ALLAHABAD HIGH COURT

Fertilizer Corporation of India Limited

Vs.

Domestic Engineering Installation

F.A. F.O. No. 341 of 1967 against judgment and decree of Civil J. Gorakhpur
(Rajeshwari Prasad and A.K. Kirty, JJ.)

05.07.1967. 23.05.1968

JUDGMENT

R. Prasad, J.

1. This is a first appeal from order filed under Section 39 of the Indian Arbitration Act, 1940. The appeal has been filed on behalf of the Domestic Engineering Installations Gorakhpur through its partner Sri Gorakh Mohan Das (hereinafter referred to as the plaintiff). The respondent to this appeal is Fertilizer Corporation of India Ltd. (hereinafter referred to as defendant).

2. The order appealed against is an order purported to have been passed under Section 20 of the Indian Arbitration Act, 1940 (hereinafter referred to as the Act).

3. The plaintiff filed an application under Section 20 of the Act alleging inter alia the facts given herein under. The defendant invited sealed tenders in August, 1964 for carrying out the work of laying Main Sewerage in the Fertilizer's Township. The plaintiff submitted its tender which was eventually accepted by the defendant on or about 20th October 1964. The work-order dated 19/20th October 1964 was issued to the plaintiff which contained in detail the various terms of the contract. It was also noted therein that the work had to be executed in accordance with the terms and conditions of the notice inviting tenders (hereinafter referred to as "NIT") and the general direction and conditions of contract (hereinafter referred to as "GDCC"). Clause 65 of the G. D. C. C. contained arbitration clause which provided for the settlement of disputes arising under the contract. When the plaintiff started executing the work, it found that it was required to do certain work which was wholly different from the work tendered for. The plaintiff further met with the difficulty that the

Engineer In charge of the work on behalf of the defendant neglected to give adequate instructions to the plaintiff as required by the terms of the contract. Certain major disputes arose during the course of the work. Accordingly, the plaintiff sent a notice dated 17th December 1964 to the General Manager of the defendant in accordance with Clause 65 of G. D. C. C. calling upon him to himself act as arbitrator or nominate some one else to act as arbitrator and to refer the dispute to arbitration. The General Manager did not take any action on the notice sent by the plaintiff. The plaintiff, therefore, sent a reminder on 13th January 1965. Thereafter, Shri Gorakh Mohan Das partner of the plaintiff firm personally met Shri N. R. Sheshadari, the then General Manager of the defendant. The plaintiff requested Mr. Sheshadari to proceed in the matter of arbitration but he refused to act as arbitrator and showed his unwillingness to appoint any other arbitrator. It was under those circumstances that the plaintiff proceeded to file his application under Section 20 of the Act on the 18th January 1965. The plaintiff prayed that the agreement be ordered to be filed and the dispute be referred for arbitration. The proceedings initiated by the plaintiff proceeded as a suit as required by the provisions of the Indian Arbitration Act and the application was treated to be the plaint in that suit. Some further facts were incorporated in the plaint as a result of the order of the Court below allowing the plaintiff to make amendments therein.

4. The additional facts introduced in the plaint are that in May 1965, Mr. N. R. Sheshadari was replaced by Mr. B. K. Khanna as General Manager. Shri Gorakh Mohan Dass approached Shri B. K. Khanna also and requested him to settle the dispute that had arisen under the contract. Mr. B. K. Khanna is said to have first assured the plaintiff that he would try to give necessary relief to the plaintiff, but later on, he went back upon his words and insisted that the plaintiff should withdraw his petition filed under Section 20 of the Act. He held out that he would be able to do something in the matter only after the petition had been withdrawn by the plaintiff from Court. Shri Gorakh Mohan Das, however, did not agree to the suggestion made by Sri B. K. Khanna. As a result thereof, Shri B. K. Khanna got a notice dated 12/16th June 1965 served on the plaintiff containing the threat that on the expiry of 48 hours, sewerage work of Type III quarter would stand withdrawn to the extent specified in the said notice and that further action would also be taken against the plaintiff under Clause 63 of the G. D. C. C. It has then been alleged that Shri V. S. Pahwa, the Deputy Chief Engineer of the defendant was the main person responsible for all the troubles of the plaintiff. He had been prejudiced against the plaintiff from the very

inception and had been threatening the plaintiff with dire consequences. Mr. B. K. Khanna, the General Manager was led away by the representations and influence of Mr. Pahwa and he became biased against the plaintiff. He, therefore, became incapable of acting as arbitrator and impartial adjudication of the dispute was not expected from him. Further Mr. B. K. Khanna accepted and acted upon the explanation given by Mr. Pahwa on the disputed items and in a report which he made to his Head office, at New Delhi, he represented the representations made by Mr. Pahwa as his own conclusions in the matter. He also sought legal opinion on the question as to how best the plaintiff could be penalised and thereafter he directed his subordinates to act accordingly. Arbitration by Mr. B. K. Khanna or by a person appointed by him would wholly be unjust and inequitable and is bound to result in miscarriage of justice. It has also been alleged by the plaintiff that in preparing the abstract of costs, serious mistake had been committed by the defendant. The employees of the defendant had been attempting to throw the entire responsibility of their mistakes on the shoulders of the plaintiff and had conspired to deprive the plaintiff of its legitimate dues. The General Manager and all other officers of the defendant, therefore, have become incapable of functioning as arbitrators in the matter. The plaintiff, therefore, prayed that reference of the dispute be made to any other arbitrator appointed in accordance with provisions of law.

