
(1991) 11 MAD CK 0031
In the Madras High Court

Kayes Constructions

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 26-11-1991

Acts Referred:

Arbitration Act, 1940 — Section 20

Citation : (1992) 1 MLJ 364

Hon'ble Judges : Lakshmanan, J

Bench : Division Bench

Judgement

Lakshmanan, J.—O.P. No. 21 of 1989 filed by the plaintiff u/s 20 of the Indian Arbitration Act on the file of Sub-court, Madurai was transferred to the file of this Court for trial and determination as per order dated 3.8.1990 made in Application No. 2228 of 1990.

2. The plaintiff is an Engineering Contractor undertaking civil works in Railways. The respondent railway administration called for limited tenders in their letter dated 5.11.1987 for the work of "Madras-Gudur Section Bridge No. 237 at Km. 122/ 11, 113/12 proposed Reconstruction of Down Line in Newalignment with 20x 12.19 m. 1 x9.98m. and 1 x 7.39 m. girders." The plaintiff is one of the contractors submitted his tender on 30.11.1987 as per the tender conditions, which was finally accepted by the defendant by their letter dated 29.1.1988 in No. W/148/V/M/222. The plaintiff accepted the contract as desired by the respondent. The plaintiff again accepted the award of tender as per letter dated 12.4.1988 sent by the railway administration. The agreement bearing No. 4/CE/88, dated 10.6.1988 was executed by the plaintiff and the defendant. According to the plaintiff he was always diligent and was doing the work and that in the course of the work he found that the soil conditions were quite different and were not anticipated. The bore chart given along with the tender did not indicate the presence of pebbles or mica. The variations in the soil conditions resulted in disproportionate consumption of consumables like wire ropes, diesel and other times which costed abnormal wear and tear of the winches, engines

and high rate of labour was also necessitated. The plaintiff was also asked -to purchase M.S. plates which rate had increased abnormally more than 22%. The plaintiff found that the work could not be done as per the tender and hence he wrote a letter to the Chief Engineer, Southern Railways Madras on 15.11.1988 to take notice of these things and allow extra rates. The plaintiff made several representations to the respondent but they did not settle the matter and that the plaintiff by his letter dated 16.2.1989 requested the railway administration to appoint a pre-arbitration committee in accordance with the departmental circular. As a result of the impracticable nature of the work and the attitude of the railway administration the progress of the work was affected and the plaintiff was put to heavy loss. Since the attitude of the railway administration was such that they were not going to appoint a pre arbitration committee or appoint an arbitrator as per the terms of the agreement dated 10.6.1988, it has become necessary for the plaintiff to approach the court to compel the defendant to file the agreement in this Court and also for the appointment of an arbitrator to settle the disputes between the parties. The plaintiff has also reserved his right to file his claim as and when the arbitrator is appointed. The plaintiff therefore prayed:

1. to direct the defendant to file the agreement entered into between them.
2. since the defendant has not appointed a pre-arbitration committee or an arbitrator, to appoint an arbitrator by this Court to settle the disputes and pass an award, and
3. for costs.

The plaintiff as stated above filed the O.P. No. 21 of 1989 on the file of the Principal Subordinate Judge of Madurai which was later transferred to this Court as per the order in A.No.2228 of 1990 and re-numbered as C.S.No.970 of 1990 (A.A.)

3. The defendant railway administration filed their counter affidavit. According to the department, the plaintiff failed to carry out the terms of the contract and there was a considerable delay in the execution of the work. The plaintiff began to give lame excuses for the delay on some untenable pretext and he even removed from the work site all the installations of machineries for which he had received payments of Rs. 4 lakhs, without the knowledge and concurrence of the railway administration and even refused to extend the currency of the bank guarantee, thereby clearly indicating that he had abandoned the contract and he was reluctant to complete the work. Because of the plaintiff abandoned the work and refused to complete the contract, notices were issued on 3.5.1989 followed up by another letter dated 9.5.1989. Only at that juncture, the plaintiff filed the present proceedings in O.P. No. 21 of 1989 on the file of the Sub-Court, Madurai. The O.P. was filed in the principal Sub-Court, Madurai on 25.4.1989 before termination and during the currency of the agreement. Before termination and during the currency of the agreement, the plaintiff sent a letter on 16.2.1989 addressing to the defendant setting out the reasons for not doing the work and

