

Bharat Bhushan Bansal

Vs

U.P Small Industries Corporation Ltd.

Civil Appeal No. 1940 of 1984

(Sujata V. Manohar, R.C. Lahoti JJ)

21.01.1999

JUDGMENT

SUJATA V. MANOHAR, J.-

1. The appellant had entered into a contract with the respondent under which the appellant had undertaken the work of construction of a factory and allied buildings of the respondent at India Complex, Rae Bareilly. The agreement is dated 19-10-1973. Clauses 23 and 24 of the agreement are as follows :

*"Decision of the Executive Engineer of the UPSIC to be final on certain matters,*

23. Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instruction hereinbefore mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs drawing, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor.

*Decision of the MD of the UPSUC on all other matters shall be final*

24. Except as provided in clause 23 hereof, the decision of the Managing Director of the UPSIC shall be final, conclusive and binding on both the parties to the contract all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of this contract and not specifically mentioned herein."

2. There were disputes between the appellant and the respondent in connection with the payments to be made under the terms of the said contract and in connection with the work of the said contract. The appellant made an application under Section 8 of the Indian Arbitration Act, 1940 before the Civil Judge, Kanpur. He applied for the appointment of an independent arbitrator in the place of the Managing Director. The respondent denied that there was any arbitration clause in the said contract. The Court, however, allowed the petition of the appellant under Section 8 of the Arbitration Act and appointed one D.D. Sharma, Executive Engineer, as arbitrator. In appeal, the High Court, while

upholding the finding that there was an arbitration clause, held that the court below had no jurisdiction under Section 8 to appoint another arbitrator in the place of the Managing Director since none of the clauses of Section 8 was attracted in the present case. The High court, therefore, set aside the order of the court below and dismissed the application of the appellant under Section 8. From this judgement, the appellant has filed the present appeal.

3. The first question that requires consideration is whether there is any clause in the contract which provides for arbitration between the parties. The relevant clauses are clauses 23 and 24. Under clause 23, the decision of the Executive Engineer is final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, specifications, designs etc. and as to the quality of workmanship or material used or relating to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications etc. or otherwise concerning the execution or failure to execute the same. Under clause 24, except as provided in clause 23, the decision of the Managing Director of the respondent shall be final, conclusive and be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract and in respect of all other matters arising out of the contract and not specifically mentioned in the said clause. Therefore, in respect of certain claims, the decision of the Executive engineer is final and binding on both the parties to the contract. While in respect of the remaining binding on both the parties to the contract. While in respect of the remaining matters, the decision of the Managing Director of the respondent is final, conclusive and binding on both the parties to the contract. Clause 24 does not mention that any dispute can be referred to the arbitration of the Managing Director. Clause 24 also does not spell out any duty on the part of the Managing Director to record evidence or to hear both parties before deciding the questions before him. From the wording of clause 24, it is difficult to spell out any intention of the parties to leave any disputes to the adjudication of the Managing Director of the respondent as an arbitrator.

4. In the case of *K.K., Modi v. K.N. Mofi*<sup>1</sup> a Bench of this Court (of which one of us was a Member) has the occasion to consider the essential ingredients of an arbitration clause. Among the ingredients which are described in the said judgment, two important ingredients are that the agreements are that the agreement between the parties must contemplate that substantive rights of parties will be determined by the agreed tribunal and that the tribunal will the tribunal owing an equal obligation of fairness towards both sides and also that the agreement of the parties to refer their disputes to the decision of the tribunal must be intended to be enforceable in law. There s a difference between an expert determination and arbitration. S.K. Chawla in *Law of Arbitration and conciliation* at p. 164 states as follows.