5. The defendant put in contest and filed written statement and additional written statement. The pleas raised by the defendant are varied. It is said that the application was not maintainable under Section 20 of the Arbitration Act because no agreement had been reduced to writing or had been executed before the petition was filed. No dispute had arisen between the parties inasmuch as all the grievances were heard and finally disposed of by the defendant in accordance with the provisions of Clause 64 of the G. D. C. C. The differences pointed out on behalf of the plaintiff were those which were covered by Clause 64 of the G. D. C. C. Disputes which could be referred to arbitration under Clause 65 of G. D. C. C. were referred to the defendant only after the institution of the present proceedings. There was, therefore, no occasion for the arbitrator to act as provided under Clause 65 aforesaid. It was incorrect on the part of the plaintiff to say that the General Manager had failed to act as arbitrator within the provision of Clause 65 of the G. D. C. C. It was also wrong to say that Sri B. K. Khanna, the General Manager of the defendant was ever approached to act as arbitrator or to appoint an arbitrator. He could, therefore, not be charged to neglect in acting as an arbitrator or in appointing an arbitrator. The allegations made by the

plaintiff against Mr. B. K. Khanna, the General Manager and Sri V. S. Pahwa, the Deputy Chief Engineer were denied. The General Manager never directed his subordinates to take any steps against the plaintiff beyond the scope of G. D. C. C. and that he never became biased against the plaintiff. It has been denied that any mistake had been committed in preparing abstract of costs in the tender. The merits of the dispute have also been denied.

6. A large number of Issues were Sramed by the Court below which arose on the pleadings of the parties. The more important findings returned by the Court below are that the application under Section 20 was maintainable inasmuch as an arbitration agreement did exist before the proceedings had been started. It has been further held that the disputes relied upon by the plaintiff fell within the scope of the arbitration clause and that they could be referred to arbitration under Clause 65 of the G. D. C. C.

7. Next it was held that the fact that notice of the disputes contained in Annexure 'A' of the petition was given to the defendant only after the institution of the present proceedings, was no ground for refusing to pass an order to file the agreement. The Court below further found that Sri N. R. Sheshadari who was the General Manager of the defendant showed his unwillingness to do anything in the matter of giving arbitration to the plaintiff, and, therefore, he failed to arbitrate or to appoint a nominee to arbitrate. There is the further finding of the Court below that Shri B. K. Khanna General Manager of the defendant who succeeded Mr. N. R. Sheshadari also showed his unwillingness to arbitrate in the matter. According to the Court below, mistakes had occurred in preparing the abstract of costs in the tender, and that it could not be said that the apprehension of the plaintiff that the General Manager and the other officers of the defendant were trying to make the plaintiff suffer the consequences of their mistakes, was unreasonable. Another important finding returned by the Court below is that as after the passing of an order for filing of the agreement under Section 20 of the Act, it is the further duty of the Court to make an order of reference, the Court must look into the question of negligence or misconduct or bias etc. raised by the plaintiff against the named arbitrator, on the ground of justice, equity and good conscience. Next the Court below held that the General Manager had rendered himself incapable of either acting himself as arbitrator or appointing a nominee for the purpose of arbitration. Shri B. K. Khanna, the General Manager had made up his mind against the plaintiff and had also directed the actions which were taken against the plaintiff,

and therefore, there was well-founded apprehension in the mind of the plaintiff that the General Manager was biased against it. It was further found that the plaintiff's apprehension that no other officer or person of the Fertilizer Corporation of India Ltd. could be trusted to act fairly as an arbitrator is not unjustified. On the question of law, the Court took the view that the Court acting under Section 20, Clause (4) of the Arbitration Act, had ample power to fill in vacancy caused by the failure of the nominated arbitrator and to pass an order of reference of disputes to an arbitrator otherwise appointed by the parties and in case there was no such agreement, to appoint an arbitrator itself. On such findings, the Court below passed the order directing that the arbitration agreement be filed in Court. The Court further asked the parties to submit the name of some agreed arbitrator within ten days from the date of the order so that disputes contained in Annexure "A" of the petition with the exception of the disputes given under Items Nos. 4 and 11 be referred to him. It was also observed that in case the parties failed to submit the name of an agreed arbitrator within the time allowed, the Court itself would appoint an arbitrator and refer the said dispute to him.

8. By its order, it is obvious, that all that the Court below has done is to direct the filing of the arbitration agreement in Court. It has neither appointed an arbitrator nor has referred the dispute to any arbitrator.

9. An objection was raised on behalf of the respondent that the appeal is not maintainable against the order of the Court below in view of the provision of Section 39 of the Act. An order relating to filing or refusing to file an arbitration agreement is alone appealable under Section 39 (1) (iv) of the Act. As we have pointed out above by its order the Court below only directed the filing of the arbitration agreement in Court and the order cannot be read to be an order appointing an arbitrator or making reference to an arbitrator. The Court gave opportunity to the parties to submit the name of some agreed arbitrator within the period fixed by the Court. The observation that in case the parties failed to submit the name of an agreed arbitrator within the time allowed, the Court itself would appoint an arbitrator and refer the dispute to him, cannot be deemed to be an order actually appointing an arbitrator or making reference to any arbitrator. The appointment of the arbitrator and making of reference to him were proposed to be done by other orders to be passed in future. This being so, we are of the opinion that the appeal is not incompetent.