requesting the administration to appoint pre-arbitration committee to examine the matters of disputes and settle them so as to enable the plaintiff to complete the work. The letter was produced before this Court which would clearly show that the plaintiff wanted only a pre-arbitration committee and not an arbitrator. He had not even asked for any escalation charges in the said communication. Since there is no improvement in the work, the railway administration have duly terminated the contract by giving notice sent on 3.5.1989. The details of several other proceedings initiated by the plaintiff have also been given in the, counter statement. Thus, according to the railways, the plaintiff had been harassing and gave pinpricks to the railway administration by filing a number of litigation one after the other and risk tenders were called for giving the plaintiff also a chance in the risk tender and ultimately the balance of the work was awarded to the new contractor, M/s. Sarva Mangala Constructions. According to the railways, the plaintiff has not made any proper application for appointment of an arbitrator under the relevant clauses of the general conditions of contract and his request was only for appointment of a pre-arbitration committee that too during the currency of the contract and that the plaintiff had also not chosen to approach the administration with any requisition requesting for appointment for an arbitrator and that the only request that is subsisting in this proceedings dates backs to April, 1989 before the termination of the contract. However, it is stated that the Railway Administration are ready to refer the matter to arbitration provided the plaintiff presents a proper application to the railway administration in this behalf invoking the arbitration clause and once the same is done, the railway administration is ready and willing to consider the said request and go in for arbitration. However it is stated that the railway administration is not willing to refer the matter to any third party or private arbitrators since the parties are bound by the terms of the contract and relevant clauses mentioned in the general conditions of the contract and at best the plaintiff can call upon the railway administration to appoint two arbitrators as envisaged under Clauses 63 and 64 of the general conditions of the contract.

4. I have heard Mr. R. Krishnaswamy on behalf of the plaintiff and Mr. V.R. Gopalan on behalf of the railway administration. However, Mr. V.R. Gopalan has agreed to treat the application already filed by the plaintiff as an application for referring the matter to arbitration and willing to refer the matter to arbitration as per the terms of the contract and the relevant clauses mentioned in the general condition of the contract and not to any third party or private arbitrators. Mr. R. Krishnaswamy at the time of hearing submitted that the railway administration is very much prejudiced against the plaintiff and that it is a fit case for referring the matter to any third party or private arbitrators, in view of the bias attitude on the part of the railway administration against the plaintiff and in view of the various legal proceedings filed on the file of this Court and also before other courts.

5. Mr. Krishnaswamy stated that the arbitrator being a quasi-judicial tribunal some circumstances which exist may tend to create a bias in his mind, he should not act as an arbitrator in the matter concerned and the bias in the arbitrator

may be a personal bias or a bias arising from his situation with reference to the parties or the subject matter of the dispute before him. A reasonable apprehension has arisen in the minds of the plaintiff that he is not likely to get justice at the hands of the departmental arbitrator, even though he has agreed for appointing such departmental men as arbitrators. According to Mr. Krishnaswamy that the mind of an arbitrator must always be impartial and pure and the moment one feels that the arbitrator is likely to be vitiated by personal considerations, he ceases to be qualified to act as such. According to the clause in the present agreement, the department shall nominate two arbitrators as envisaged under Clauses 63 and 64 of the general conditions of the contract. In any case, the arbitrator being a Government or Departmental Officer always looks to the Government or Department for his future career prospects and this brings in an unconscious element of self-interest into action. One cannot ignore the supreme reality of human nature. Such an officer will tend to support the decision either given by himself or given by his organisation. The maxim that "no man is to be a judge in his own cause" extends to cases where he may have prejudged the issue or in which he is interested. This maxim should be held sacred by all. Thus, according to Mr. Krishnaswamy, such an arbitrator envisaged under Clauses 63 and 64 disqualifies himself to sit as an arbitrator. Mr. Krishnaswamy cited *The Andhra Pradesh State Road Transport Corporation, Hyderabad and Another Vs. Sri Satyanarayana Transports (Private) Ltd., Guntur and Others*, , where the Supreme Court has observed that it is not necessary for a contractor to establish the existence of an actual bias in the arbitrator and it is enough if by virtue of his situation with the subject matter or with the Government the inference of a bias or the probability of a bias is established to vitiate his qualification to act as arbitrator. He also cited *Amarchand Lalitkumar Vs. Shree Ambica Jute Mills Ltd.*, , where the Supreme Court observed,

It is true that on an application u/s 5, it is not necessary to show that the arbitrator is in fact biased and it is enough to show that there is a reasonable ground for apprehension that the arbitrator will be biased.