"4. *Arbitration agreement to be distinguished for agreement for decision by an engineer of expert.*- Contracts may contain a clause that on certain questions the decision of an engineer, architect or another expert shall be final. The decision given in such cases by the engineer no obligation, unless the contract otherwise provides, to receive evidence or submissions and is entitled to his decision solely upon there results of his own expertise and investigations. The procedure involved is not arbitration, and the Arbitration Act does not apply to it The primary material on which such person acts is his own knowledge and experience, supplemented if he thinks fit by (I) his won investigations; And/or (ii) material (which need not conform to rules of 'evidence') put up before him by either party. An arbitrator on the other hand, acts primarily on material put before him by the parties. The determination by an engineer or an expert would involve a less thorough investigation. Only one mind

will be brought to bear on the problem. There will be no discovery of documents, there will not normally be any oral 'evidence' or oral submissions."

5. In the present case, reading clauses 23 and 24 together, it is quite clear that in respect of question arising from or relating to any claim or right, matter or thing in any way connected with the decision of the Executive engineer is made final and binding in respect of certain types of claims or questions, the decision of the Managing Director is made final and binding in respect of the remaining claims. Both the Executive engineer as well as the Managing director are expected to determine the question or claim on the basis of their own investigations and material. Neither of clauses contemplates a full-fledged arbitration covered by the Arbitration Act.

6. A clause very similar to the present clause was also held to be not arbitration clause by this court in the case of *State of Orissa v. Damodar Das*<sup>2</sup>. The language of that clause was very similar to the present clause. Under the clause in question, (at SCC p. 222, para 9)

"except where otherwise specified in this contract, the decision of the public Health Engineer for the time being, (was to) be final, conclusive the meaning of the specifications, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question claim, right, matter or this, whatsoever in any way arising out of or relating to, the contract...or otherwise concerning the works or the execution or failure to execute the same..."

The court held that this Clause did not spell out any intention to refer any disputes and differences between the parties to arbitration.

7. The wording of the clause in the present case is very similar to the wording which was interpreted as not an arbitration clause in the above case. Both the above judgments of this court have relied upon an earlier decision of this Court in the case of *State of U.P. v. Tipper Chand*<sup>3</sup>. The clause which was interpreted in the above case was also materially similar to the clause before us. Clause 22 of the contract in that case provided: (SCC p. 341, para 2)

"Except where otherwise specified in the contract the decision of the Superintending engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all be final, conclusive the meaning of the specification, design, drawing and instructions hereinbefore mentioned. The decision of such engineer as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or things whatsoever, in any way arising out of or relating to the contract, designs, drawing specification, ... or otherwise concerning the works, or the execution or failure to execute the same, ... shall also be final, conclusive and binding on the contractor."

This court held that the clause did not contain an arbitration agreement either expressly or by implication. The intention was to vest the Superintending engineer with supervision and administrative control over the work.

8. In *Hudson's Building and engineering Contracts*, 11<sup>th</sup> Edn., Vol. 1, in para 6.065, while making a distinction between a certifier and an arbitrator in a building contract, it has been emphasised that essentially the certifier in a construction contract will often be performing an administrative rather

than a judicial function, and when doing so, there may often be no formulated dispute before him at all. He has been described as a "presenter of disputes" in contradistinction to an arbitrator whose function can only arise once a dispute is in existence. He is not under the same obligation to afford the parties or their representatives a full hearing and receive evidence from them. Thus each contractual provision may need to be carefully scrutinised to see into which category the person named falls.

9. In the present case, the Managing director is more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner. In para 18.067 of Vol. 2 of *Hudson on Building and engineering contracts*, Illustration (8) deals with the case where, by terms of a contract, it was provided that the engineer

"shall be the exclusive judge upon all matters relating to the construction, incidents and the consequences of these presents, and of the tender, specifications, schedule and drawings of the contract, and in regard to the execution of the works or otherwise arising out of or in connection with the contract, and also as regards all matters of account, including the final balance payable to the contractor, and the certificate of the engineer for the time being, given under his hand, shall be binding and conclusive on both parties".

It was held that this clause was not an arbitration clause and that the duties of the Engineer were administrative and not judicial.

10. Since clause 14 does not contemplate any arbitration, the application of the appellant under Section 8 of the Arbitration Act, 1940 was misconceived. The appeal is, therefore, dismissed though reasons somewhat different from the reasons given by the High Court. There will, however, be no order as to costs.