

(1975) 03 CAL CK 0003
In the Calcutta High Court
Case No : Award Case No. 188 of 1974

Calcutta Metropolitan Development Authority

APPELLANT

Vs

K.C. Anand and Co.

RESPONDENT

Date of Decision : 20-03-1975

Acts Referred:

Arbitration Act, 1940 — Section 33, 9

Calcutta Metropolitan Water and Sanitation Authority Act, 1966 — Section 90(A), 90(b)

Citation : 80 CWN 328

Hon'ble Judges : S.K. Roy Chowdhury, J

Bench : Single Bench

Advocate : P. Banerjee, for the Appellant; S.B. Mukherjee and Arun Deb, for the Respondent

Judgement

S.K. Roy Chowdhury, J.—This is an application u/s 33 of the Arbitration Act inter alia for declaration that the arbitration clause contained in the contract dated the 20th of April, 1971 is invalid and void, for declaration that the appointment of Sri S. Sinha as the sole Arbitrator is invalid and without jurisdiction. Alternatively appointment of said sole Arbitrator be set aside and liberty given to the petitioner to appoint an arbitrator, for injunction and other reliefs. The facts of this case which lies on a very short compass as it involves the interpretation of the arbitration Clause in the contract and the effect of superstition of an authority under a West Bengal Act.

2. The admitted facts are that the tender submitted by the respondent Messrs K. C. Anand & Co. in respect of certain works known as Tollygunge storm and drainage project construction was accepted by the Calcutta Metropolitan Water and Sanitation Authority, a body corporate constituted under the West Bengal Act, (XIII) of 1956 and a formal contract dated the 20th of April, 1971 was entered into between the said authority hereinafter referred to as "C.M.W.S.A." It appears that the respondent alleged to have completed the work under the said contract but certain disputes arose relating to the same and by a letter dated the

31st of January, 1974 the respondent called upon the then Chairman of "C.M.W.S.A." to settle the disputes in terms of Clause 35 of the General Condition of Contract which is set out hereunder :

C.L. 35. ARBITRATION :

If any dispute or difference of any kind whatsoever shall arise between the Authority and the Contractor in connection with or arising out of the contract or construction or the carrying out of the works (whether during the progress of the works or after their completion but during the maintenance period and whether before or after the determination, abandonment or breach of the contract) ii shall be referred to and the settled by the Chairman who shall give his decision in writing within "90 days and give notice of the same of the contractor. Such decision in respect of every matter so referred to shall be final and binding on all parties to the contract until the completion of the work and maintenance thereof and shall forthwith be given effect by the Contractor who shall proceed with the works with all due diligence whether notice of dissatisfaction is given by him or not. If, however, the contractor is dissatisfied with any such decision of the Chairman, he may within thirty days after receiving notice of such decision give notice in writing to the Authority that he is dissatisfied with the decision. If no such notice of dissatisfaction is given within the said period the decision shall not hereafter be open to question and shall be final and binding upon the contractor. If such notice of dissatisfaction with any such decision of the Chairman be given within the said period of 30 days, the dispute or difference upon which such decision has been given shall be referred to two Arbitrators (one to be appointed by the Authority and the other by the Contractor) with an Umpire to be appointed by the said Arbitrators. The reference shall be made in accordance with the provisions of the Arbitration Act, 1940 (Act. No. X of 1940) of the Central Legislature or any re-enactment or statutory modification thereof provided however that the Umpire shall be appointed in writing before entering on the reference. Such Arbitrators or Umpire as the case may be whose decision shall be final and binding shall have full power to open up, review and revise any decision, opinion, direction, certificate of valuation of the Chairman and neither party shall be limited in the proceeding before such Arbitrators or the Umpire to the evidence or arguments put before the Chairman for the purpose of obtaining his decision above referred to. Such reference except as to the withholding, by the Engineer of any certificate or the withholding of any portion of the Security Deposit to which the Contractor claims to be entitled or as to the exercise of the General Manager's power under clause 33, titled "Action when entire security deposit becomes payable to the authority, shall not, unless agreed to by the Authority and the Contractor in writing be opened until after the completion or alleged" of the works, provided always that the giving of a certificate of completion under the provisions of these General Conditions shall not be condition precedent to the opening of any such reference.