6. Mr. Krishnaswamy further submitted that the arbitration agreement is no free consent of the arbitrator and being a term in the standard contract form is almost imposed upon him. Secondly, the basic essence of arbitral adjudication is to secure fair and impartial decision on a dispute between the parties but if a party disputant expresses reasonable apprehension of not being able to secure such a fair and impartial adjudication at the hands of an arbitrator, the Court should always relieve him of such an onerous responsibility.

7. In this connection, Mr. Krishnaswamy cited the Supreme Court decision in *Venkatesh Narahar Katti Vs. Haji Saheb Khadir Saheb Mulla and Another*, , where the Supreme Court has ruled as follows:

The strict principle of sanctity of contract is subject to the discretion of the court, for there must be read with every such agreement an implied term or condition that it would be enforceable only if the Court having due regard to the other

surrounding circumstances thinks fit in its discretion to enforce it. It is obvious that a party may be released from the bargain if he can show that the selected arbitrator is likely to show bias or by sufficient reason to suspect that he will not act fairly....

Mr. Krishnaswamy has also cited the following decisions reported in *Swaran Singh v. Union of India* A.I.R 1982 Del 103; *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.*, , *Jiwnani Engineering Works Pvt. Ltd. Vs. Union of India (UOI)*, and *Vipinbhai R. Parekh Vs. General Manager Western Railway, Bombay*, .

8. Of course, the above critical appraisal of Mr. Krishnaswamy on some aspects of the arbitration clause highlights some of its bad features. There is also no doubt that the arbitration clauses in some of the Central Government Department are one sided and is heavily rated against the contractors. But, at the same time, there are cases and cases that the courts in fact have come to the rescue of the weaker party time and again. Thus, it was open to the contractors to come to this Court to have these bad features struck down. This is by the way.

9. It is now to be seen whether the contractor/ plaintiff in this case has established the existence of an actual bias in the arbitrator and that the plaintiff herein has further established that the nominated arbitrator in the matter in question is likely to show bias against him by sufficient reasons to suspect that he will not act fairly. It has also to be seen whiner there is any pleadings in the present plaint to the said effect.

10. I have been taken through the entire pleadings and also the notice dated 16.2.1989 proceeded before the filing of O.P. No. 21 of 1989 before the Principal Sub-Court, Madurai. In the concluding portion of the letter dated 16.2.1989, the plaintiff has only requested the General Manager to appoint a Pre-Arbitration Committee to examine the matters mentioned in the said letter and settle them so as to enable them to complete the work without any further loss of time. No prayer to appoint an arbitrator was ever asked for, prior to the filing of the O.P. No. 21 of 1989 in the lower court. That apart, the request was made only during the currency of the agreement. No allegations have been made regarding the bias against the officers of the railway administration. Top of it, the plaintiff has not challenged the Clauses 63 and 64 of the general conditions of the contract. The O.P. was filed before the lower court before the termination of contract, but during the currency of the agreement on 25.4.1989. The prayer in the O.P. is to direct the railway administration to file the agreement entered into between the parties in court and to appoint an arbitrator by this Court to settle the disputes and pass an award since the railway administration has not appointed a Pre Arbitration Committee or an arbitrator. As stated above, the notice preceded before the filing of the O.P. dated 16.2.1989 refers only to a Pre Arbitration Committee. But, the prayer in the present O.P. is contrary to the request made in the letter dated 16.2.1989 and this Court is expected to decide the point raised in this petition O.P.21 of 1989. Even though the plaintiff has not chosen to say anything against the railway administration, arguments were advanced regarding

bias at the time of hearing. The reason given by Mr. R. Krishnaswamy is that the railway administration is biased against the plaintiff since the plaintiff has initiated several proceedings against the railway administration. This cannot at all be accepted as a ground for apprehension of any bias in the arbitrator. No sufficient reason to establish that the arbitrator will not act fairly has been adduced in this proceedings. In the absence of any pleadings to the said effect, it will not lie in the mouth of the plaintiff to allege bias against the railway administration. Hence, I reject the contention put forward by Mr. R. Krishnaswamy, the learned Counsel for the plaintiff on this aspect. Hence the judgments cited by Mr. R. Krishnaswamy are also not applicable to the facts of this case and are distinguishable.

