

(1966) 11 MP CK 0010

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No"s. 17, 18 and 19 of 1965

Ardeshar Sorabji and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 10-11-1966

Acts Referred:

Arbitration Act, 1940 — Section 34

Citation : AIR 1968 MP 13 : (1967) JLJ 267

Hon'ble Judges : M.A. Razzaque, J;H.R. Krishnan, J

Bench : Division Bench

Advocate : U.N. Bachawat, for the Appellant; Balwantsingh, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Krishnan, J.—The appellants in all these three appeals are contractors who had done work in the Madhya Pradesh side of what is popularly known as the "Gandhi Sagar Scheme". They had in course of their contract been given part payments on assessment of work done, but when the final settlement was to be made on different dates in each of the contracts there cropped up certain differences as to the sums ultimately payable. The work by its very nature is slow and there being always some scope for difference of opinion such differences are by no means unusual and have been provided for in all these written agreements by an arbitration clause which is a standard one, and in this case follows the wording in vogue in the Central P. W. D. and numbered Clause 25 in the written Instruments. The essence of it is that all such disputes are to be referred to the arbitration of the Superintending Engineer in charge of the scheme for the time being. This officer would be in any case a servant of the Government, that is one of the parties and might quite conceivably be the very one closely associated with the work out of which the disputes arise.

All the same, these contracts include this condition presumably on the theory that a public servant of that standing is assumed not to be so over-zealous in the

Interests of Government as to take sides or assume a partisan attitude. Anyway, this clause having been held to be good by the Courts it was expected that the claimants would first move for a reference to the arbitration before going to the Courts. Actually, however, in circumstances to be set out presently they filed suits each for his claim alleging inter alia that the other side, that is, defendant Government had been unwilling to join in the reference to arbitration.

The latter, however, on receipt of summons entered appearance and before taking any other step of the proceedings, asked for stay u/s 34, Arbitration Act till the reference could be made and the arbitrator enabled to decide. This being accepted by the lower Court the plaintiffs have come up in appeal. The only question that has to be considered at this stage is whether immediately before the filing of the suits and after it the defendant had been unwilling to join in the reference. If so, the stay would be improper: but in case the defendant had been and was still willing to go before the arbitrator the stay was proper and need not be interfered with.

2. Though this is the only question that can be properly examined at this stage the plaintiff-appellants had both in the lower Court and somewhat summarily in this Court, gone into the fitness of the Superintending Engineer for the time-being who was one Ranganna in two of the three suits to discharge the functions of arbitrator. We are really not concerned with that at this stage. Even in the event of the arbitration being compulsory, it would be open to either party to move the court under the Arbitration Act that the particular arbitrator nominated in the agreement cannot function. and a variation in the personnel was called for for reasons to be given. That court will be competent to consider them and decide whether any change would be called for.

3. Each of the three plaintiffs has asserted that before filing his plaint he tried to find if the defendant was willing to join the reference and found that he was not. The defendant, on the contrary, has urged in all the three cases that he was and is always willing to take the matter before the arbitrator. We shall fully examine these allegations and counter allegations. However the manner and the wording of the plaintiffs requests, showed that they were suggesting a new arbitration clause in variation of the old one, or asking for arbitration by somebody other than "the superintending engineer for the time-being" all this with the sole purpose of creating confusion and thereby seeking justification for avoiding the arbitration, or at any rate of delaying the matter so long as the superintending engineer whom they did not want might be transferred or retired.

Accordingly we have to see whether there was at any time either a straightforward request for arbitration in terms of the agreement by each of the plaintiffs, and on the other, an express or implied but definite indication of unwillingness on the part of the defendant.

4. In the case of Ardeshar Irani the position is as follows: The dispute having arisen sometime in 1960 the plaintiff-contractor wrote at length on 30-11-1960

(page 42 of the paperbook). He sets out the history of the contract and the particulars of the disputed items with all of which we are not directly concerned at this stage. Then he speaks of the arbitration and asserts that he is ready and willing to go to arbitration in respect of the aforesaid claim. This "readiness" is immediately qualified by the condition that it should not go to the superintending engineer for the time being, because he had as executive engineer in the same division had some administrative connection with the work concerned. In effect it was a statement expressing no readiness to accept the arbitration of the person mentioned in Clause 25 of the agreement, but asking for a variation as a condition precedent to the implementation of the arbitration agreement.

