment (See *Oliver v. Collings*). ((1809) 11 East 367 : 103 ER 1045)

15. The appointment by arbitrators of an umpire should be the act of the will and judgment of the two. Such an appointment is to be one of choice and not of chance. (See *re-Cassell*). ((1829) 9 B & C 624 : 109 ER 232) If an umpire declines the office the appointment is ineffectual. The arbitrators in such a case can make another appointment is ineffectual. The arbitrators in such a case can make another appointment of an umpire if the arbitration agreement empowers them to do so or the court can appoint an umpire in lieu of as appointed umpire who refuses to act. Declining the office will be refusal to act.

16. It is, therefore, apparent that appointment of umpire is something different from the acceptance of office by the umpire. The arbitrator or umpire assumes his office when he accepts the appointment. There is no authority for the proposition that consent of the appointee is required before an umpire is appointed by the arbitrators. The observations in *Russell on Arbitration*, 18th Ed. at page 212 do not support that submission. The decision in *Ringland v. Lowndes* (supra) which is referred to in *Russell* claim to compensation was to be settled by arbitration. Arbitrators were required to make an award within twenty-one days after the appointment or within extended time, if

any. If arbitrators neglected or refused to appoint an umpire for seven days after being requested so to do by any party the court of quarter sessions would on the application of such party appoint an umpire. In that case arbitrators were appointed in January, 1861. The arbitrators refused to appoint an umpire. The plaintiff applied at the easter to sessions to appoint an umpire but failed in consequence of want of a notice of his intention to make such application. The plaintiff thereafter gave the required notice and the second application was made at the Midsummer sessions. One Johnson was named as umpire. But as his consent had not been obtained no formal appointment was made. A third application was made at the Michaelmas sessions and Johnson was on October 14 appointed umpire and accepted the appointment. The question for consideration was whether the appointment of the umpire was at the Midsummer sessions or at the Michaelmas sessions. Under the statute the award was to be made within three months from the umpire's appointment. The umpire made in award on December 30, 1861. If the appointment was in the Midsummer sessions the award would be bad.

17. It will appear from the report [15 CB (NS) 173 at pp. 178, 179 and 196, 143 ER 749 at pp. 752 and 759] that it was the duty and practice of the clerk of the peace to make an entry of the acts and proceedings of the Court from which the orders of the Court were subsequently formally drawn up and not order would in the course of practice be formally drawn up unless the assent of the umpire to act had been previously obtained. Counsel for the board in Ringland's case (supra) did not strongly press the objection that an order was made at the Midsummer sessions, because there was no formal order of the Court in midsummer sessions. The decisions in Ringland v. Lowndes (supra) went up on appeal as will appear from 17 C B (N S) 514 144 ER 207. The appeal, however, was on actual decision in Ringland's case (supra) as to whether a party who attended before an arbitrator under protest, cross-examined adversary's witnesses and called witnesses did not preclude himself from afterwards objecting that the arbitrator was proceeding without authority. It will appear at p. 516 of 17 C B (NS) and p. 288 of 144 ER that it was conceded that the appointment of Johnson as an umpire took place at the October sessions. The special provisions of the statute, the mode of making an application to the Court of quarter sessions, the practice of the court in regard to drawing up of orders for appointment of umpire and the specific requirement of consent of the appointee to an order for appointment of umpire are all special and peculiar features in Ringland v. Lowndes (supra) to support the view that acceptance of umpirage is necessary for the appointment of the umpire.

18. The decision of the Judicial Committee in *Mirza Sadik Husain v. Musammat Kaniz Zohra Begam* (supra) was on the meaning of the words 'refuses to act' occurring in section 510 of the Code of Criminal Procedure, 1882. That section conferred power on the Court to appoint a new arbitrator or umpire "if the arbitrator or the umpire refuses to act". The Judicial Committee did not accept the construction put upon the words 'refuses to act' by the High Courts in India that the power of the Court under Section 510 to appoint a new arbitrator in place of another arise only when that other had first consented to act and thereafter refused or became incapable. The Judicial Committee said "It appears to Their Lordships that when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he has not performed the first action of all, namely, to take up the office by signifying his assent to his appointment. Their Lordships do not enter at length into the matter as it appears that any other construction would open the way to an easy defeat of the provisions of the statute."