10. In support of the appeal, it has first been urged that the petition under Section 20 of the Act was not maintainable inasmuch as there was no arbitration agreement in existence before the institution of the suit. What had happened in this case was that the documents which formed the contract were signed on the 25th March 1965 i. e. after the petition under Section 20 of the Act had been filed. Learned counsel for the appellant has referred to Section 2 (a) of the Act for the purpose of showing that "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not According to the plaintiff-respondent, the contract had been completed between the parties on 20th October 1964. The defendant-appellant had accepted the tender of the plaintiff which was offered on 24th September 1964. In pursuance of that acceptance of the tender, the defendant issued work-order to the plaintiff dated 19/20-10-1964. That document contained all the terms of the contract and in spite of the fact that the formal agreement was signed at a later date, the parties treated themselves bound by the agreement from the date of the work-order. The document constituting the contract included G. D. C. C. (General Directions and Conditions of Contract). Clause 65 of the document is the arbitration agreement. Both the parties filed that document and relied upon it. The Supreme Court has more than once expressed the view that the agreement in order to be an arbitration agreement need not necessarily be signed by the parties. In the case of *Jugul Kishore Rameshwar Das v. Mrs. Goolbai Hormusji,* [1] it was held that in order to constitute an arbitration agreement in writing, it is not necessary that it should be signed by the parties and it is sufficient that the terms are reduced to writing and the agreement of the parties thereto is established. Again in the case of *Union of India v. A. L. Rallia Ram,* [2] similar view was taken. In the last mentioned case, the Food Department of the Government of India invited tenders in the name of Chief Director of Purchases. The respondent submitted his tender which was duly accepted by the Government of India. The acceptance letter set out general conditions of contract. One of the conditions contained therein, was an arbitration clause. On such facts, it was held by the Supreme Court that it constituted an arbitration agreement within the meaning of Section 2 (a) of the Act. No particular form is necessary for an agreement to constitute an arbitration agreement. We have, therefore, no hesitation in coming to the conclusion that arbitration agreement was in existence before the institution of the suit in this case.

11. It was then urged that the disputes pointed out by the plaintiff were covered by Clause 64 of the G. D. C. C. and were not covered by Clause 65 of the G. D. C. C.

which is the arbitration clause. The dispute, therefore, could not be referred to arbitration. Incidentally, it was urged that the disputes which were all covered by Clause 64 of the G. D. C. C. had already been decided by the defendant's Engineer and for that reason also, there was nothing which needed being referred to arbitration. In order to appreciate the contention of the learned counsel for the appellant, it is necessary to quote CL 64 referred to above: -

> "All disputes or differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the works or after the completion and whether determination of the contract shall be referred by the contractor to F. C. I. (Fertilizer Corporation of India Ltd.) and F. C. I. shall within a reasonable time after presentation make and notify decisions thereon in writing. The decisions, directions and certificates with respect to any matters, decision on what is specially provided for by these conditions given and made by F. C. I. or by the Engineer on behalf of F. C. I. which matters are referred to hereinafter as excepted matters, shall be final and binding upon the contractor and shall not be set aside or be attempted to be set aside on account of any informality, omission, delay or error in proceedings in or about the same or on any other reason and shall be without any appeal. "

That clause is followed by Clause 65, which also, it is necessary to quote, and is as follows: -

> "Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship, or materials used in the work, or as to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the work of the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof or otherwise shall within one month of the arising of such question or dispute, be referred to the sole arbitration of the General Manager of F. C. I. and if the General Manager is unable or unwilling to act, to the sole arbitration of some other person appointed by the General Manager, willing to act as such arbitrator. There will be no objection if the arbitrator so appointed is an

employee of F. C. I. (Fertilizer Corporation of India Ltd.) and that he had to deal with the matters to which this agreement relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or differences. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this contract. "

Under Clause 64, the decisions which are said to be final and binding on the contractor are those decisions, directions and certificates which relate to "excepted matters". Those "excepted matters" are said to be (Sic) by the conditions given in the G. D. C. C. The "excepted matters" as appears from the G. D. C. C. are (i) extension of time provided in Clauses 21, 22 and 32, (ii) measurement on completion of work and before final certificate provided in Clause 23; (iii) payment of lump sum in estimate given in Clause 26; (iv) return of F. C. I's surplus materials to F. C. I. given in CL 29; (v) liability for damages for three months after final certificate given in clause 38; and (vi) costs incurred or excess amount paid to another contractor for the work left incomplete after determination of contract for default of contractor given in clause 63 (xii) (b) (c).

12. On an examination of the various items of disputes and the differences as given in Annexure "A" to the petition, the court below came to the conclusion that majority of them are items of disputes and differences that do not come within the category of "excepted matters" as provided in Clause 64. We have ourselves examined the various items of disputes and differences given in Annexure "A" mentioned above, and we find ourselves in agreement with the view taken by the Court below. It must, therefore, be held that the contention of the defendant that no dispute had arisen between the parties within the meaning of Clause 65 of the G. D. C. C., is not correct. It is obvious that it was necessary to have recourse to the contract to settle the disputes and differences given in Annexure "A" of the petition. That being so such disputes and differences must be held to be disputes and differences under the contract. In the last item of Annexure "A", the claim of the plaintiff is that he was entitled to recover from the defendant the sum of Rs. 2, 55, 000 for the work done including the costs of planks and bailies, left in trenches and which amount had not been paid. The plaintiff also claimed the sum of Rs. 11, 000 being refund of earnest money and Rs. 26, 610 for wrongful termination of the contract. He claimed interest on the total claim. The real controversy between the parties, related to the designs, drawings, specifications, estimates, instructions and orders concerning the work or its execution or failure to

execute. For the settlement of that controversy the contract had necessarily to be looked into. We are, therefore, unable to accept the contention of the learned counsel for the appellant on this point.

13. It was thereafter urged by the learned counsel for the appellant that the disputes and differences given in Annexure "A" to the application were brought to the notice of the defendant only after the execution of the present proceedings, and that, therefore, they could not form subject-matter of decision under Section 20 of the Arbitration Act. We, however, do not find much substance in such contention. A person has a right to move the Court under Section 20 of the Act for filing of the arbitration agreement on the ground that he had entered into an arbitration agreement before the institution of the suit with respect to the subject-matter of his agreement or any part of it and that differences had arisen between the parties to which the agreement applied. In this case before the stage of making of reference was reached, the defendant did get notice of the disputes which were required to be referred as those disputes and differences were clearly mentioned in Annexure "A" of the petition itself.

