

ALLAHABAD HIGH COURT

State

Vs.

Sardul Singh Kulwant Singh

F.A.F.O. Nos. 663, 600 and 601 of 1984

(O.P. Saxena and I.P. Singh, JJ.)

17.10.1984

JUDGEMENT

O.P. Saxena, J.

1. These are three connected appeals against order dated 7-5- 1984 passed by Civil Judge, Bijnor making a reference of the disputes to the arbitration of Sri R. N. Misra, Retired Chief Engineer, U.P. Jal Nigam, Lucknow.

2. The facts giving rise to those appeals are that respondent No. 1 submitted three separate tenders for three different works which were accepted by appellant No. 2 Superintending Engineer, Madhya Ganga Canal, Construction Circle I Meerut. The contractor completed the works. There was a dispute regarding the amount payable to the contractor under each contract. Clause 34 of the Agreement provided for the settlement of the disputes by Chief Engineer, Madhya Ganga Canal, Irrigation Department (respondent No. 2). On 4- 10-1983 the respondent No. 1 gave three notices to respondent No.2 under Section 8 of the Arbitration Act calling upon him to enter on a reference and adjudicate the disputes. The notices were delivered to respondent No. 2 on 7-10-1983. The respondent No. 2 did not enter on the reference.

3. On 14-11-1983 the respondent No. 1 gave three separate applications under Sections 8 and 20 of the Arbitration Act.

4. The applications were contested by the appellants and respondent No. 2 *inter alia* on the pleas that the respondent No. 1 did not prefer claims within 48 hours as required under clause 5.12 of the Agreement, that the claims are barred by time, that the claims are false and imaginary, that in fact there is no dispute

between the parties, that there is no question of the decision of the dispute by respondent No. 2, that clause 34 does not provide for arbitration and that the court has no jurisdiction.

5. The Civil Judge heard the parties and on 24-3-1984 allowed the applications. He called upon the parties to furnish the names of arbitrators so that the disputes could be referred to arbitrator for settlement. The appellants submitted to this order and did not file any appeal against the same.

6. Respondent No. 1 submitted the names of some retired Chief Engineers for being considered for arbitration.

7. The appellants did not submit any names for consideration. They filed an objection that the disputes could only be referred to the arbitration of respondent No. 2 and none else.

8. Respondent No. 1 objected to the reference of the disputes to respondent No. 2 on the ground that he is partisan and biased and as such disqualified to be an arbitrator.

9. On 7-5-84, the Civil Judge accepted the objection of respondent No. 1 and made the reference to Sri R. N. Misra, retired Chief Engineer, U.P. Jal Nigam, Lucknow from among the names suggested by respondent No. 1. He called upon respondent No. 1 to take necessary steps and file the consent of the arbitrator.

10. On 17-5-84, the Civil Judge accepted the consent filed by the arbitrator and directed that the arbitrator be informed. He also fixed Rs. 3000/- as remuneration of the arbitrator and directed that it would be taxed as costs of the proceedings in the decree.

11. On 22-5-84, after the steps were completed, the Civil Judge directed that the disputes be referred to the Arbitrator for awards by 1st August 1984.

12. On 30-5-1984, the learned Civil Judge accepted the request of the arbitrator and extended the time for filing awards up to 22nd September 1984.

13. Sri N. P. Misra, learned Chief Standing counsel referred to clause 34 of the Agreement which provides as below :

"All disputes in respect of the contract arising between contractor and the department will be put up to the Chief Engineer, Madhya Ganga, Irrigation Department, Lucknow and his decision shall be final and legally binding on both the parties."

There is no merit in the submission that the aforesaid clause is not an arbitration clause. The mere absence of the word 'arbitration' does not make any difference. The substance of the clause clearly is that all disputes between the contractor and the department will be referred to the arbitration of the Chief Engineer, Madhya Ganga Canal, Irrigation Department and his decision shall be final and legally binding on the parties. It is the substance and not the form of an arbitration clause which is material. We accept the contention of Sri Lalji Sinha, learned counsel for respondent No. 1 that clause 34 of the Agreement is an arbitration clause.

14. Sri N. P. Misra next submitted that the Civil Judge erred in holding that the respondent No. 2 is partisan and biased and is disqualified from being appointed arbitrator. He contended that the respondent No. 1 had impleaded respondent No. 2 also and as such the latter had no choice but to file an objection. The appellants and respondent No. 1 naturally filed a joint objection and the averments made therein should not be taken into account for inferring bias.