3. It appears that thereafter by an order made by the State Government in

exercise of the power conferred u/s 90(A) of the Calcutta Metropolitan Water & Sanitation Authority Act, 1966, the said C.M.W.S.A. was superseded for a period of one year from 12th of February, 1974. The consequence of such supersession is provided by amendment of the Calcutta Metropolitan Water & Sanitation Authority Act, 1968 and incorporated in section 90(b) which are inter alia as follows :

90.B. (1) when an order of supersession has been made u/s 90(A), then with effect from the date of the order : --

(a) all directors and members of the Authority shall vacate their offices;

(b) all properties, funds and dues which are vested in or realisable by the Authority shall vest in and be realisable by the Calcutta Metropolitan Development Authority constituted u/s 3 of the West Bengal Calcutta Metropolitan Development Authority Act, XI. of Act, 1972, (hereinafter referred to as 1972 the Metropolitan Authority);

(c) all contracts and liabilities which are enforceable by or against the Board shall be enforceable by or against the Metropolitan Authority;

(d) all the powers and duties which may, under the provisions of this or any other Act or any rule, regulation by-law, order or notification made there under, be exercised or performed by the authority shall be exercised or performed by the Metropolitan Authority;

(e) all legal proceedings instituted by or against the Authority may be continued or enforced by or against the Metropolitan Authority;

(f) all officers and other employees of the Authority continuing in office immediately before the date of the order shall be deemed to be employed by the Metropolitan Authority on such terms and conditions not being less advantageous than what they were entitled to immediately before the said date;

....

4. It appears that by virtue of the said order the C.M.W.S.A. was superseded and all contracts, liabilities which were enforceable by or against the C.M.W.S.A. became enforceable by or against the Calcutta Metropolitan Development Authority, hereinafter referred to as "C.M.D.A." It is admitted that after the respondent called upon the Chairman of C.M.W.S.A. to adjudicate the dispute by the letter dated the 31st of January, 1974 the said Chairman did not took upon himself the said adjudication and did not enter upon the reference in terms of Clause 35 of the said contract between the parties. Thereafter, it seems that from 12th of February, 1974 C.M.W.S.A. was superseded and C.M.D.A. took over the same and the effect it appears by the Calcutta Metropolitan Water & Sanitation Authority amendment Act, 1968 which I have set out being section 90(b) that there is a complete substitution of the C.M.W.S.A. by C.M.D.A. including the rights and obligation under the said contract dated the 20th of

April, 1971 between the parties and the effect seems to me that in the said Clause 35 of the contract, Chairman of the C.M.W.S.A. would be substituted by the Chairman of the C.M.D.A. That seems to be the inevitable effect of the said supersession and as such in my view after the disputes arose and the said respondent called upon the Chairman C.M.W.S.A. to enter upon the reference and who failed to do so before the supersession of C.M.W.S.A., it is now the Chairman of C.M.D.A. who by the operation of the said amendment Act and the order made there under is substituted in place and stead of the Chairman of C.M.W.S.A. and therefore, he has become the arbitrator to adjudicate the disputes between the parties arising out of the said contract dated the 20th of April, 1971 at the first stage.

