Prasun Roy,

Vs

Calcutta Metropolitan Development Authority and Another

Civil Appeal No. 1466 of 1987

(Sabyasachi Mukharji, G. L. Oza JJ)

20.07.1987

JUDGMENT

SABYASACHI MUKHARJI, J. -

1. Special leave granted. This is an application challenging the order of the learned Single Judge dated December 8, 1986 of the High Court of Calcutta. By the impugned judgment the said learned judge, has set aside the order dated April 19, 1983 of another learned Single Judge on the ground, inter alia, that the first learned judge, when she passed the order, acted without jurisdiction. There was an arbitration agreement. Clause 25 of the said Agreement, inter alia, was as follows :

> except where otherwise provided in the contract all questions of disputes relating to the granting of specifications, designs, drawing and instructions hereinbefore mentioned and as to the quality of workmanship and materials used in the work or as to any question claims, rights, matters, or things whatsoever in any way arising out of or relating to the contract, designs, drawings specifications, estimates, instructions order or these conditions or otherwise concerning the work or execution or failure to execute the same where arising during the progress of the work or after completion or abandonment thereof was to be referred to sole arbitration of the Director/Unit Head, CMDA not connected with the particular work as may be appointed by the authority. The award of the arbitrator shall be final, conclusive and binding on all the parties to the contract.

2. On that basis the appellant had moved an application for removal of the named arbitrator before the first learned judge which come up for hearing on April 19, 1983 and this was by filing of any application under Section 20 of the Arbitration Act for an order for filing the arbitration agreement, for appointment of an arbitrator and for other consequential reliefs. By the order dated April 19, 1983 the said learned judge has recorded the facts of this case and further recorded that by virtue of the Clause 25 of the agreement the appellant herein had prayed for appointment of an arbitrator for determination of the dispute that had arisen which had been set out in paragraph 15 of the petition. Inasmuch as according to the appellant the directors of all the units of Calcutta Metropolitan Development Authority had already expressed their opinion in respect of the disputes that had arisen between the appellant and the respondent and inasmuch as by the Central Tender Committee, the directors were members. Under the circumstances the appellant apprehended that the appellant might not get justice or proper relief under such circumstances. There was reasonable basis of the apprehension against the unnamed arbitrator, and it was urged that instead of appointing any officer of the respondent as arbitrator an independent member of the bar be appointed as arbitrator. The learned judge passed such order on April 19, 1983 while recording these facts as alleged by the

petitioner. These appear to have been reasons for appointing Sri Amitav Guha as the arbitrator in this case in terms of prayer (c) of the said petition.

3. The learned judge in the impugned order has observed that the court was bound to enforce the particular agreement with which the parties came to the court, and the parties were not entitled to have any fresh opportunity to appoint a new arbitrator as that would amount to a new agreement between the parties. This position is good insofar as it goes, but that does not solve the problem in all situations. The learned judge also observed that no appointment can be made by the court on the ground of disqualification of the arbitrator without having proper materials on record and without coming to a definite finding on this point. The learned judge further observed that the court either should have given effect to the agreed machinery for appointment of the arbitrator or it could have appointed afresh after coming to a clear finding that all directors of the Unit of CMDA were biased against the appellant herein as well as they had rendered themselves disqualified from being appointed as arbitrators. Until all of them were found disqualified, the court did not have the jurisdiction to appoint any new one and had to follow the correct machinery. It appears that the first learned judge has in fact held that the arbitrator named had disqualified himself on the ground of bias and on that basis, appointed an outside advocate, Sri Amitav Guha as the arbitrator. If the respondents were not satisfied they could have moved an appeal against the order; instead respondents participated in the arbitration proceedings and acquiesced in such appointment. The order was made on April 19, 1983 appointing Shri Amitav Guha an advocate of the Calcutta High Court as sole arbitrator. The arbitrator appointed started arbitration proceedings in which both the parties submitted to his jurisdiction and filed their respective claims and other documents in support thereof. It appears from the list of dates submitted before us that respondent 1 moved three interlocutory applications at different points of time which were, however, disposed of with orders in favour of the appellant. Both parties got extension of the arbitration proceedings even by Hon'ble Mrs. Justice Pratibha Bonnerjea at least 14 times and the last extension was granted up to November 1985 by Justice Mrs. Bonnerjea. In the meantime the said arbitrator had held 74 sittings which were attended by the parties of both sides and their counsel. A large amount of time and money, some at the cost of public have been spent on these.