14. On the whole, we are satisfied that the order of the Court below directing that arbitration agreement be filed in Court does not suffer from any legal infirmity and therefore, reversal of that order by this Court is not called for.

15. Extensive and elaborate arguments have been advanced by the learned counsel for the parties on the question whether on the facts of the instant case, Court below had or had not the power to appoint an arbitrator other than the General Manager of the defendant corporation or his nominee under Section 20, Clause (4) of the Act. We have already quoted Clause 65 of the agreement earlier. It may be recalled that certain classes of disputes arising between the parties under the contract were to be referred to the sole arbitration of the General Manager of the F. C. I. and if the General Manager was unable or unwilling to act, to the sole arbitration of some other person appointed by the General Manager, willing to act as such arbitrator. In that clause,, the parties also expressed that there would be no objection if the arbitrator so appointed was an employee of the F. C. I. and that he had to deal with matters to which this agreement relates and that in course of his duties as such he had expressed views on all or any of the matters in dispute or differences. It was further provided that the award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the contract. Clause (4) of Section 20 of the Act reads as follows: -

> "Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator, appointed by the Court. "

16. It is clear from the above clause that the reference will be made to the arbitrator who is appointed by the parties either in the agreement itself, or appointed by the parties otherwise, in case, the parties have not nominated an arbitrator in the agreement and they did not, otherwise, agree to the appointment of a particular arbitrator, the Court would have the power to refer the disputes to an arbitrator appointed by itself.

17. In the instant case, it was pointed out that the nomination of the General Manager of the defendant had been made by the parties in the agreement itself and if for some reason, the General Manager could not arbitrate then the parties had agreed that the nominee of the General Manager would be the person who will act as an arbitrator. This being so, it was urged that the power of the Court to appoint another person as an arbitrator could not be exercised by the Court below in this particular case.

18. To us it appears that the question whether the lower Court could appoint an arbitrator under Section 20 (4) of the Act or not, does not arise in this case. We have already pointed out that the Court below did not actually appoint an arbitrator by the order under appeal, but all that it did was to ask the parties to give an agreed name so that the dispute could be referred to him for decision. Perusal of Clause (4) of Section 20 of the Act indicates that there are three courses open to the Court under that provision of law. After the arbitration agreement has been ordered to be filed, the Court shall proceed to make reference firstly to the arbitrator appointed by the parties in the agreement; secondly to the arbitrator not named in the agreement, but with regard to whom the parties agree otherwise; and thirdly, when the parties cannot agree upon an arbitrator, to an arbitrator appointed by itself. The stage for exercising power of arbitration by Court, was not yet reached in this case. The Court below only directed the parties to give an agreed name so that the Court might make a reference to him for deciding the dispute that had arisen between the parties. The precise question, that really arises in the case, is whether, the plaintiff could be permitted to contend that the arbitrator named in the agreement had since then incapacitated himself from acting as an arbitrator between the parties and that, therefore, the

plaintiff had the right to urge that reference be not made to the arbitrator named in the agreement. If the plaintiff could do so, then the order of the Court below directing the parties to give an agreed name for appointment of arbitrator must be held to be correct.

19. The grounds on the basis of which the plaintiff objected to the reference being made to the General Manager or to his nominee have already been indicated by us earlier. The contention of the plaintiff is that the General Manager had refused to arbitrate and also to nominate any person to act as arbitrator. It has been further alleged by the plaintiff that the General Manager has disabled himself from acting as an arbitrator for the reason of bias and prejudice against the plaintiff. It has also been contended on behalf of the plaintiff that the General Manager had already made up his mind regarding the merits of the disputes that have arisen between the parties and had also expressed his opinion in those matters unequivocally. It is on account of such reasons that the plaintiff urged that reference could not be made to the General Manager of the defendant corporation, nor could the General Manager be relied upon for the purpose of nominating an appropriate person to act as arbitrator over the disputes between the parties. Before we examine the correctness of the facts alleged by the plaintiffs against the General Manager, we propose to answer the question of law mentioned above.

20. On behalf of the appellant, it has been urged that the plaintiff having entered into the agreement that disputes arising under the contract would be referred to the arbitration of the General Manager of the defendant, the plaintiff could not resile from that position, and consequently, the plaintiff was bound to accept the General Manager or his nominee as arbitrator to decide the disputes which have thus arisen under the contract. It was further urged that the Court cannot relieve the plaintiff of the consequence of that agreement, and could not refuse to make reference to the General Manager or to the nominee of the General Manager. It was also urged that it was not open to the plaintiff in proceedings under Section 20 to ask the Court to consider the allegations of bias, prejudice and neglect against the arbitrator appointed under the terms of the agreement itself. The learned counsel for the appellant sought to substantiate his contention by urging further that the Court seized of proceedings under Section 20 of the Act could not exercise powers provided for under Section 8 of the Act. It was also urged that the term in the agreement giving power to the General Manager to nominate an arbitrator could not be deemed to be an arbitration clause and that there was no reason why that specific contract between the parties should not be

enforced.

21. The learned counsel for the plaintiff has urged that the question raised by the plaintiff could very well be gone into in proceedings under Section 20, Clause (4) of the Act. Relying upon Clause (5) of Section 20, it has been contended that all the other provisions of the Act are applicable to a proceeding under Section 20, Clause (4) of the Act. The Court can exercise the powers provided for under Section 8 of the Act in a proceeding under Section 20, Clause (4) of the Act. It was also, urged that in view of the facts proved by the plaintiff, the plaintiff is entitled to be relieved of that part of agreement by which the parties had nominated the General Manager to act as an arbitrator or by which power had been given to the General Manager to nominate an arbitrator. It was also urged that on account of the above disqualification of the General Manager, it must be held that there ceased to be an agreement between the parties that the General Manager or his nominee would act as an arbitrator. It was also urged that the point of time at which there should be an agreement between the parties to be bound by the decision of a particular arbitrator is the one when reference of the disputes is to be made and not prior to it. On that date, plaintiff could not be deemed to be in agreement regarding reference being made to the General Manager or to his nominee for arbitration.