15. Sri Lalji Sinha submitted that respondent No. 1 impleaded respondent No. 2 as an arbitrator. He referred to the three applications given by respondent No. 1 in which the word 'Arbitrator' was put down in brackets after the name of respondent No. 2. In the circumstances, it was not necessary for respondent No. 2 to have joined the objection filed by the appellants. He could have avoided the charge of being partisan and biased. He has not joined the three appeals and has been impleaded as respondent No. 2. The appellants have also put the word 'Arbitrator' in brackets after the name of respondent No. 2. It was urged that there was no compulsion in law on respondent No. 2 to join the objection filed by

the appellants. He could have retained his independent character and could have kept away, but he did not do so.

16. In para 21 of the joint objection filed in the case giving rise to F.A.F.O. No. 663 of 1984 it was alleged :

"21. Para No. 21 is not admitted. The applicant is not entitled to get any amount over and above the agreed amount. The schedule of claims put up by the applicant is baseless and wrong. The applicant, if at all had any claim, although the same is emphatically denied, could have preferred the same within 48 hours of occurrence as required under clause 5-12 of Chapter V of the agreement. No claim was made under the aforesaid clause, because there was none to make. The alleged claims are time barred, contrary to and over and above the provisions of the contract. The applicants are estopped from making any claims which are only imaginary and false."

Para 22 was as below :

"22. Para No. 22 is not admitted. The work was completed in March 1983. The so called claims which are imaginary and baseless were referred for the first time in September 1983. This is clearly in violation of clause 5-12 (Chapter V of the agreement)."

Para 24 was as below :

"Para No. 24 is not admitted. There is, in fact, no dispute in respect of the contract, the question of deciding the same by the Chief Engineer does not arise. The provisions of Indian Arbitration Act 1940 are not applicable."

Para 29 was as below :

"Para 29 is not admitted. Since there is no dispute in respect of the contract, and clause 34 is not an arbitration agreement, hence the Hon'ble Court has no jurisdiction to hear the petition."

17. Similar pleas were taken in the other two cases also.

18. We have carefully considered the submissions made before us. As

respondent No. 2 had been impleaded as Arbitrator, there was no obligation on him to file any objection, much less join the objection filed by the appellants. If he could refrain from joining the appeals as an appellant, he could also stay away from the proceedings before the Civil Judge. He, however, did not retain his independent character and joined the objection filed by the appellants. Besides other pleas, he has assailed the claim of respondent No. 1 as imaginary and false. He also took the plea that in fact there is no dispute in respect of the contract and the question of the same being decided by arbitration does not arise. There could be no better case of an arbitrator having not only become partisan and biased but also having expressed opinion on the merits of the case against a party.

19. In *Uttar Pradesh Co-operative Federation Ltd. v. Sunder Brothers, Delhi*,¹ Rules 115 and 116 of the Co-operative Society Rules provided for a reference of the dispute to the Registrar of the Co-operative Societies. It was alleged that the Registrar Co-operative Societies is ex officio president of the Society and it was with his approval that the agreement in dispute was terminated. Apprehension was, therefore, expressed by the respondent that the Registrar might not act fairly in the matter and therefore it was not proper that he should be an arbitrator in the dispute between the parties. The Supreme Court held that an order of stay of suit under Section 34 of the 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.

20. In *Fertiliser Corporation of India v. M/s. Domestic Engineering Installation*,² it was held in para 29 on page 42 :

"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 become prejudiced against that party, but who had also expressed his opinion on the merits of the case against that party."

We are unable to accept the contention of Sri N. P. Misra and hold that respondent No. 2 is disqualified from being appointed Arbitrator.

21. Section 8 of the Arbitration Act contemplates three situations where the

court may appoint an arbitrator. Sub-clause (b) as amended by U.P. Civil Laws (Reforms and Amendment) Act, 1976, U.P. Act No. 57 of 1976 provides :

"(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and as the case may be, the parties of the arbitrators do not supply, or the person designated does not under sub-section (3) of section 4 supply the vacancy, or."

The explanation to Section 9 of the Arbitration Act as amended in U.P provides :-

"The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section."

21A. It is not disputed that respondent No. 1 sent 3 notices to respondent No. 2 on 4th October 1983 calling upon him to enter on and proceed with the reference within a month, that the notices were duly served on respondent No. 2 and that he did not enter on the reference. In view of the Explanation referred to above, this conduct of respondent No. 2 would amount to a neglect or refusal to act within the meaning of Section 8(b) of the Act. In view of this also, the Civil Judge was competent to appoint an arbitrator.

