

(1997) 02 PAT CK 0031

In the Patna High Court

Case No : Appeal From Original Order No. 239 of 1989

Bharat Refractories Ltd. and Another

APPELLANT

Vs

R.K. Das, Proprietor, N. Das and Sons and Others

RESPONDENT

Date of Decision : 17-02-1997

Acts Referred:

Arbitration Act, 1940 — Section 34, 5

Citation : (1997) 2 BLJR 1207 : (1997) 1 PLJR 737

Hon'ble Judges : B.P. Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.P. Sharma, J.—This appeal is directed against the order dated 10-7-1989, passed by the learned Subordinate Judge I, Monghyr, in Money Suit No. 53 of 1987, by which he has rejected the petition filed on behalf of the appellants for stay of the suit u/s 34 of the Arbitration Act.

2. The brief facts of the case are that the plaintiff-respondent had entered into an agreement with the appellants for supply of some materials. Subsequently, because of delay in payment of the price of the materials plaintiff-respondent No. I filed Money Suit No. 53 of 1987 in the court of learned Subordinate Judge, Monghyr, praying for a decree of Rs. 76,666/- with interest thereon. The suit was filed on 2-9-1987 and after the notices were issued, the defendants (present appellants) appeared and filed a petition on 17-11-1987, purported to be a petition u/s 34 of the Arbitration Act, for staying of the suit. It was contended on behalf of the defendants-appellants that in view of the terms of clause 18 of the General Conditions of Contract containing arbitration clause and in view of the fact that the defendants-appellants were willing to refer the matter to the Arbitrator, the said suit could not proceed. The plaintiff-respondent No. I also filed a rejoinder to the petition stating that the petition was not maintainable as the defendants-appellants while inviting tender for supply of Quartzite did not enclose any copy of the General Conditions of Contract in their letter dated

15-6-1985 and it was nowhere stated that the general conditions of contract was condition precedent of the acceptance of the tender. It was also further stated that even after the purchase orders were given to the plaintiff-respondent No. 1, the general terms and conditions of the Company was never supplied to the plaintiff and since the general conditions of contract were model terms subject to modification or variation with the consent of the parties it was not binding upon the plaintiff-respondent. The learned lower court after considering the facts stated in the petition and in the rejoinder and after hearing both the parties came to his conclusion that the conditions of clause 18 of the General Conditions of Contract were not binding against the plaintiff and therefore, the petition of the appellants was dismissed. Against this order the present appeal has been filed.

3. It has been contended on behalf of the appellants that the appellants had invited sealed quotation for supply of 1200 metric tonnes of quartzite required for the appellant's factory by a notice issued on 15-6-1985. It was also stated in the notice that the terms and conditions under which the appellants were ready to enter into contract were mentioned in the general conditions to be supplied by the office on demand. It is also further stated that Clause 11 of the tender notice specified that the supplier will be deemed to have read, understood and accepted the General Conditions prescribed by the purchasers- appellants, which could be seen at the office of the General Manager (Commercial) on any working day. Thereafter, on 28-6-1985 the plaintiff- respondent submitted their quotation in pursuance to tender notice dated 15-6- 1985. Then some negotiations took place and on 18-9-1985 the plaintiff submitted a fresh quotation incorporating several terms, including an arbitration clause as Clause 13. This clause says that no terms, which is not specifically agreed to, shall be binding on the parties. However, the negotiation between the parties continued and the deal was finalised between the parties after discussion held on 5-12-1985 and by a letter of that date the plaintiff confirmed the terms. Thereafter, the appellant issued a purchase order for 250 M.T. of quartzite. However, the said purchase order was subject to the terms and conditions printed overleaf. The first condition of the purchase order was as follows:

This order will be governed by our terms and conditions of contract which can be had from our office.

It is further stated that the appellant is a Government of India Enterprise and the contracts made by it are on standardised form containing general conditions of contract. So an offer made by the appellant has to be governed by the general conditions of contract in the standard form. It is further stated that in pursuance to the purchase order the plaintiff-respondent started supplying the material and thus the contract was concluded. However, when the supplies commenced it was detected that instated of 250 M.T., the contractor had supplied only 176.26 M.T. of material and shortfall in supply gave rise to the dispute between the parties regarding payment, and, accordingly, the suit was filed.

4. It appears that the learned lower court has refused to allow the petition filed on behalf of the appellants on two main grounds, first being that there is no material to show that Clause 18 of the General Conditions of Contract was binding on the plaintiff-respondent and also that because an authority of the Company was supposed to be the sole arbitrator, it was against the principle that a party cannot be a Judge itself.