22. Reference was made to the Division Bench decision of this Court in the case of *Union of India v. Gorakh Mohan Das,* [3] In that case, Sri Gorakh Mohan Das filed an application under Section 8 of the Act and prayed that an arbitrator be appointed to hear and decide certain matters in dispute between the parties. That application of Sri Gorakh Mohan Das was opposed by the Union of India on a variety of grounds. It was pleaded that the application was not maintainable.

23. The learned Civil Judge who was seized of the matter found that a dispute had arisen between the parties which required reference to arbitration; that the notice requesting appointment of an arbitrator was legal and valid; and that the request of the respondent for the appointment of an arbitrator not having been attended to, the petitioner was entitled to apply for the appointment of an arbitrator. The learned Civil Judge allowed the application and appointed one Sri Sri Narain Singh Vakil as arbitrator to go into the disputes between the parties as disclosed in the application. He also gave some other directions for the guidance of the arbitrator. The Union of India being aggrieved by the order of the learned Civil Judge filed a petition in revision in this Court, which came for disposal before a Division Bench on account of the case

being referred to such Bench by a learned Single Judge of this Court. After quoting Sections 8 and 20 of the Act, the Court proceeded to point out that the province of the two provisions is quite distinct-one confers power upon the Court to appoint an arbitrator where the parties do not concur in the appointment of an arbitrator, the other entitled a party to apply for the filing of the arbitration agreement in Court and empowers the Court to make an order of reference to the arbitrator appointed by the parties and in the absence of such appointment to the arbitrator appointed by it. It was observed that the power of the Court to make reference to arbitration is contained in Section 20 and further that there was nothing in Section 8 from which such power could be spelled out. In the result, it was held that it was clear from the terms of the order, made by the learned Civil Judge that he did not merely appoint Sri Sri Narain Singh as arbitrator but also referred the disputes to him. This according to the view expressed by the Bench could not be done without there being an application under Section 20 of the Act, and to that extent, the order was held to be without jurisdiction.

24. Reference was then made to the case of *Union of India v. Gopal Dass and Co.* [4] which was decided by a learned Single Judge of this Court (and is reported in***).*** The arbitration clause in that case was to the effect that in the event of any question or dispute arising under or in connection with the contract it was to be referred to the arbitration of a sole arbitrator nominated by the General Manager of the North Eastern Railway and the decision of the arbitrator was to be final and binding on the parties. When certain disputes arose between the parties, Messrs Gopal Dass and Co. served notice upon the General Manager of the North Eastern Railway calling upon him to appoint or nominate the sole arbitrator within fifteen days and when the General Manager did not so appoint or nominate an arbitrator, the petitioner moved two applications under Section 8 (2) of the Arbitration Act for the appointment of a sole arbitrator. The learned Civil Judge allowed both the applications and appointed one Sri K. C. Srivastava as the sole arbitrator. During the pendency of the proceedings, the General Manager proceeded to appoint or nominate sole arbitrator. The question raised in that case was whether applications under Section 8, Clause (2) of the Act were maintainable. The observation made in that case was that there were three important ingredients in Clause (a) of sub-section (1) of Section 8 of the Act. The arbitration agreement must provide that the reference shall be to one or more arbitrators appointed by the consent of the parties; that after the differences had arisen, all the parties did not concur in the appointment or appointments; and that a written notice had been duly served calling upon the other party to concur in the appointment or

appointments or in supplying the vacancy. Where any one of those ingredients was not fulfilled, application under Section 8 (2) of the Act could not be said to be maintainable though it may be open to the aggrieved party to seek remedy in accordance with the provisions of the Act. The learned Single Judge then expressed doubt whether the person appointed or nominated by the General Manager as the sole arbitrator could in the eye of law be deemed to be an arbitrator appointed by the consent of the parties. In the view that the learned Single Judge took, he came to the conclusion that Section 8 of the Arbitration Act did not apply to a case where the General Manager had not appointed or nominated, or appoints or nominates at a later stage, the sole arbitrator, and the only remedy available to the aggrieved party is to move the Court under Section 20 of the Arbitration Act.
Reference was also made to the case of *Union of India v. M/s. Himco (India) P. Ltd.* [5] All that was laid down in that case is that the arbitration agreement in that case contained adequate and exhaustive machinery for appointment of arbitrators including provisional appointments in case the appointed arbitrator refused to Act. It was also observed that the fact that the appointed arbitrator had not yet signified his willingness to act as arbitrator did not debar the Court from making an order of reference of the dispute to him. In case, he subsequently refused to act as arbitrator the procedure laid down in the arbitration agreement would prevail and would be followed. The facts of that case were different and not in (pari) materia with the facts of the instant case.

25. On behalf of respondent reliance has been placed on various decisions of different Courts. One of the cases relied upon by the learned counsel for the respondent is the case of *Karam Chand v. M/s. Sant Ram Tara Chand,* [6] The facts of that case put briefly are these. Karam Chand and Diwan Chand mortgaged certain property in favour of M/s. Sant Ram Tara Chand respondent by a registered mortgage deed. Clause (14) of that deed provided that any dispute arising between the parties out of that transaction would be referred to the arbitration of Hari Kishan Dass, who was known to the parties. Dispute arose in respect of this transaction between the parties, whereupon the mortgagee filed an application under Section 20 of the Act and prayed that the arbitration agreement be filed in Court. That application was contested by the mortgagor principally on the ground that Hari Kishan Dass was one of the partners of the petitioner's firm, consequently, was not a fit person to act as an arbitrator. The trial Court framed an issue to the effect whether Sri Hari Kishan Dass was not a fit person to arbitrate between the parties. The learned Subordinate Judge in that case upheld that objection of the mortgagor but he ordered the filing of the arbitration agreement.