5. Thereafter, various correspondences passed between the parties and it appears that the petitioner on the one hand contended that the said arbitration clause 35 has become inoperative as the Chairman and Board of C.M.W.S.A. have been superseded and it has become void and inoperative whereas the respondent contended that the Chairman having refused or failed to give his decision in terms of Clause 35 they have become entitled to appoint their sole Arbitrators in terms of clause 35 after calling upon the petitioner to appoint its Arbitrator in consequence of the failure on the part of the petitioner to do so. Further it appears that the petitioner suggested a fresh agreement to be entered into between the parties for adjudication of the disputes and give effect to clause 35 of the contract by mutual agreement whereas the respondent did not agree to such suggestion. Ultimately, it appears that the respondent contended that their nominee Arbitrator Mr. Sachin Sinha has been appointed sole Arbitrator and he was to proceed with the reference. The said Arbitrator Mr. Sinha purported to enter upon the reference and proceeded with the same. The chairman of the petitioner that is C.M.D.A. by a letter dated the 4th of October, 1974 to the said Arbitrator Mr. Sachin Sinha inter alia challenged his jurisdiction to act as the sole Arbitrator and requested him not to proceed with the reference. If further appears that the said sole Arbitrator Mr. Sachin Sinha held his second meeting on the 5th of October, 1974 where the petitioner's representative appeared and stated that he was present in the said meeting for the specific purpose of making over the said letter dated the 4th of October, 1974 of the Chairman of C.M.D.A. to the Arbitrator challenging the jurisdiction of the Arbitrator to proceed with the reference. The Arbitrator fixed the next meeting on the 7th of December, 1974 and thereafter, on the 5th of December, 1974 this application was moved and an ad-interim injunction was issued by me against the said Arbitrator Mr. Sachin Sinha to proceed with the reference. As usual for Statutory Authorities after directions for affidavit was given several extensions were obtained for filing the affidavits and ultimately the matter appeared in my list for hearing and I could persuade the parties to get the matter heard.

6. Mrs. P. Banerjee, appearing for the petitioner, submitted drawing my attention to the arbitration Clause that the obtaining of a decision from the Chairman C.M.W.S.A. was a condition precedent to the right of the respondent to refer the

matter to arbitration and therefore, admittedly there having been no such decision, it cannot be said that any dispute has arisen between the parties and as such no reference to arbitration in terms of Clause 35 of the contract can be made. Further, Mrs. Banerjee submitted that the C.M.W.S.A. having been superseded with effect from 12th of February, 1974 that is, immediately after, the respondent called upon the Chairman of C.M.W.S.A. to give his decision in terms of clause 35 of the Contract, the entire board of C.M.W.S.A. including the Chairman ceased to be in office as the board was superseded. Therefore, the said Clause became impossible of performance and consequently, the arbitration clause became invalid, inoperative and void. Mrs. Banerjee referred me to the principles that when an Arbitrator is appointed by the parties under the arbitration agreement and if he becomes incapable of acting or the said office is not in existence at the time of the dispute the arbitration clause fails and cannot be operative, and also the principle that the arbitration agreement should be strictly construed. She cited several decisions in *Ganpatiroy Gupta vs. Modi Brothers Ltd.* 35 C.L.J.....M. L. Shahdab vs. Mohd. Abdullah Mir & Ors. AIR 1967 J.K. 120(125), *Teamco Private Ltd. Vs. T.M.S. Mani*, . Relying on those decisions Mrs. Banerjee submitted that in the events which have happened i.e. the supersession of C.M.W.S.A. by the C.M.D.A. the arbitration clause cannot be given effect to and has become void and inoperative. Mrs. Banerjee also submitted that the said order of supersession came into operation from the date when it was issued and had no retrospective effect and therefore, it cannot be said that disputes which have arisen between the parties can be referred to arbitration under the present statutory provision of supersession. For that principles she cited a decision of this court in *Sarot Chandra Mitra vs. Santosh Kumar Haider & Ors.* 47 C.W.N. 544(553) that the supersession order had no retrospective effect but prospective. Relying on those principles Mrs. Banerjee submitted that the arbitration agreement after the said C.M.W.S.A. was superseded by C.M.D.A. has become void and inoperative and as such the purported appointment of sole Arbitrator by the respondent must be declared to be void and the Arbitrator has no jurisdiction to proceed with the reference and the interim injunction should be made absolute and declaration should be given as asked for.

7. Mr. S. B. Mukherjee, appearing with Mr. Arun Deb, for the respondent submitted that there is a total supersession of C.M.W.S.A. and substitution by C.M.D.A. Mr. Mukherjee submitted that the effect would be for all purposes, C.M.W.S.A. should now be treated as C.M.D.A. and as such the arbitration clause still remains operative and can be given effect to by the parties. Mr. Mukherjee has drawn my attention to the consequence of supersession as laid down in section 90(B) of the Calcutta Metropolitan Water & Sanitation Authority Amendment Act, 1968. He submitted that the clause 35 remains and as from the facts which he pointed out, after drawing my attention to the correspondence and the minutes of the meeting of the Arbitrator that the C.M.D.A. has rejected the respondent's claim and consequently, the Clause for referring the disputes to