5. So far as the first point is concerned, it has been contended by the learned Counsel for the appellants that the papers in this connection are sufficient to make this point clear. Annexure-1 enclosed to the affidavit filed on behalf the appellant is the notice of tender dated 15-6-1985. In this notice Clause 11 says as follows:

It sending your quotation you will be deemed to have read, understood and accepted the General Conditions/Special Conditions of the Contract prescribed by the purchaser which can be seen in the office of the Manager (Com.) on any working day.

It is further pointed out that so far as Annexure-2 to the affidavit filed on behalf of the appellant is concerned, it is the tender filed on behalf of the plaintiff-respondent. It was pointed out by the learned Counsel for the appellants that in this tender it was nowhere stated that the arbitration clause was not acceptable to the plaintiff-respondent (the supplier). However, there was negotiation between the parties and then a further tender was supplied by the plaintiff-respondent. It is Annexure-3 to the affidavit on oath filed on behalf of the appellant. It is dated 18-9-1985. It was pointed out that according to Clause 13 of this revised tender it is clear that in case of any dispute or difference between the parties, none of the parties shall seek relief in Civil Court unless they have gone through arbitration. Each party shall nominate one arbitrator each by giving at least 30 (thirty) days' notice by registered post acknowledgment due to other party. In case the other party does not nominate an arbitrator within 30 (thirty) days, then the arbitrator appointed by the party giving notice within time shall be the sole arbitrator. The decision of the arbitrator or the sole arbitrator as the case may be, then there shall be a final and binding on the parties. So it has been contended that in view of this clause it becomes clear that the plaintiff-respondent had also agreed to the reference of the dispute to arbitration and it is obvious that without taking recourse to this clause regarding arbitration the plaintiff-respondent filed the suit, and therefore, the petition for stay was genuine and it would have been just and proper for the learned Trial Court to have allowed this prayer. It was also further pointed out that it is not the case that the defendants-appellants sat idle after receiving the notice of the plaintiff-respondent, rather a reply was sent by letter dated 28-10-1986 and it was stated in the letter that the matter is under scrutiny and examination by their Legal Department and a detailed reply would be sent shortly. In this view of the matter, the plaintiff-respondent was requested to wait, but the plaintiff respondent had no patience to wait and see what the other side intended to do

and filed the suit in question hurriedly.

6. learned Counsel for the appellant has also pointed out that in a revised tender dated 5-12-1985, which is enclosed as Annexure-4 to the affidavit of the appellant, it has been mentioned in Clause-5, "All other terms and conditions mentioned in our tender submitted earlier in response to your above enquiry shall hold good in so far as they have not been altered or modified by this letter." It is, therefore, submitted on behalf of the appellants that in view of this specific mention in the revised tender, it becomes clear that the arbitration clause was left intact and it was not altered or deleted. learned Counsel for the appellant further submitted that finally after all the negotiations were complete and tender of the plaintiff-respondent was accepted by the appellants the order was given to the plaintiff-respondent. A copy of the order has been enclosed as Annexure-5 to the affidavit. It is dated 19/21-12-1985. It was pointed out by the learned Counsel for the appellants that in this order (Annexure-5) it is specifically mentioned that other terms and conditions shall be as per their P.O. No. 389, dated 29-6-1984. It refers to the General Conditions of Contract, which is enclosed as Annexure-6 to the affidavit of the appellant. The relevant Clause 18 of this General Conditions of Contract has been referred to above.

7. In this connection it was contended on behalf of the appellants that in view of the fact that the plaintiff-respondent supplied the materials as per the order placed with him, vide Annexure-5 of the affidavit, and in view of the fact that this condition was mentioned in the order as stated above, he cannot resile from the liability of being bound by the conditions. It was contended that by performing a part of the contract in supplying the materials in accordance with the order, the plaintiff could not have taken this plea that he is not bound by the conditions in the order because a person cannot be allowed to approbate and reprobate at a time. In this regard Mr. Sudhir Kumar Katriar, learned Counsel for the appellants, has cited the principle in Halsbury's laws of England, Vol. 16, at para 1507, at page 1012. It runs as follows:

On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais. The principle that person may not approbate and reprobate expresses two propositions, (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile, and (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent.

In this view of the propositions of law, it has been contended by the learned Counsel for the appellants that on the one hand the plaintiff-respondent after receiving the order from the defendants-appellants supplied the materials and on the other hand instead of existing to the clause for arbitration he filed a suit in the court. Therefore, he cannot be allowed to do so.