The mortgagor then filed an appeal against that order in the Punjab High Court. In support of that appeal, it was urged that after accepting the objection of the appellant, the only course open to the Court was to dismiss the application for filing the agreement, and that the Court did not have jurisdiction to allow the filing of the agreement in absence of the intention of the parties to refer the dispute to the arbitration of any other person. The main question, therefore, that arose in that case was whether the arbitration agreement had become inoperative on account of the incapacity of the above named arbitrator to act, or could the Court keep the agreement alive under the Act. It was observed that on failure of the parties to agree to the appointment of the arbitrator, the Court could appoint one, and that, therefore, the Court was competent to keep the agreement alive in spite of incapacity of the named arbitrator to act. This being so, it was further held that the Court did have jurisdiction to order the filing of the agreement in that case. Thereafter, the implications of sub-section (5) of Section 20 as well as Section 47 of the Act were considered and the Court came to the conclusion that the provisions of Section 8 of the Act were attracted in proceeding under Section 20 of the Act.

26. In the case of *Gannon Dunkerley and Co. v. Union Carbide (India) Ltd.,* [7] an application under Section 20 of the Act for an order that the arbitration agreement be filed in Court and reference be made, was filed. Dispute having arisen, the plaintiff wrote a letter purporting to refer the dispute stated in the said letter to the arbitration of the Chief Engineer, Central Public Works Department in terms of the arbitration proceedings. The Chief Engineer in reply protested that he never agreed either to arbitrate or to nominate an arbitrator and wondered how his name came to be incorporated in the agreement without his consent. After an examination of the scheme of the Indian Arbitration Act and after referring to the three classes of arbitration provided for by that Act, it was observed that in a reference whether made privately without the intervention of the court or under an order of the Court either under Section 20 or Section 23, proceedings must be conducted in the same manner, arbitrator may be appointed or removed on the same ground and an award filed, confirmed or set aside on the same ground and according to the same procedure. One of the contentions made in that case was that under the arbitration clause, the Executive Engineer, Central Public Works Department or his nominee alone could be appointed arbitrator and no other, that being the express agreement between the parties. It was then urged that the Executive Engineer having refused to act or to appoint an arbitrator, no arbitrator could be appointed and no order of reference could

be made in consequence. It was further urged that the parties had agreed upon an arbitrator i. e. the Chief Engineer, or his nominee and the Court, therefore, did not have power to appoint anybody else and for the same reason the Court was not empowered to make any order of reference as there was no arbitrator to whom the reference could be ordered. It was also urged that the parties could have filed an application under Section 8 of the Act, but if the parties chose to proceed under Chapter III and make an application under Section 20, reference could be made only to the arbitrator agreed to by the parties and only in those cases where the parties could not agree, the reference could be made to an arbitrator appointed by the Court. The Court was not empowered to appoint an arbitrator in case the parties had agreed to an arbitrator who was unwilling or unable to act. The further argument was that it was only after the order is made under Section 20 and not before that the other provisions of the Act in Chapter II in which Section 8 occurs became applicable to the arbitration proceedings with the intervention of the Court. In support of that argument, reliance was placed on the use of the words "thereafter" in subsection (5) of Section 20. In meeting that argument, the Court observed that on the language of Section 20 (4) it was open to contend that only when the parties could not agree upon an arbitrator that the Court is empowered to appoint arbitrator. In cases where the parties agreed to an arbitrator either at the time of the arbitration agreement or subsequently, the Court has not been empowered to appoint any arbitrator other than the arbitrator agreed to by the parties. In cases where the parties had not agreed to an arbitrator, the Court was expressly authorised to appoint one in order to make an effective reference. It was noticed that sub-clause (4) of Section 20 does not provide for the third class of cases where the parties agreed to an arbitrator but the arbitrator was unable or unwilling to act. That class of cases has been expressly provided for in Section 8 of the Act and if the parties choose to proceed under Chapter II and make an application under Section 8, the Court would have power to appoint one. The Court then proceeded to make the following observations: -

> "Under sub-clause (5) however provisions of Chapter II can be invoked to govern arbitration proceedings after the filing of the agreement under Section 20 of the Act. The provisions of Chapter II cannot be taken recourse to, till after the order is made under Section 20. The language of sub-section (5) indicates that it cannot be invoked before. The orders to be passed in an application under Section 20 are: (a) filing the agreement in Court and (b) order of reference to an arbitrator. If the word "thereafter" in sub-section (5) is construed to have

