
(1960) 09 AHC CK 0021
In the Allahabad High Court
Case No : Writ Petition No. 277 of 1959

Dr. Brij Mohan Sharma

APPELLANT

Vs

The Chancellor, Lucknow University, Lucknow

RESPONDENT

Date of Decision : 12-09-1960

Acts Referred:

Arbitration Act, 1940 — Section 20, 20(4), 46, 47
Constitution of India, 1950 — Article 226
Lucknow University Act, 1920 — Section 44

Citation : AIR 1961 All 331

Hon'ble Judges : Tandon, J

Bench : Single Bench

Advocate : K.S. Verma, for the Appellant; A.G., for the Respondent

Final Decision : Dismissed

Judgement

Tandon, J.—The petitioner, Dr. Brij Mohan Sharma entered the service of the Lucknow University in October, 1933. For some time he worked as Lecturer. Later in 1948 he became a Reader and ultimately a Professor of Political Science in February, 1952. He also entered into an agreement with the University concerning his employment as a teacher of the University. On the 18th of March, 1936, his date of birth was recorded as 27th January, 1900.

In 1956 the Executive Council of the University adopted a resolution providing that for the purposes of superannuation the age of a teacher as evidenced by the High School Certificate shall be accepted. According to such a certificate Dr. Sharma's date of birth would be 15th January, 1898, In April, 1957 the Executive Council whose attention had apparently been drawn to the difference in the two dates, the one recorded earlier in 1936, i.e., the 27th January, 1900, and the other as entered in the High School Certificate i.e., the 15th January, 1898, adopted a further resolution providing that the latter date shall be acted upon in the case of the petitioner.

At the same time, it further decided that his employment shall continue upto the

end of April, 1958. Dr. Sharma who apparently was not satisfied with this decision of the Executive Council wrote to the Chancellor stressing that his true date of birth was the 27th of January, 1900 and that he could not be superannuated earlier than the 27th of January, 1960, This was done on the 12th November, 1958. A representation to the same effect had perhaps been separately made by him to the Vice-Chancellor of the University also.

While the representation to the Chancellor was still undisposed of the Vice-Chancellor on the 24th December, 1958, decided in favour of accepting the 15th January, 1898, as his date of birth. The representation to the Chancellor also was later rejected on the 1st April, 1959. The prayer made in the above representation to the Chancellor was that an arbitration tribunal be appointed u/s 44 of the Lucknow University Act to decide the issues raised under the representation.

The Chancellor's reply which refused to grant the request of the petitioner was in view of it a refusal to appoint the tribunal contemplated by the above section. It is in this light that it has been treated by the parties also, though in giving his reasons for not appointing the tribunal the Chancellor has refuted the correctness also of the claim preferred by the petitioner. But with this aspect of the matter this Court is not presently concerned in these proceedings.

Before coming to this Court the petitioner twice represented to the Chancellor to review his decision communicated on the 1st of April, 1959, but these representations were turned down, the one on the 18th July, 1959 and the second on the 8th August, 1959. The relief claimed in the petition accordingly is a writ in the nature of certiorari quashing the aforementioned three orders.

2. The learned Advocate-General for the Chancellor has raised a preliminary objection which may be stated in two parts. One part is that Section 44 under which the Chancellor had been approached placed no duty upon him to appoint a tribunal, on the other hand, the section merely provided the manner of constitution of what has been called a tribunal of arbitration, consisting of three persons, one to be appointed by the Executive Council, another to be nominated by the officer or teacher aggrieved and an umpire to be appointed by the Chancellor.

The Chancellor has no larger hand in the matter than the appointment of an umpire and it is to that extent alone that a legal obligation attaches to him. The setting up of the tribunal is the joint responsibility of all the three persons, viz. the teacher or the officer concerned, the Executive Council and the Chancellor, and each is obliged independently of the other to perform his part of the duty. In other words Section 44 does not place any liability on the Chancellor to set up a tribunal if and when so required by any party.

The second part is that having regard to the provision in Section 44 read with Section 46 and Section 47 of the Arbitration Act, 1940, the petitioner's remedy against the refusal by any party to the dispute to constitute the tribunal of

arbitration lies by an application u/s 20 of the Arbitration Act, 1940. The instant proceedings under Article 226 of the Constitution, therefore, deserved to be" dismissed on the ground of alternative remedy.

3. I have heard the learned counsel for the petitioner and -I am of opinion that both the objections must prevail.

4. Section 44 of the Lucknow University Act lays down, after providing the constitution of the tribunal of arbitration, that every dispute which is referred to such a tribunal for decision shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1940. It further provides that the provisions of the said Act, with the exception of Section 2, shall also apply to such proceedings.

There cannot be any doubt in view of what is contained in the section itself, that the provisions of the Arbitration Act, 1940, are attracted in the case of arbitrations covered by the section. But independently of it also this will be so in view of Section 47 of the Arbitration Act which lays down that subject to the provisions of Section 46 of that Act and save in so far as might otherwise be provided by any law for the time being in force the provisions of the Arbitration Act shall be applicable to all arbitrations and to all proceedings thereunder.

Section 46 to which Section 47 is subject says that the provisions of the Arbitration Act, except subsection (1) of Section 6 and Sections 7, 12 and 37 shall apply to every arbitration under any other enactment, which will include arbitration u/s 44 of the Lucknow University Act also as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as the Arbitration Act might be inconsistent with such other enactment or any rules made thereunder. By virtue of the above provisions in the two enactments the Arbitration Act except certain sections referred to in Section 46 is applicable to arbitrations held u/s 44 of the Lucknow University Act.