Government did not reply to it and accordingly the plaintiff sent a notice on 5-5-1961 in which he repeated this "readiness" to go to arbitration on condition that the arbitrator would be somebody other than the one mentioned in the agreement. Government being silent even on this he filed the suit on 31-7-1961 and there also he entered into a lengthy averment that though the arbitration agreement was that the arbitrator should be the superintending engineer for the time being in the particular case the superintending engineer concerned was in the view of the plaintiff unacceptable as arbitrator. The defendant having insisted upon arbitration and having asked for stay u/s 34 of the Arbitration Act the Court had to make the order now assailed.

5. In Krishnamurthy's case (Appeal No. 18) the position was as follows: Differences having arisen sometime in 1960 and after some informal correspondence the plaintiff issued notice u/s 80 C. P. C. on 8-6-1960. There is no direct readiness to make a reference to the arbitrator, but in the conclusion of the notice the plaintiff writes:

"My client is prepared if you so desire to have the matter referred to the arbitration as provided for by Clause 25 of the contract. In the absence of signifying your intention to have the matter referred to arbitration within the statutory period of two months my client will be put to the necessity of reporting to a Court of law seeking redress."

It would appear unusual why the plaintiff instead of straightway calling upon the defendant to join in the arbitration wanted the latter to take the first move. But it is explained by the plaintiff's subsequent letter dated 5-11-1960. Now he says:

"At the outset the agreement entered into between us is defective in this respect Clause 25 mentions arbitration to the superintending engineer of the circle for the time being The work is under the supervision of the same superintending engineer and hence any reference to arbitration should be to an outside authority and not the same authority Hence please reconsider the clause and if the clause could not be revised I will be forced to seek justice only through legal authorities."

While Irani would consent to arbitration only if an arbitrator other than the one mentioned in the agreement would be chosen, Krishnamurthy wants the

arbitration clause itself to be rejected and a fresh clause to be substituted; otherwise he would not accept arbitration.

6. The third case (Appeal No. 19) is of Mani who is a brother of Krishnamurthy but whose contract was separate and self-contained. In his case the differences developed in 1961. On the 10th August 1961 he wrote to the Chief Engineer Chambal Hydel and Irrigation Project categorically stating, without any particulars that there were disputes regarding Rs 9501 and Rs. 5000 and stating that he was in compliance with Clause 25 of the agreement ready to make a reference to the "superintending engineer referred to in the said clause". He also called upon the Chief Engineer to join in the submission of the reference to the appointed arbitrator. On receipt the Chief Engineer telegraphed to the lawyer that he was giving his consent to refer the dispute for arbitration by the superintending engineer.

On further examination, however, the Chief Engineer found that the subject matter sought to be referred was not particularised. Accordingly, he sent, two separate telegrams but on the same date to the lawyer, first, that he should send the particulars of the amounts of Rs. 5000 & Rs. 9501 mentioned in the letter of the 10th August; simultaneously he cancelled the telegram of the 21st presumably, the one in which he had given his consent to refer the dispute to arbitration. The plaintiff wants to read this as the defendant's unwillingness to accept arbitration at this stage. On the other hand, what follows shows only that this cancellation was part of the same request as had been conveyed in the companion telegram for particulars of the amounts of Rs. 5000 and Rs. 9501. Till he got these particulars the Chief Engineer was suspending his consent for arbitration.

Soon enough the particulars were given and along with the particulars there was a statement of what this contractor meant by "arbitration under Clause 25." Both are contained in the contractor's letter dated 19-10-1961 and printed in the paperbook at pages 78 to 82. Here the contractor sets out the particulars of the dispute in some detail obviously in reply to the communications of the 22nd September, presumably the Chief Engineer's telegrams, and sets out what he really meant by going to arbitration (vide paragraph 2 on page 79 of the paperbook) :

"It appears that at your end Government is not ready and willing to join in the reference to the arbitrator, my clients have therefore prepared a reference to be submitted to the arbitration. On a plain reading of Clause 25 of the printed conditions the disputes have to be referred to the superintending engineer of the circle for the time being who in the present case was no other than Shri Ranganna at present Superintending Engineer, Irrigation, Tawa Project. So the reference will be submitted to him."