19. Under Section 8 of the arbitration Act, 1940 if any umpire refuses to act and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the

parties or the arbitrators, as the case may be, do not supply the vacancy any party may take recourse to the provisions of the statute for appointment of umpire. The construction which the Judicial Committee put upon the words 'refuses to act' in Mirza Sadik Husain's case (supra) applies to the provisions contained in the arbitration Act, 1940. Where the arbitrators appoint an umpire upon the condition of the umpire's acceptance of office, the arbitrators will have power to reappoint an umpire if the post is refused. Where, again, the arbitrators appoint an umpire without any such condition of acceptance of officer and the appointee declines the office, the arbitrators in accordance with their powers under the arbitration agreement can appoint an umpire again. The court has also power to appoint in lieu of an appointed umpire again. The court has also power to appoint in lieu of an appointed umpire who refuses to act, as stated in Section 8 of the Arbitration act, 1940. In all these case the appointment of an umpire becomes effective by acceptance of the office. Thereupon the power of appointment is exhausted. If the appointed person after acceptance of officer refuses to act or will not act the parties have to take recourse to the Court.

20. When the umpire assumes his officer he accepts the appointment. The acceptance may be express or implied. The acceptance need not be in writing. It may be evidenced by conduct. It may be also by proceeding with the arbitration. In Mirza Sadik Husain's case (supra) both the parties by agreement appointed arbitrators to settle their respective rights. One of the arbitrators refused to act. The respondents in that case declined to nominate another arbitrator in their behalf. The Judicial Committee said that "this declinature was within their rights", the reason being that the arbitrator refused to accept office or to act after he had been appointed. The arbitrators in the present case completed their appointment of umpire before entering on the reference. Thereafter, it remained for the umpire to act or to refuse to act.

21. The question of acceptance of appointment of umpire arises with reference to the stage when he is called upon to act. The Arbitration Act, 1940 does not say that appointment of umpire by arbitrators is to be made only after obtaining consent of the appointee. The arbitrators here appointed an umpire before entering on the reference. The appointment was not conditional upon the acceptance of appointment by the umpire. The scheme of arbitration proceeding indicates that the appointment of umpire and the acceptance of office are two separate matters arising at different stages in the proceedings. When the umpire is called upon to proceed in terms of the appointment he will either assent expressly or by conduct to act or he will decline to act.

22. The High Court was correct in holding that there was valid appointment of the umpire and the umpire rightly entered upon the reference. The umpire's authority commenced when he entered upon the reference on being asked to proceed with the reference.

23. The other contention on behalf of the appellants that Paragraph 4 of the First Schedule to the Arbitration Act, 1940 was excluded by clause (6) of the arbitration agreement in the present case is unsound. Section 3 of the Arbitration Act provides that an arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference. Paragraph 4 of the First Schedule provides that if the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators. Clause (6) of the arbitration agreement does not state that only in the event of a difference arising between the arbitrators there shall be a reference to the umpire. There is no intention in the agreement to exclude the operation of Paragraph 4 of the First Schedule to the Arbitration Act. In the present case the agreement provided for appointment of umpire. The agreement also provided for making of the

award by the arbitrators. It is, therefore, apparent that the intention of the parties was that when the arbitrators would allow their time to expire without making the award the umpire would enter on the reference in lieu of the arbitrators.

24. The High Court expressed the view that if the arbitrators allowed the time to expire that by itself would not amount to disagreement between the arbitrators. As to what constitutes disagreement cannot be laid down in abstract or inflexible propositions. It will depend upon the facts of the case as to whether there was disagreement. The High Court did not agree with the view expressed in Russell on Arbitration, 18th Ex. at pages 205 and 208, that failure to make an award in time where the agreement prescribed time in which the arbitrators' award is to be made would amount to disagreement. In *Lossifoglu v. Counmantaros*, ((1941) 1 KB 396) the arbitration clause provided "in case the arbitrators so appointed disagree they shall appoint an umpire". One of the arbitrators repeatedly endeavoured to arrange a meeting with the other, but failed to arrange such a meeting. The arbitrator then unsuccessfully attempted to obtain consent of the latter to the appointment of umpire. Thereafter, application was made to the Court for the appointment of umpire. Disagreement between the arbitrators may take various shapes and forms. In the present case the arbitrators by reason of attitude of a party in correspondence addressed to the arbitrators could not agree to proceed with the matter. Where one of the arbitrators decline to act and the other is left alone it will in a case of this type amount to disagreement between the two arbitrators. In the present case, there was disagreement between the arbitrators. Time to make the award also expired. Therefore, from both points of view the umpire had authority to enter upon the reference.

25. For these reasons, we are of opinion that the High Court was correct in making the order. The appeals are dismissed. The order of the High Court is upheld. The view of the fact that the time granted by the High Court till December 31, 1968, for making the award cannot apply, the umpire Porus A. Mehta is granted time for three months to make the award. Three months will run from the date of service of this order by any party to these appeals. The appellants will pay one set of hearing fee to the respondents.

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