22. Sri N. P. Misra next submitted that as clause 34 referred to Chief Engineer, Madhya Ganga Canal, Irrigation Department, by designation, the intention was that the vacancy should not be filled up.

23. Sri Lalji Sinha submitted that no such inference can be drawn from such a provision.

24. In *P. G. Agencies v. Union of India*,³ the agreement provided for reference of disputes to Judicial Commissioner, Himachal Pradesh for arbitration. The Judicial Commissioner declined to act as an arbitrator. The court was moved for

appointment of some other arbitrator. The application was opposed on the ground that the arbitration clause did not provide for such an appointment. The objection was accepted and the application was dismissed.

25. In para 4 it was held :

"Section 20 is merely a machinery provision. The substantive rights of the parties are found in Section 8(1)(b). Before Section 8(1)(b) can come into operation it must be shown that (1) there is an agreement between the parties to refer the dispute to arbitration; (2) that they must have appointed an arbitrator or arbitrators or umpire to resolve their dispute; (3) anyone or more of those arbitrators or umpire must have neglected or refused to act or incapable of acting or had died; (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled and (5) the parties or the arbitrators as the case may be had not supplied the vacancy."

In para 5 it was held :-

"In the cases before us it is admitted that there is an agreement to refer the dispute to arbitration. It is also admitted that the parties had designated the Judicial Commissioner of Himachal Pradesh as the arbitrator for resolving any dispute that may arise between them in respect of the agreement. The Judicial Commissioner had refused to act as the arbitrator. The parties have not supplied that vacancy. Therefore the only question is whether the agreement read as a whole shows either explicitly or implicitly that the parties intended that the vacancy should not be supplied. It may be noted that the language of the provision is not 'that the parties intended to supply the vacancy' but on the other hand it is that 'the parties did not intend to supply the vacancy.' In other words if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of section 8(1)(b) what is required is not the intention of the parties to supply the vacancy. We have now to see whether the agreements before us indicate such an intention."

26. *Governor General-in Council v. Associated Live Stock Farm (India) Ltd.* ⁴ *Union of India v. Raj Narain Misra*⁵ and *Fertiliser Corporation of India Ltd. v. M/s. Domestic Engineering Installation*, ⁶ were approved. *Chief Engineer Buildings and Roads, Jaipur v. Harbans Singh*, ⁷ relied upon by Sri N.P. Misra was distinguished. It was held that the arbitration clause did not afford any indication that the parties to the agreement intended not to supply the vacancy. The appeals were allowed and the case was remitted to the court for appointment of an arbitrator.

27. In *Tata Iron and Steel Co. v. Rajrishi Mineral Industries*, ⁸ it was held at page 93 :-

"Thus, unless a negative intention is indicated, Section 8(1)(b) of the Act would be applicable and under the provisions of Section 20(4) of the Act, which confers power on the court to appoint arbitrator or umpire, jurisdiction would be vested in the court to make the appointment and thus fill up the vacancy."

28. In view of the legal position, we are unable to accept the contention of Sri N. P. Misra that the intention was that the vacancy should not be filled up. There being no such intention, the Civil Judge was competent to appoint another arbitrator whose impartiality and integrity was not assailed either before the Civil Judge or this Court.

29. Sri N. P. Misra lastly submitted that as the then Chief Engineer, Madhya Ganga Canal has been transferred and a new officer has taken over, the case may now be referred to the arbitration of the present Chief Engineer. Sri Lalji Sinha stated that the evidence of respondent No. 1 has been concluded before the arbitrator and the case is now fixed for the evidence of the appellants. Sri N. P. Misra did not dispute this. The order passed by the Civil Judge is highly just and proper. It does not suffer from any infirmity. It has also been acted upon. In the circumstances, the mere fact that a new Chief Engineer, Madhya Ganga Canal has taken over during the pendency of these appeals, is no good ground for allowing the appeals and setting aside the order passed by the Civil Judge.

30. There is no merit in the appeals and the same are dismissed with costs.

Appeals dismissed.

Cases Referred.

1. AIR 1967 SC 249
2. AIR 1970 All 31
3. AIR 1971 SC 2298
4. AIR 1948 Cal 230
5. ILR (1952) 1 Cal 324
6. AIR 1970 All 31
7. AIR 1955 Raj 30
8. AIR 1979 Ori 88