arbitration by appointment of Arbitrator by each of the parties in terms of the clause 35 came into operation. Mr. Mukherjee, therefore, submitted that the respondent having failed to appoint their arbitrators inspite of being called upon by the respondent to do so and as such Mr. Sachin Sinha has become the sole Arbitrator by virtue of section 9 of the Arbitration Act, 1940. Therefore, Mr. Mukherjee submitted that the effect of the supersession has not affected the existence of the rights and liabilities of the parties under the said contract and the same are continuing subject to that C.M.W.S.A. has been substituted by C.M.D.A. Therefore, Mr. Mukherjee submitted that the injunction should be vacated and the sole Arbitrator should proceed with the reference in terms of the Arbitration clause. Mr. Mukherjee has drawn my attention to paragraph 6 of the petition where the petitioner has pleaded the alternative case and praying for condonation of delay in appointment of their arbitrator. He also referred me to the alternative prayers in the petition for setting aside the appointment of the sole Arbitrator and liberty being given to the petitioner to appoint its arbitrator. Relying on those pleading and prayers in the petition Mr. Mukherjee submitted that the petitioner themselves are accepting that the Arbitration Clause is operative and still valid and asking for such a relief by appointment of their arbitrator in terms of the arbitration clause. Mr. Mukherjee submitted that the application should be dismissed.

8. Considering the respective contentions very carefully and giving my anxious thoughts over the matter, it appears to me that the question which arises in this applications, as I have indicated before is limited within a very short compass as would depend on the interpretation of the clause 35 in the contract between the parties dated the 20th of April, 1971 and the effect of the supersession order of C.M.W.S.A. and taking over the same by C.M.D.A. under the said Calcutta Metropolitan Water & Sanitation Authority Amendment Act, 1968 by virtue of section 90(B).

9. I have set out hereinbefore both the said Clause 35 of the contract and the provision of 90(B) of C.M.W. S.A. Amendment Act, 1968. Now it is a settled principle for interpretation of a clause in a contract so as to determine whether a particular person has been appointed as Arbitrator or valuer or certifier or engineer who has to exercise and use his personal skill and knowledge and without taking any evidence or hearing the parties would give his decision, certificate or opinion as the case may be. It will depend on the intention of the parties as clearly expressed in the agreement containing the said clause, if on interpretation it appears that if a man is, on account of his skill in such matters, appointed to decide solely by the use of his eyes, his knowledge and his skill he is not acting judicially; he is using his skill, not of a judge, then he would not be an Arbitrator, as he has to determine the matter by using solely his own eyes, knowledge and skill. But on the other hand, if a person is appointed with the intention that he should hear the parties and their evidence and decide in a judicial manner, then he is an Arbitrator. In short, if the intention is such that there shall be a judicial enquiry worked out in a judicial manner, that is

arbitration and the person so appointed to decide is an Arbitrator, whatever designation of words may be used in respect of the same (See. Hudson's Building and Engineering Contract 10th Edition page 826). Applying the said principles to the facts of this case and reading the said Clause 35 as a whole, it is quite clear, that the Chairman of this C.M.W.S.A. was appointed as an Arbitrator as he was to decide on evidence and arguments of the parties and give his decision in writing. In my view, the said Chairman is not appointed for his personal skill and decide the dispute raised by the Contractor by the use of his own eyes, knowledge and skill but he was to act as a judge and enquire in a judicial manner and hear the respective cases of the parties and decide upon evidence laid before him after hearing the arguments of the parties. Therefore, it is clear from the intention of the parties that the Chairman would act as an Arbitrator and there shall be a judicial enquiry worked out in a judicial manner. That being the position, it appears to me that the arbitration agreement contained in clause 35 of the contract contains really an arbitration what is known as the two tier system of Arbitration. See *Giacamo Costa etc vs. British Italian Trading Co. Ltd.* 1962 (2) A.E.R. 53. First there will be an award by the Chairman and thereafter, if the Contractor is dissatisfied with such award he may refer the disputes to the arbitration of two Arbitrators, one to be appointed by each of the parties who will appoint the Umpire before proceeding with the reference. That seems to be the intention of the parties clearly appealing from the said Clause 35 of the contract. Further it is clear that the certificate, decision and opinion of the Engineer and General Manager are treated on a different footing than the decision of the Chairman and it further appears that the said two Arbitrators or the Umpire to be appointed by the parties has full power to open up review and revise any decision, opinion, direction, certificate of valuation of the Chairman as a whole. That being the interpretation and construction of the clause 35 as it appears to me to be clear and specific from the said agreement. It becomes incumbent on the respondent to refer the dispute at the first stage" to the arbitration of the Chairman and after he enters upon the reference and makes an award the respondent would have a right to prefer an appeal or review and reopen the said decision in the award of the Chairman by appointment of Arbitrators provided in the said clause 35 of the agreement. Therefore, before such an award at the first stage is made there cannot be any right of the respondent to appoint the Arbitrator which is the second stage of the arbitration under the said Clause 35. Therefore in my view the appointment of the sole arbitrator by the respondent without getting an award of the Chairman at the first stage appears to be invalid and without jurisdiction.

