

Jiwan Kumar Lohia and Another

Vs

Durga Dutt Lohia and Others

Civil Appeal No. 4341 of 1991

(B. C. Ray, M. N. Venkatachaliah, S. C. Agarwal JJ)

30.10.1991

JUDGMENT

AGRAWAL, J. –

1. Special leave granted.
2. Heard learned counsel for the parties.
3. This appeal is directed against the order dated December 21, 1990 passed by the High Court of Calcutta whereby the application filed by respondents 1 and 2 under Sections 5, 11 and 12 of the Arbitration Act, 1940 for revoking the authority of the arbitrator and alternatively for his removal was allowed and Mr. Justice Anil Kumar Sen, retired Chief Justice of the said High Court who had been appointed as the sole arbitrator under order of the High Court dated February 20, 1987 was relieved of his charge and Mr. Justice Shambu Chandra Ghosh, retired Chief Justice of the said High Court was appointed as the sole arbitrator in place and stead of the learned outgoing arbitrator.
4. The parties to this appeal are descendants of a common ancestor. Certain disputes arose amongst them which gave rise to two suits; Title Partition and Administration Suit No. 37 of 1975 filed by Gouri Shankar Lohia, Durga Dutt Lohia and others in the court of Assistant District Judge, Dibrugarh and Title Suit No. 185 of 1975 filed by Rabindra Kumar Lohia, appellant 2 herein, against Durga Dutt Lohia in the 3rd Court of Subordinate Judge, Alipore. Both these suits were withdrawn and thereafter, on November 4, 1976, the parties entered into an arbitration agreement for referring their disputes to arbitration. Mr. B. P. Khaitan, Mr. Nathmal Himatsingha and Mr. S. K. Rajgaria were appointed as joint arbitrators. After holding the reference for two years nine months, the joint arbitrators, on August 30, 1979, expressed their inability to make the award and thereafter by order dated September 12, 1980, passed by the High Court of Calcutta, the authority of joint arbitrators was revoked and they were removed and Mr. Justice A. K. Mukherjee, a retired Judge of the said High Court, was appointed as the sole arbitrator. By order dated February 20, 1987, passed by the High Court, Mr. Justice A. K. Mukherjee was removed as the sole arbitrator and in his place Mr. Justice Anil Kumar Sen, retired Chief Justice of the said High Court, was appointed as the sole arbitrator. The said arbitrator entered reference on June 5, 1987. He recorded the evidence of the claimants which was closed on November 21, 1989, and directions were issued for adducing evidence on behalf of respondent 1, Durga Dutt Lohia. While the statement of Durga Dutt Lohia was being recorded by the arbitrator an application was moved on March 16, 1990 by respondents 1 and 2 in the High Court of Calcutta for removal/substitution of the arbitrator. The said application was allowed by the learned Judge of the High Court by order under appeal.

5. The revocation of the authority of the arbitrator was sought by the respondent applicants before the High Court on the ground of bias on the part of the arbitrator. With regard to bias in relation to a judicial tribunal the test that is applied is not whether in fact a bias has affected the judgment but whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal [Manaklal v. Dr. Prem Chand (1957 SCR 575, 580-81 : AIR 1957 SC 425)]. In Ranjit Thakur v. Union of India ((1987) 4 SCC 611 : 1988 SCC (L&S) 1 : (1987) 5 ATC 113) this Court has laid down that "the test of likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely" and whether the person concerned "was likely to be disposed to decide the matter only in a particular way". These tests would also apply to an arbitrator. But while considering whether there is a reasonable ground for apprehension that the arbitrator will be biased, on an application under Section 5 of the Arbitration Act, 1940, the Court should be satisfied that substantial miscarriage of justice will take place in the event of its refusal of the said application. The discretion to give leave to revoke an arbitrator's authority has to be exercised cautiously and sparingly and while doing so the Court must bear in mind that arbitration is a particular method for the settlement of disputes and parties should not be relieved from a tribunal they have chosen because they fear that the arbitrator's decision may go against them. [See : Amarchand Lalitkumar v. Shree Ambica Jute Mills Ltd. ((1963) 2 SCR 953, 968-69 : AIR 1966 SC 1036)]

6. In the present case, the learned Judge has removed the arbitrator on the ground that there was a reasonable apprehension in the minds of the respondent applicants about likelihood of bias in the arbitrator inasmuch as he had adopted a double standard while conducting the arbitration proceedings.