Admittedly, even according to this letter, and according to the submissions of the appellant himself in this Court, Shri Ranganna was not the "superintending

engineer for the time being", and in fact had been transferred in July before it to another project named Tawa in the same State. In other words, what this contractor meant by arbitration was again not what was mentioned in Clause 25 but something substantially different. The peculiarity is that while 3.1 the time relevant in Irani's suit Ranganna was the superintending engineer for the time being and Irani wanted somebody else, the present contractor (Man!) for whose time Ran-ganna was not the superintending engineer wanted him. But both of them are in a similar position, namely, that they were prepared to go to arbitration only on conditions materially different from what are in the contract. Krishnamurthy as already mentioned, did not want Clause 25 at all but invited the Government to enter into another agreement regarding arbitration

7. In none of the three suits did Government give any reply either accepting the modifications suggested by the contractors, or pointing out that it was not consistent with the agreement and expressly agreeing to go to arbitration in the manner mentioned in Clause 25. In one of the cases (Mani's case) they wrote a letter asking the Contractor to wait as his suggestions were being examined But there also nothing more happened.

8. The contention of all the three contractors is that this silence should be read as unwillingness to accept arbitration. On the other hand, the Government Advocate's position is that Government was not expected to reply to every suggestion and as long as the suggestions were expressly in variation of the arbitration agreement, it was the contractors that were unwilling for arbitration and not the Government. Of course, as soon as the suits are filed Government drew attention to the arbitration agreement and wanted stay.

9. Section 34 is clear enough and we are immediately concerned only with that part of it which applies to the consent of the party that wants the stay:

"If satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was at the time when the proceedings commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration such authority may make an order staying the proceedings."

The "willingness and readiness" are with reference to two points of time which may be separate at least by a few months. The first point is the commencement of the legal proceedings, which is properly speaking the filing of the suit, but which can in a broad sense be stretched backwards to the time by which the notice u/s 80, C. P. C. is served. The second point of course is the date on which the application is made for stay u/s 34 of the Arbitration Act in view of the agreement in force. About the readiness at the second point of time there can usually be very little dispute and at all events there is none whatsoever in this case.

The other requirements for such an application are also fulfilled. There has been no delay and the defendant as the first and the foremost thing made this

application. About the earlier stage there was a difference of opinion between the parties, the plaintiffs in all the cases asserting that the defendant was really unwilling to go to arbitration, and having forced the plaintiffs to spend their money in bringing the suit, wants now to go back and ask for arbitration. The defendant naturally denies it

10. The first point to remember is that mere failure to reply to a notice or disinclination to enter into unnecessary argument with the noticer is not an indication of un-willingness. This is generally so and in the case of Government it is the practice--and one should say a commendable practice--for the law officers to advise departments not to pick up avoidable arguments with private parties. The reason is obvious. While private litigants can at least act with one mind and with unanimity. Government departments by their very nature have a varying personnel and any inadvertent statement or equivocal language may be understood in different senses by different officers and give rise to complications. Therefore excepting in cases where things are quite straightforward or where Government is willing to make concessions and compromise departments do not send out argumentative replies

In the instant case, for example, had there been a straightforward request for arbitration in terms of the agreement the departments could have straightway consented. In fact at the first instance in one case (Appeal No 19) this was what had happened. But it was soon found the claim itself was not particularised, and accordingly the Chief Engineer suspended his consent for the elucidation of particulars, and at the very moment of giving them the plaintiff put in a new condition altogether inconsistent with the agreement.

11. What has been said above is a matter of commonsense; we are interested to find that in the Punjab ruling reported in *Daulat Ram v. State of Punjab*, AIR 1958 Punj 19 it was observed.

"Silence of a party before the proceedings are started is not of any serious consequence The choice whether the party would like the matter to be referred or determined by the Court is to be made after the proceedings are instituted and not when the same are contemplated or threatened."

We certainly see that in some cases there may be circumstances in which the conduct of a party immediately before the filing of the suit clearly indicates bad faith and the prayer for stay is made with an ulterior purpose, the applicant having at earlier stages shown definite and unmistakable unwillingness.

In this case there has been no unwillingness whatsoever and the silence was only a measure of caution not to get into arguments with the plaintiffs who were exactly fishing for such complications by putting out suggestions patently incompatible with the arbitration agreement.

12. The problem is by no means difficult or complicated; but as the Supreme Court has pointed out in *The Printers (Mysore) Private Ltd. Vs. Pothan*

Joseph, , no Inflexible rule can be laid down. In the same judgment they have indicated the general lines along which applications for stay u/s 34 of the Arbitration Act should be dealt with; we find nothing in the Court's orders in these three suits which goes against these guiding principles,

12A. In the Bombay case reported in *Middle East Trading Co., Bombay v. New National Mills Ltd.*, Ahmedabad AIR 1960 Born 292 it was pointed out that the defendant should satisfy the Court that he was willing to do everything for the proper conduct of the arbitration not only at the time of the application but also at the time of the commencement of the proceeding. Even stretching the work "commencement" to the point where the plaintiffs put out his suggestions, still the silence at the stage on the part of Government does not at all suggest any unwillingness. The willingness at the time of the application is of course patent. In the comparatively recent ruling of this High Court reported in *Sansarchand Deshraj Vs. State of M.P. and Others*, it was pointed out that the defendant's own move u/s 34 may itself be evidence of willingness.