reference to the order of filing the agreement only and not to the order of reference as stated in the Punjab case noted before, then it can be said that in making the subsequent order of reference to an arbitrator, the provisions of Chapter II for filling up the vacancy as provided in Section 8 may be attracted. In my judgment, however, the order contemplated under Section 20 is not merely an order filing the agreement but a reference to an arbitrator as well. This order is one and the word "thereafter" in sub-section (5) of Section 20 refers not merely to an order of filing the agreement but an order of reference as well. Other provisions of the Act including the provisions of Section 8 are made applicable under sub-section (5) after an order is made not only of filing the agreement but also of making the reference. It is not, therefore, open to the Court to appoint an arbitrator in this application by attracting the provisions of Section 8 of the Act. It is to be noted that had the applicant proceeded under Chapter II and made an application under Section 8 for the appointment of an arbitrator, on the ground that the named arbitrator is unable or unwilling to act, this Court would have justification to make an effective reference by appointing an arbitrator in place of the arbitrator unable or unwilling to act. This he can do even now after the present application is dismissed on the acceptance of the construction of Section 20 (4) of the Act contended for by Mr. Niten De. This leads me to think that Section 20 (4) should be liberally interpreted as to cover all the three classes of cases indicated before and the Court is empowered to appoint an arbitrator in the cases where the agreed arbitrator is unwilling and/or unable to act. Mr. De's argument, as noted before is that the Court is empowered to appoint arbitrator in two cases (a) when the parties have agreed to an arbitrator, and (b) when the parties cannot agree and not in the third class of cases in which the arbitrator having been agreed to by the parties becomes unable or unwilling to act. This is the lacuna of the Act, according to the submission of Mr. Niren De. This lacuna, however, can be avoided if it is construed that the second class of cases contemplated by sub-section (4) not only includes cases where at no previous point of time the parties agreed to an arbitrator but also to cases where the parties having agreed to an arbitrator previously do not agree to a new appointment after the arbitrator previously agreed to is unable or unwilling to act .... If the clause "Where the parties cannot agree to an arbitrator" in Section 20 (4) is given a liberal interpretation it may very well include not only cases in which at no point of time parties agreed to an arbitrator but also cases where the parties are unable to

> agree to a new arbitrator after the arbitrator previously agreed to is found unable or unwilling to act. This inability to agree to a new arbitrator, in my judgment, has reference to the point of time when the application under Section 20 is made and no reference to the state of affairs previously. "

After making those observations, the Court ultimately came to the conclusion that cases where parties did not agree to an arbitrator at any point of time and cases where the parties agreed previously to an arbitrator but he proved unable or unwilling to act and the parties could not agree to a new arbitrator must be treated on the same footing under Section 20, Clause (4) of the Act.

27. The learned counsel for the respondent also relied on the case of *Uttar Pradesh Co-operative Federation Ltd. v. Sunder Brothers, Delhi,* [8] It is true that that case was one under Section 34 and not under Section 20 of the Act. One of the reasons accepted by the Supreme Court for refusing to stay the hearing of the suit under Section 34 of the Act was that under Rules 115 and 116 of the Co-operative Societies Rules, the reference of the dispute had to be made to the Registrar of the Co-operative Societies who could decide that dispute himself or refer the dispute to an arbitrator or to two joint arbitrators, appointed by him or to three arbitrators, of whom one shall be nominated by each of the parties to the dispute and the third by the Registrar who could also appoint one of the arbitrators to act as Chairman. In the case before the Supreme Court, it was alleged that the Registrar of the Cooperative Societies is ex-officio President of the Society and it was with his approval that the agreement in dispute was terminated. The Registrar was the Chief controlling and supervising officer of the Society under its bye-laws. Apprehension was, therefore, expressed by the respondent that the Registrar might not act fairly in the matter and therefore, it was improper that he should be an arbitrator in the dispute between the parties.

The Supreme Court held that the legal position was that an order of stay of suits under Section 34 of the Indian Arbitration Act could not be granted if it could be shown that there was good ground for apprehending that the arbitrator would not act fairly in the matter or that it was for some reason improper that he should arbitrate in the dispute between the parties. The Supreme Court further pointed out that it was the normal duty of the Court to hold the parties to the contract and to make them present their disputes to the forum of their choice but that an order to stay the legal proceedings in a Court of law could not be granted if it was shown that there was good ground for apprehending that the arbitrator would not act fairly in the matter or that it was for some reason improper that he should arbitrate in the dispute. Their Lordships also

made reference to the decision of the House of Lords in *Bristol Corporation v. John Aird and Co.,* [9] That case before the House of Lords was a proceeding under Section 4 of the English Arbitration Act which is similar to Section 34 of the Indian Arbitration Act. The House of Lords in that case held that the fact that the Engineer, without any fault of his own must necessarily be placed in the position of a Judge and a witness, is a sufficient reason why the matter should not be referred in accordance with the contract. Their Lordships of the Supreme Court then proceeded to quote a passage from the report of Lord Atkinson made in that case. We cannot do better than to quote that passage in this judgment also. It is as follows: -

> "Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the judge to decide upon matters upon which necessarily that arbitrator, has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those preformed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shown in fact that there is any reasonable prospect that he will be so biassed as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matter in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contrator has the right to appeal to a Court of law and they are entitled to say, in answer to an application to the Court to exercise the discretion which the 4th Section of the Arbitration Act vests in them. We are not satisfied that there is not some reason for not submitting these questions to the arbitrator. In the present case the question is, has that taken place?"

The Supreme Court then proceeded to observe that it was manifest that the strict principle of sanctity of contract is subject to the discretion of the Court under Section 34 of the Indian Arbitration Act, for there must be read in every such agreement an implied term or condition that it would be enforceable only if the Court, having due regard to the other surrounding circumstances, thinks fit in its discretion to enforce it. It was also observed that it was obvious that a party could be released from the bargain if he could show that the selected arbitrator was likely to show bias or by sufficient

reason to suspect that he would act unfairly or that he had been guilty of continued unreasonable conduct.