4. In the year 1985 respondent 1 challenged the validity of the order of appointment of arbitrator passed by first learned judge where she acted on the basis of the findings mentioned hereinbefore.

5. Can a party be permitted to do that? In Jupiter General Insce. Co. Ltd. v. Corporation of Calcutta (AIR 1956 Cal 470 : 60 Cal WN 721) P. B. Mukharji, J. as the learned Chief Justice then was observed :

It is necessary to state at the outset that courts do not favour this kind of contention and conduct of an applicant who participates in arbitration proceedings without protest and fully avails of the entire arbitration proceedings and then when he sees that the award has gone against him he comes for ward to challenge the whole of the arbitration proceedings as without jurisdiction on the ground of a known disability of a party. That view of the court is ably stated by the editor of the 15th edition of Russell on the Law of Arbitration at page 295 in the following terms :

> Although a party may by reason of some disability be legally incapable of submitting matters to arbitration that fact is not one that can be raised as a ground for disputing the award by other parties to a reference who were aware of the disability. If one of the parties is incapable the objection should be taken to the submission. A party will not be permitted to lie by and join in the submission and then if it suits its purpose

> attack the award on that ground. The presumption in the absence of proof to the contrary will be that the party complaining was aware of the disability when the submission was made.

6. Mr. Kacker submitted that this principle could be invoked only in a situation where the challenge is made only after the making of an award, and not before. We are unable to accept this differentiation. The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceeding preclude such a party from contending that the proceedings were without jurisdiction.

7. Russell on Arbitration, 18th edition page 105 (20th edn., p. 131) explains the position as follows :

> If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence.

8. The Judicial Committee in its decision in Chowdhri Murtaza Hossein v. Mussumat Bibi Bechunnissa (LR (1875-76) 3 IA 209, 220) observed at page 220 :

> On the whole, therefore, their Lordships think that the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their awards, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself; and that is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filling of the award.

Relying on the aforesaid observations this Court in N. Chellappan v. Secretary, Kerala State Electricity Board ((1975) 1 SCC 289) acted upon the principle that acquiescence defeated the right of the applicant at a later stage. In that case the facts were similar. It was held by conduct there was acquiescence. Even in a case where initial order was not passed by consent of the parties a party by participation and acquiescence can preclude future challenges.

9. In the grounds of appeal no prejudice has been indicated by the appointment of the second arbitrator.

10. Mr. S. N. Kacker, learned counsel for the respondents drew our attention to the fact that the decision in the Chowdhri Murtaza Hossein case (LR (1875-76) 3 IA 209,220) was where the party challenged the appointment of the receiver after the award was made. He also submits that in this case the respondents herein had challenged the order of appointment of the arbitrator on April 19, 1983 and not after the arbitrator had made the award. We are unable to accept this distinction. Basically the principle of waiver and estoppel is not only applicable where the award had been made but also where a party challenges the proceedings in which he participated. In the facts of this case, there was no demur but something which can be called acquiescence on the part of the respondents which precludes them from challenging the participation (sic proceedings).

11. In that view of the matter, we are of the opinion that the judgment and impugned order cannot be sustained. In the premises the appeal is allowed. The order and judgment of the High Court dated

December 8, 1986 are set aside. The arbitration proceedings will go on before the arbitrator appointed by order dated April 19, 1983. Time for making the award is extended for four months from today. For further extension of time the party may apply to the High Court of Calcutta.

12. The appeal is disposed of accordingly. The parties will bear their respective costs.

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