5. What has now to be considered is whether there is any inconsistency between the two enactments and if there is any, how far the right of the parties to the agreement, i.e., the teacher, the University and any other authority which might have joined in it is affected. A feature of Section 46 of the Arbitration Act will be relevant to point out just now.

In extending the provisions of the Arbitration Act to statutory arbitration it has further laid down that the provisions of the Arbitration Act shall apply to it as if the arbitration were pursuant to an arbitration agreement and as if the enactment under which the arbitration takes place is an arbitration agreement. By a legal fiction the statutory provision by which compulsory arbitration is provided is conferred the place of an agreement arrived at between the parties. It is in that context and background that the various provisions of the Arbitration Act whose application is not excepted have to be construed and applied.

6. Having thus noticed the true effect and meaning of Section 46 of the Arbitration Act, it has next to be seen how far the other provisions of the Arbitration Act are attracted by the facts of this case and whether the petitioner is entitled to any remedy under that Act which he has not pursued but which shall be the appropriate remedy under the circumstances. Section 20 of the Arbitration Act makes provision for arbitration with intervention of a Court where there is no suit pending.

Admittedly no suit was pending in any Court at the time when the representation was made to the Chancellor for setting up a tribunal of arbitration. Sub-section (1) provides that where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen, they or any of them, may apply to a Court having jurisdiction in the matter to which the agreement relates that the agreement be filed in Court.

The legal fiction enacted in Section 46 above, confers on Section 44 of the Lucknow University Act the place actually of an arbitration agreement. The sub-section, therefore, entitled the petitioner who is thus relegated to the position of a party to such an agreement to apply to the Court having jurisdiction in the matter that the same be filed in Court. In actual practice in cases of statutory arbitration no agreement, as one does not otherwise exist, is or can be filed in response to any such notice.

What will actually take place in such a case is consideration of the fact whether the case is one to which the provisions of the enactment, i.e., the section are attracted. Sub-sections (2) and (3) are not relevant and Sub-section (4) provides that where no sufficient cause is shown the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

In a statutory arbitration since the enactment takes the place of the agreement what the Court will do is, once it holds that the conditions necessary for the application of Section 46 of the Arbitration Act are satisfied, to make an order of reference to the arbitrator to be appointed in accordance with its provisions. Where those provisions require the parties to nominate, whether jointly or separately any arbitrator or arbitrators and they do not fulfil that obligation, it will itself appoint an arbitrator.

Therefore, the moment the University authorities including the Chancellor had refused to refer the dispute raised by the petitioner to a tribunal of arbitration or to nominate an arbitrator or umpire, the petitioner became entitled to take recourse to Section 20 of the Arbitration Act. Under it the Civil Court will be entitled not only to refer the dispute to a tribunal of arbitration but further to constitute as well the tribunal itself, should any party refuse to nominate etc., any member necessary therefor.

7. The learned counsel for the petitioner has contended that Section 20 of the Arbitration Act is inapplicable, as he considers that there is an inconsistency between Section 44 of the Lucknow University Act and the provision in Sub-section (4) of that section. In spite of my examining the two provisions and also hearing the learned counsel I am unable to discover any inconsistency, much less an inconsistency as will make Section 20 inapplicable to the arbitration u/s 44 above.

Sections 8 and 9 of the Arbitration Act give power to a Court to appoint an arbitrator or umpire where any party to the agreement refuses or avoids to do so. Sub-section (4) of Section 20 again gives power to the Court to refer the dispute in cases where the parties cannot agree upon an arbitrator to an arbitrator appointed by it. Sub-section (5) also says that thereafter the arbitration shall proceed in accordance with and shall be governed by the other provisions of the Arbitration Act so far as they can be made applicable.

There is nothing in Section 44 of the Lucknow University Act which might be said to militate against the above provisions in the Arbitration, Act. The fact that an umpire has to be appointed by the Chancellor, and of the two other members of the tribunal one has to be appointed by the Executive Council and the other by the teacher or officer concerned, do not again show any more than that the appointments as such have to be made in that manner.

And because these provisions have, the force of an agreement, in view of Section 46 of the Arbitration Act, the failure of any party to do what the section requires him to do is in the eye of law but a refusal by that party to nominate or appoint an arbitrator to be otherwise nominated or appointed by him. No inconsistency therefore exists between Sub-section (4) of Section 20 of the Arbitration Act and Section 44 of the Lucknow University Act. Truly speaking, the provision in the former by which the Court is given the power to appoint an arbitrator where a party has failed to do so is on furtherance of the intention enacted in Section 44, that is the dispute should be settled through arbitration. The contrary argument by the learned counsel is not based upon a true appreciation of the meaning and intention of the section.

8. In this connection I may mention this further fact. Apart from the fact that the petitioner had his remedy under the provisions of the Arbitration Act, it will really be in those proceedings alone that he will be able to get complete remedy. There the Court will have power in case any party refuses to appoint or nominate its representative on the tribunal to so appoint by its own order. But in proceedings under Article 226 of the Constitution the Court will obviously not take any such step. Therefore on this further ground also, I think the petitioner ought to be asked to seek his remedy by appropriate proceedings under that Act.

9. On the second part of the question as raised by the learned Advocate-General, I need only add that Section 44 of the Lucknow University Act does not charge the Chancellor with the duty of constituting the tribunal. His duty is to appoint an

umpire which contingency can arise when the tribunal is otherwise constituted. If, therefore, the Chancellor has no duty under the law to constitute the tribunal no writ or direction can be issued against him requiring him to do so.

10. In view of the above discussion the instant petition ought to fail. It is therefore dismissed. The learned Advocate-General has not insisted for costs. NO order is therefore made in that behalf.