8. learned Counsel for the appellants also referred to the principles laid down in Russell on Arbitration . It was pointed out that in the 19th Edition of the Book Russell on Arbitration, in Chapter 7 at page 117, it has been stated as follows:

The more important question in arbitration tends to be what procedure is open to an aggrieved party when he discovers the arbitrator's interest. If he knew about it before appointment, then subject to the above-mentioned statutory exception, he can do nothing. If he discovered it on it arose only after appointment he can take one or more of the steps set out in the chapter on "Revocation or Authority and Removal of Arbitrator" or the chapter on "Challenging the Award". If he discovered it only after the award had been made, of course his only choice is to challenge the award.

9. Thus it has been enunciated that if the name of the arbitrator is mentioned in the agreement and if a party to the agreement does not challenge it at any early stage he cannot do so when the question of referring the matter to the arbitrator arises. This contention has been advanced on the point that the learned lower court has refused to accept the prayer of the appellants on the ground that the Arbitrator mentioned in this case was an officer of the Company of the appellant. In my view, the contention holds good because Clause 18 of the General Conditions of Contract very specifically lays down that in case of any dispute the matter shall be referred to the General Manager of Bhilai Refractories Plant, a component of the appellant and this fact was known to the plaintiff from before and he accepted the order for supply of materials.

10. It has also been further pointed out by the learned Counsel for the appellants, Mr. Sudhir Kumar Katriar that in the case of Eckersley and Ors. v. The Mersey Docks and Harbour Board, (1894) 2 Queen's Bench Division at page 667, it has been held by their Lordships.

"The rule which applies to a judge or other person holding judicial office, namely, that he ought not to hear cases in which he might be suspected of a bias in favour of one of the parties--does not apply to an arbitrator, named in a contract, to whom both the parties have agreed to refer disputes which may arise between them under it."

The learned Counsel for the appellants further referred to a decision in the case of the Secretary to Government, Transport Deptt., Madras Vs. Munuswamy Mudaliar and Another, . It has been held by their Lordships.

"This is a case of removal of a named arbitrator u/s 5 of the Act which gives jurisdiction to the Court to revoke the authority of the arbitrator. When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme and the fact that the Chief Engineer is superior and the Superintending Engineer is subordinate to the Chief Engineer of the particular Circle. In spite of that the parties agreed and entered into arbitration and indeed submitted to the jurisdiction of the Superintending Engineer at that time to begin with, who, however, could not

complete the arbitration because he was transferred and succeeded by a successor. In those circumstances on the facts stated no bias can reasonably be apprehended and made a ground for removal of a named arbitrator. In our opinion this cannot be, at all, a good or valid legal ground. Unless there is allegation against the named arbitrator either against his honesty or capacity of mala fide or interest in the subject-matter or reasonable apprehension of the bias a named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Court u/s 5 of the Act."

It has also been further observed by their Lordships--"Reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. The . reasonable apprehension must be based on cogent materials."

11. It is thus clear that merely because the arbitrator named in this case under the arbitration clause of the contract was an offer of the company of the appellant the impartiality of the arbitrator could not have been doubted and bias could not have been imputed. Therefore, it becomes clear that the plaintiff-respondent in this case was bound by the term in Clause 18 of the General Conditions of Contract and was required to get the matter referred to the arbitrator as per this clause and filing of a suit without taking recourse to this provision of arbitration, it was improper on his part to have filed the suit.

12. Section 34 of the Arbitration Act, 1940 says--

"Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any, other party to the agreement or any person claiming under him, In respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings, and 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 were 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.

13. In this case after the notice was given to the appellants they had asked the plaintiff-respondent No. 1 to wait for sometime as the matter was under consideration, but before ascertaining the final decision taken by the defendants-appellants in this regard the plaintiff-respondent filed the suit in question and the defendant-appellants filed the petition for stay of the proceeding u/s 34 of the Arbitration Act. But the learned lower court refused to entertain the prayer on ground which are untenable. There does not appear to be any justification for refusing the grant of prayer of stay u/s 34 of the Arbitration Act. The impugned

order of the learned lower court, therefore, is not fit to be upheld.

14. Accordingly, this appeal is allowed and the impugned order of the learned Subordinate Judge I, Monghyr, dated 10-7-1989, passed in Money Suit No. 53 of 1987 is hereby set aside. The learned Trial Court will follow the procedure accordingly so that the matter is referred to the arbitrator and after the award is made the aggrieved party shall be at liberty to take recourse to the provisions of law in challenging the award. However, there shall be no order as to costs.