28. It is clear from the above decision of the Supreme Court that a party is entitled to be released from a bargain of this nature if he could show that the selected arbitrator was likely to show bias or by sufficient reason to suspect that he would act unfairly or that he had been guilty of continued unreasonable conduct. It is equally clear that the Supreme Court took the view that under such circumstances, a Court should refuse to stay the hearing of a proceeding before it in exercise of its discretion under Section 34 of the Act. The question that then arises is whether a party cannot be released of the bargain, in such circumstances, in a proceeding under Section 20 of the Act on the ground that the power under Section 20 is not a matter of discretion as it is under Section 34 of the Act. In our opinion, the answer to that question must be in the negative. After all, the question really is whether the term of the contract regarding the reference to a particular nominated arbitrator is one which should be specifically enforced under the circumstances of the case or not. It cannot be contended that relief of specific performance of contract is not a matter of discretion. There is no reason why the principle underlying Section 22 of the Specific Relief Act, be not pressed into service for doing justice in such a case. Section 22, Cl. II provides that where the performance of the contract would involve more hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff, the Court is not bound to grant the relief of specific performance merely because it is lawful to do so and the Court had the discretion to refuse to enforce that contract between the parties. If it is possible to avoid a contract on that basis in its entirety, it should be possible to avoid a part of contract also on the same basis provided that part is not inseparable from the other part. The plaintiff in this case is not trying to avoid the arbitration clause as a whole but is only trying to ensure that the arbitration should be fairly and justly done. We are, therefore, of the opinion that in case the plaintiff has succeeded in establishing reasonable apprehensions that the General Manager of the defendant corporation or his nominee may not act fairly and justly as arbitrator he was entitled to be released from the bargain even in the instant case.

29. It would amount to denial of natural justice if in a case of this nature, the party is forced to submit to the arbitration of a person who has not only gone biased and became prejudiced against that party, but who has also expressed his opinion on the

merits of the case against that party. In fact it may be a farce to allow the dispute to be decided by an arbitrator against whom such charges have been made and substantiated. We are, therefore, of the opinion that a Court cannot be said to act without jurisdiction under such circumstances in a case where charges of the nature enumerated above have been substantiated, in refusing to refer the dispute to the arbitration of the person named in the agreement itself. If the decision of the arbitrator even if has resulted in an award, can be avoided on the ground of misconduct of the arbitrator in relation to the proceedings as provided for under Section 14 of the Act, there is no reason why at the initial stage before reference is actually made, the question whether the proposed arbitrator has become prejudiced and biased and otherwise disqualified to act as such, should not be relevantly allowed to be raised.

30. It now remains to be considered whether on the facts of the present case, the contention of the plaintiff of unfair conduct of the General Manager or his nominee is reasonably well founded or not.

31. It may be reiterated that the contention of the plaintiff in this case is that Shri B. K. Khanna, the present General Manager of the defendant has been completely won over and influenced by the other side; that he has already formed his opinion on the dispute and differences which have arisen between the parties, on the basis of reports submited to him by Sri V. S. Pahwa, the Deputy Chief Engineer of the defendant. The Deputy Chief Engineer, Sri Pahwa was displeased with the plaintiff from the very beginning on account of his personal reasons and had been threatening the plaintiff with complete ruin, that Sri B. K. Khanna also threatened the plaintiff and took action against him finally leading up to the cancellation of the contract without notice and that Sri B. K. Khanna had also obtained legal opinion in the matter. Consequently, Sri B. K. Khanna had become biassed and that he attempted to prejudice the higher authorities against the plaintiff, It was on such grounds that the plaintiff expressed apprehension that an arbitration by Sri B. K. Khanna, the General Manager or by any person appointed by him would be highly inequitable and was bound to result into miscarriage of justice. The Court below in its order has observed that the only argument on behalf of the defendant on this part of the case, was, that the plaintiff was not entitled to agitate such question in proceedings under Section 20 of the Arbitration Act and that no arguments were addressed before the lower Court on the merits of the points which were raised on behalf of the plaintiff. According to the lower Court, all that was done on behalf of the defendant before that Court was to show that Sri B. K.

Khanna and Sri V. S. Pahwa had denied the allegations of the plaintiff in their statement.

32-42. The plaintiff examined Sri Gorakh Mohan Das (P. W. 1), who is one of the partners of the plaintiff firm.

(Their Lordships then considered the oral as well as the documentary evidence and proceeded as under):

43. The lower Court has also referred to certain documents exhibited in the case and after considering the same had arrived at the conclusion that Sri Pahwa the Deputy Chief Engineer of the defendant was not on good terms with the plaintiff and that he did not render cooperation to the plaintiff in the execution of the work and perhaps he was responsible for inadequate payment to the applicant. We have looked into those documents and have also considered the reasoning's advanced by the Court below on that point. Nothing has been pointed out to us to show that the view taken by the Court below regarding the attitude of Mr. Pahwa as against the plaintiff, is not correct.

44. For all the reasons given above, we have arrived at the conclusion that the Court below acted rightly in not making the reference of the disputes to the arbitration of Sri B. K. Khanna, the General Manager of the defendant or of his nominee under the circumstances of the case. We are further of the opinion that the Court acted well within its powers to ask the parties to give an agreed name to act as arbitrator and to whom the Court could refer the dispute.

45. In view of the part played by Shri B. K. Khanna in this matter, and in view of his performance in the witness box, we are definitely of the view that it is not desirable that the plaintiff be asked to submit to the arbitration of Shri B. K. Khanna or to submit to his judgment in the matter of choice of arbitrator. It would also not be decorous for Sri B. K. Khanna to act as arbitrator in this case or to have his nominee act as such.

46. Before parting with the case, we must observe that the Court below should not have expressed opinion on the merits of the various items of dispute raised by the plaintiff in these proceedings. That was essentially the job of the arbitrator to whom

the disputes are to be ultimately referred for decision. It is hoped that the arbitrator while deciding the dispute will not allow himself to be influenced by the expression of opinion by the Court below on the actual merits of the disputes between the parties.

47. For all the reasons, given by us, the appeal must be dismissed.

48. We, accordingly, dismiss the appeal with costs.

Appeal dismissed.

Cases Referred.

1. AIR 1955 SC 812
2. AIR 1963 SC 1685
3. AIR 1964 All 477
4. 1966 All LJ 518
5. AIR 1965 Cal 404
6. AIR 1958 Pun 418
7. AIR 1962 Cal 360
8. AIR 1967 SC 249
9. 1913 AC 241