7. Shri S. K. Kapur, the learned counsel appearing for the appellants, and Shri A. K. Sen, the learned counsel appearing for the respondent applicants, have taken us through the record of the arbitration proceedings. We have carefully considered the said record including the minutes of proceedings before the arbitrator and the record of evidence produced before the arbitrator, in the light of the findings recorded by the learned Judge of the High Court. We are of the view that the arbitrator has conducted the proceedings in a fair and judicious manner. While recording the evidence of witnesses the arbitrator has noted the objection that was raised by the counsel against a particular question and has passed order dealing with the same. In some cases the consideration of the objection was postponed to the next hearing to enable counsel to make their submissions. During the course of cross-examination of Durga Dutt Lohia the arbitrator permitted the counsel for appellants to put questions on the basis of the document dated July 13, 1922 with the specific direction that if the objection raised by the counsel for the respondent applicants is sustained the questions as well as answers to the same would be expunged. On the next hearing the arbitrator passed an order rejecting the said document and expunged the evidence that was recorded in answer to questions put on the basis of the said document. The direction given by the arbitrator to record the statement of Durga Dutt Lohia first has to be considered in the light of the fact that he was a material witness of his alleged adoption in 1910 and he was aged 84 years and was ailing and if his statement was not recorded first his evidence may not be available. This ultimately proved true because during the pendency of the proceedings in this Court he expired. The dispute has been pending before arbitrators since 1976. The reluctance on the part of the arbitrator to grant long adjournment was due to the anxiety on his part to complete the proceedings expeditiously. Even then, when sufficient cause was shown the proceedings were adjourned to suit the convenience of the parties and their counsel. We are, therefore, unable to agree with the view of the learned Judge of the High Court that the arbitrator while conducting the arbitration proceedings has acted in a manner as to give rise to a reasonable apprehension in the mind of the respondent applicants that he

was biased in favour of the appellants (claimants) and was unfair towards the respondent applicants. In the circumstances the learned Judge was not justified in relieving the arbitrator of the charge and in appointing another arbitrator in his place. The order passed by the learned Judge of the High Court cannot, therefore, be upheld and must be set aside.

8. On going through the judgment of the High Court, we were disturbed to find that the learned Judge, while commenting on the conduct of the arbitration proceedings by the arbitrator, has made observations which are highly disparaging. Apart from the fact that the said remarks were completely uncalled for, we are of the view that the language used does not behove the dignity and judicial decorum of the court. In *State of M. P. v. Nandlal Jaiswal* ((1986) 4 SCC 566) this Court has observed : (SCC p. 615, para 43)

"We may observe in conclusion that judges should not use strong and carping language while criticising the conduct of parties or their witnesses. They must act with sobriety, moderation and restraint. They must have the humility to recognise that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice."

These observations apply with greater force when remarks are made against an arbitrator who happens to be a person who has occupied the high office of the Chief Justice of the High Court in the State. While setting aside the judgment of the High Court, we record our disapproval of the observations that have been made in the judgment against the conduct of the arbitrator.

9. The appeal is, therefore, allowed. The judgment dated December 21, 1990 is set aside. The matter will go back to the arbitrator, Mr. Justice Anil Kumar Sen, who will proceed further with the +arbitration proceedings. The arbitrator may complete the arbitration proceedings within six months. In case further extension is required, the parties will be at liberty to move the High Court for appropriate directions from time to time. No orders as to costs.

</html