

# RAJASTHAN HIGH COURT

Chief Engineer, Buildings

Vs.

Harbans Singh

Civil Rev. Appln. No. 9 of 1952  
(Wanchoo, C.J. and Dave, J.)

15.07.1954

## JUDGMENT

### **Wanchoo, C.J.**

1. This is a revision by the Chief Engineer, Buildings and Roads, Jaipur, and another against the order of the District Judge of Ganganagar on an application made by Harbans Singh, opposite party, under Section 8, Arbitration Act.

2. The facts of the case may be briefly narrated. Some construction work was to be done in Ganganagar, and Harbans Singh, opposite party, was appointed contractor for that purpose. In November, 1947, he entered into an agreement with the Chief Engineer of the former State of Bikaner. That agreement lays down the terms on which Harbans Singh had accepted the contract and one of the terms (clause 15) was this:

"Chief Engineer shall be the sole arbitrator and judge in case of dispute between me and the Executive Engineer with reference to the quality or measurements of work executed or rate of progress or the construction and meaning of plans, working drawings sections and specifications and above conditions or any other thing connected with this contract, and his decision shall be conclusive and binding."

It is said that disputes arose about this work and were referred to the arbitration of the Chief Engineer, and that officer gave an award in October, 1949. That award is being contested in the courts and is a separate matter. Harbans Singh wrote a letter to the Chief Engineer on 17-6-1950, in which he said that there was a dispute between him

and the Executive Engineer, and referred that dispute to the arbitration of the Chief Engineer. He also made it clear in that letter that that dispute was besides the dispute which had been submitted to the Chief Engineer earlier, and on which the Chief Engineer had given his award in October, 1949. Later, Harbans Singh gave a notice, on 24-7-1950, to the Chief Engineer. In this he said that as the Chief Engineer had not entered upon arbitration within one month of 17-6-1950, he was giving fifteen days' notice to him as well as to the Executive Engineer to concur in the appointment of the new arbitrator. On 31-7-1950, the Chief Engineer sent a reply to the effect that the claims were still under examination, and that it would take time as the case was old and complicated and new officers were handling it. Thereafter, Harbans Singh applied, on 7-2-1951, under Section 8, Arbitration Act, to the court alleging that the arbitrator had neglected to work, and therefore a new arbitrator should be appointed in his place.

3. This application was opposed on various grounds before the trial court. We need not refer to those grounds for the point, which has been urged before us, was not taken in the trial court, and that point is that the arbitration agreement shows that it was not the intention that the vacancy should be supplied, and therefore no new arbitrator could be appointed in place of the Chief Engineer, and inasmuch as the lower court removed the sole arbitrator, namely the Chief Engineer, and directed the parties to submit the name of another arbitrator within a month, the order was without jurisdiction.

4. We have heard learned counsel at length on this point. The relevant portion of Section 3, Arbitration Act is as follows:

"(1) In any of the following cases:

(a) .....

(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 the parties or the arbitrators, as the case may be, do not supply the vacancy;

(c) .....

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or arbitrators or umpire, as the case may cancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint

an arbitrator or arbitrators or umpire, as the case may be ....."

5. In the first place, it is urged on behalf of the opposite party that that part of clause (b), which contemplates that the vacancy would not be supplied, applies only under two conditions, namely where the arbitrator is incapable of acting or dies, and does not apply to the case where the arbitrator neglects or refuses to act. The argument is that in case of neglect or refusal to act, it cannot be said that there is any vacancy as the arbitrator is alive and well and can perform his function. We are, however, of opinion that, on a fair construction, the provision as to the intention not to supply the vacancy applies to all the four conditions mentioned in clause (h) of the section. After all, if the arbitrator refuses to act, one can say that there is a vacancy without any violence to the language.

The difference between a refusal to act and incapability of acting is, to our mind, very little. In the latter case, the arbitrator is physically incapable of acting, while in the former case, though he may be physically capable of acting, he directly intimates to the parties that he is not prepared to act. In either case, there is clearly a vacancy in the post of the arbitrator. Further, the case of neglect to act is not very different from the case of a refusal to act. In the case of refusal, the arbitrator directly communicates to the parties that he is not prepared to act, and thus a vacancy arises. In the case of neglect, the arbitrator does not make any such direct communication; but his whole conduct shows indirectly to the parties that he is not prepared to act. In both the cases, the vacancy arises because the arbitrator is not prepared to act, and we, therefore, see no reason why it cannot be said that a vacancy arises when an arbitrator neglects or refuses to act. Therefore, whether it is the case of the death of the arbitrator or of his incapacity or refusal or neglect, the question that has to be examined is whether the arbitration agreement shows that the intention was that the vacancy should not be supplied.

6. We now turn to the question whether clause 15 of the agreement in this case, which we have already set out, shows that the intention was that the vacancy should not be supplied. This naturally depends upon the terms of the agreement and the surrounding circumstances which have to be seen in each case. The circumstances in this case are that the agreement was being entered into by the Chief Engineer on behalf of the State and the contractor. The agreement provides the terms upon which the contractor worked, and the last clause provides for the arbitration of the Chief Engineer who was himself one of the parties to the agreement. Thus he accepted the tender of Harbans Singh on those terms. The fact, therefore, that one of the parties to the agreement is

constituted an arbitrator has significance where the question arises whether it was intended to replace that party by another person. Then we find that the arbitrator is not mentioned by name in the relevant clause. Instead of that the arbitrator is mentioned by his office, namely that of the Chief Engineer. This fact also supports the contention on behalf of the State that it was not intended that the Chief Engineer should be replaced by some other person as an arbitrator. It may be mentioned that two of the conditions mentioned in clause (b) of Section 8(1) would never arise in the case of an arbitrator who is appointed by office, that is the Chief Engineer would neither die, nor would be incapable of acting. It was urged that he may neglect or refuse to act. That is not impossible; but, at the same time, we cannot overlook that a public servant would generally be expected to carry on the duties which he imposes upon himself and would not neglect or refuse to do so. The fact, therefore, that the arbitrator is mentioned by office also points to an intention not to replace him by some other person.

7. Lastly the actual words in the arbitration clause are these:

"Chief Engineer shall be the sole arbitrator and judge in case of dispute, .....  
etc. etc."

These words are different from the usual words of an arbitration agreement. Usually, the words used are to the effect that the parties will refer the dispute to arbitration, and thereafter, if somebody is to be appointed arbitrator, he is named. Further we find that the Chief Engineer is not only to be the sole arbitrator, but also the sole judge. The use of the word 'judge', to our mind, must carry some significance, and we cannot agree with learned counsel for the opposite party that the word 'judge' is a mere surplusage. It seems to us that the intention was not only that the Chief Engineer should be the only arbitrator but also the only judge of the dispute between the Executive Engineer and the contractor. If he was to be the only judge, the intention must be that no other person must judge between the contractor and the Executive Engineer on the points of dispute.

8. Taking these three circumstances into account it seems to us that the intention behind this term of the agreement was that the dispute would only be referred to the arbitration of the Chief Engineer, and that no one else would replace the Chief Engineer in case of a vacancy. In these circumstances, the terms of Section 8, which entitle the court to appoint another arbitrator in place of the appointed arbitrator, have

not been fulfilled in this case, and the lower court had no jurisdiction to call upon the parties to nominate another person as an arbitrator.

9. We, therefore, allow the revision, set aside the order of the court below, and dismiss the application of Harbans Singh. In view, however, of the fact that this point was not raised in the court below, we order parties to bear their own costs.

Revision allowed.