12-B. Concerning the readiness to go to arbitration at the commencement of the proceedings certain situations are conceivable where a party has been acting in bad faith and by that very reason disentitling itself from the discretionary assistance u/s 34. For this the plaintiff will have to show that having sounded the defendant in a clear and straightforward manner he received the impression like any reasonable man that the defendant was unwilling and accordingly put himself to the trouble and expense of bringing the suit.

In all these three cases the situation is quite the opposite. Here it is not the defendant that is acting in bad faith or with an ulterior purpose, but it is the plaintiff in each of the suits who just tries to fish for some equivocal statement by the defendant or start some controversy on the basis of which he could evade the arbitration clause. In two of these suits (Irani's and Mani's) something like an offer to go to arbitration was made; but it was made with a condition that made nonsense of the original agreement. In the third suit, the plaintiff was rejecting the original agreement and was asking for a new one. Thus in none of these cases was there any good faith in the plaintiff's pretence to be willing to go to arbitration.

13. Yet another point of bad faith on the part of the plaintiffs is that all the three invited the defendant to join in the reference and falling it had expressed the intention of seeking unilateral arbitration which is of course a possibility provided the arbitration sought is in accordance with the agreement in force. Significantly enough, none of the three went with a prayer to the arbitrator-designate seeking unilaterally a reference of the dispute. In face of this all that the defendant had done was to refuse to be drawn into any argument. Whether or not this attitude of quiescence is wise it is in general accord with the policy of government departments. But that is not the real point. There was nothing ulterior in Government's failure to give any categorical reply to the equivocal suggestion made by these plaintiffs

14. It is urged before us that Section 34 being after all discretionary there may be circumstances in which the agreement notwithstanding the Court can refuse to stay. Certainly, in principle discretion can be exercised in appropriate circumstances to refuse the prayer for stay even in face of the arbitration agreement. A typical case was one reported in Michael Golodetz and Others Vs. Serajuddin and Company, There may be other cases also; but in no event should the discretion be exercised so as to enable a party having got some advantage under the agreement of arbitration to wriggle out and have things in his own way.

All these contracts were given on the express condition contained in Clause 25. Certainly, the superintending engineer whether or not associated with the work concerned would be a servant of Government against whom the claim is made; still he was made arbitrator and the contractors had accepted it. This being the policy and the express assent of the contractors themselves it does not lie on them now to say that the superintending engineer might have been associated with the work and might, therefore, be in the opinion of the claimant not an impartial arbitrator. Impartiality is desirable but connection does not necessarily make the arbitrator partial. Where the relationship between the arbitrator and one of the parties is known to the other from the very beginning, and there is no secrecy about it, and there has been no development after the agreement, we cannot ignore or modify it on that ground.

14A. Other points are also suggested, for example, Irani, who did not want Ranganna to arbitrate, pointed out that he had some difficulty in hearing. On the other hand, Mani, who wanted Ranganna though he was not the superintending engineer for the time being, seemed to suggest his special qualifications in this regard; while Kri-shnamurthy, as already noted, having got the contract with Clause 25 now began to urge that it was unreasonable and should be modified. At this rate it would be open to any party to get out of a definite agreement under which he has already got some advantage.

15. Yet another point suggested was that these disputes involve points of law and as such a superintending engineer -- whoever it be -- may not be capable of understanding and solving the problems that might arise. We do not at all agree. Arbitration is introduced almost with the sole purposes of avoiding the technicalities and the hair-splitting which always go with what is supposed to be "legal" procedure. Again, in all such contracts, the controversial question is always whether or not a certain quantity of work had been done, how it should be paid for, and whether it had not already been paid for under some other head; that way also there is not equitable ground why the stay u/s 34 should have been refused.

16. All things considered, therefore, the orders of stay u/s 34 in these suits were proper and does not call for modification. The appeals are dismissed and the appellants are ordered to pay costs to the respondent and a fixed pleader's fee at Rs 50 (fifty) in each of these cases. The parties should go before the arbitrators in accordance with the agreement without any avoidable delay.