10. The next question is, what is the effect of supersession of C.M.W.S.A. by the C.M.D.A. alter the supersession order in exercise of the power under the Calcutta Metropolitan Water & Sanitation Authority Amendment Act. 1968. In my view, it appears that there is a total substitution of the C.M.W.S.A. by C.M.D.A. and as such the Chairman of the C.M.D.A. is now substituted in place and stead of Chairman of the C.M.W.S.A. in clause 35 of the said contract. The said provision

of the said section 90(B) of the Calcutta Metropolitan Water & Sanitation Authority Amendment Act, 1968 which I have set out before is quite clear and that seems to be the only interpretation to make the same workable and that appears to be the intention and object of the legislature. The sum total effect of the supersession seems to me, that all the rights and obligations of the parties before the order of supersession continued and in the place of C.M.W.S.A., C.M.D.A. will be substituted and consequently the Chairman of C.M.O.A. would substitute the Chairman of the C.M.W.S.A. That seems to be the statutory effect of supersession and taking over of C.M.W.S.A. by C.M.D.A. by the operation of the statute which I have mentioned before. See - The Gujarat Electricity Board Vs. The Ahmedabad Electricity Co. Ltd. and Others, .

11. Therefore, in my view, Mr. Mukherjee is right in his contention that there is a total substitution of the C.M.W.S.A. by C.M.D.A. so far as the said contract between the parties are concerned, but in my view Mr. Mukherjee is not right in his" contention that C.M.D.A. has already rejected the claim of the respondent and as such the respondent has become entitled to invoke the second stage of the arbitration by appointment of the sole Arbitrator on the failure of the petitioner to appoint its Arbitrator. There must be an award by the Chairman of the C.M.D. A. first as it is admitted that Chairman of C.M.W.S.A. has not entered upon the reference before supersession and if the respondent has to invoke the arbitration clause they must go to arbitration before the Chairman of the C.M.D.A. and after an award is made by the Chairman, C.M.D.A. the respondents if they are aggrieved by the award may go to the second stage of the arbitration by appointment of Arbitrators by each of the parties as provided in the said Clause 35. The arbitration agreement as Mrs. Banerjee quite rightly points out must be construed strictly according to the intention of the parties as appearing from the clear and specific wordings from the said clause. Consequently, there must be a declaration that the appointment of sole Arbitrator by the respondent is invalid and without jurisdiction and must be set aside. Therefore, I am declaring that the arbitration clause contained in the contract dated 20th of April, 1971 is valid and binding on the parties but the appointment of the sole arbitrator is invalid and without jurisdiction as the arbitrator of the first stage being the Chairman originally of C.M.W.S.A. and now substituted by Chairman of DA. by the operation of the statute of taking over and supersession of the C.M.W.S.A. and, therefore, there having been no reference to arbitration before the Chairman, C.M.D.A. the question of the second stage of the arbitration by appointment of one arbitrator each in terms of the arbitration clause cannot arise. The appointment of the sole arbitrator is set aside and the parties will be at liberty to proceed, if they are so advised, according to the arbitration clause in the agreement being clause 35, in the light of the observations which I have made earlier. The interim injunction is made absolute.

No order as to costs.