11. Mr. V.R. Gopalan, the learned Counsel for the defendant administration submitted that the plaintiff has not filed any rejoinder to the counter filed by the railway administration alleging bias, at least in the rejoinder. He cited C.V. Krishna Vs. State of Madras, , in support of his contention that the parties to the contract are bound by the terms of the contract and to refer the disputes arising under it to an arbitrator or arbitrators specified or named by them and that such an agreement is to be given effect to. He strongly relied on the Division Bench Judgment of our High Court in the above case in which this Court held:

If the parties to a contract voluntarily incorporated as one of its terms a clause which obliges one or the other of them to refer the disputes arising under it, to an arbitrator specified or named by them, then the mandate imposed upon themselves by the parties is inescapable and has to be given effect to. To this general principle there is an exception. If it is proved that the person named or specified as the arbitrator under the contract, is biased towards one of the parties or the arbitrator overtly and covertly involved himself in the subject-matter of the contract from the time of its inception and during the course of its working so as to give an impression to a reasonable person that a reference to him of the disputes that have arisen between the parties in relation to the contract would be futile and in the ultimate analysis would not be a means to secure justice to the complaining party, then the parties could come to court to seek for the appointment of an arbitrator other than the named arbitrator before whom the differences between them could be laid for final adjudication.

Mr. V.R. Gopalan also cited Ama Corporation Vs. Food Corporation of India, judgment of the Division Bench of our High Court consisting of Ramanujam and Sengottuvelan, JJ., where it has been held:

Where the parties to a contract had agreed to adopt a particular machinery prescribed in the arbitration agreement for the appointment of an arbitrator to resolve their disputes and had specifically agreed that if for any reason such an arbitration was not possible the matter would not be referred to any arbitration at all, the appointment of an arbitrator contrary to the terms of the arbitration by the trial court of its own choice was not sustainable, when it was not a case of the party seeking arbitration that the arbitration as contemplated by the parties

under the arbitration agreement was not feasible at all.

The learned Counsel for the defendant administration further cited Union of India (UOI) Vs. Prafulla Kumar Sanyal, . The Supreme Court in the above judgment stated that it is desirable that the court should consider the feasibility of appointing an arbitrator according to the terms of the contract, Mr. V.R. Gopalan next cited J.S. Sood Vs. Saawan Kumar, . In that case, the parties have agreed to appoint a sole arbitrator who was the appellant's employee and it was with this knowledge, the respondent entered into an agreement. Disputes having arisen between the parties, the appellant filed an application u/s 20 for appointment of the named person as sole arbitrator. The respondent opposed the reference on the ground, inter alia, that the named arbitrator who was the employee may be biased or interested. There was no specific allegation of bias or partiality, nor was there any satisfactory reason put forward to go back upon the agreement. The Division Bench of the Delhi High Court held that the mere fact that the named arbitrator was the appellant's employee would not furnish sufficient cause for refusing the reference. The Court further held that it is not sufficient for a party to merely say that the arbitrator may not act fairly for the reason which he was fully aware of at the time of signing the agreement. The Delhi High Court also observed that,

It may be too far-reaching and sweeping a conclusion to hold that an order of reference should be declined merely because the named arbitrator has some connection with one of the parties. Such a proposition may render illegal a vast array of arbitration matters where invariably an arbitrator is agreed upon who is connected with one of the parties, who may even, in a broad sense, be in a dominating position so as to be able to dictate the terms of the agreement.

12. The above judgment of the Delhi High Court is directly in point as that of our present case. It is useful to refer a very recent decision of the Supreme Court reported in Secretary to Government Transport Department v. Munuswamy Mudaliar 1988 S.C.C. 651, which is directly on the point. The appeal was filed before the Supreme Court out of an order of our High Court dated 21.9.1984. The appellant before the Supreme Court was the Secretary to the Government, Transport Department, Madras and the respondent is the Managing Partner of M/s. National Company, which was the successful tenderer of the work of construction of a bridge across the river Coovum at Koyambedu within the corporation limit of the city of Madras and the respondent firm failed and neglected even to commence the job. Consequently the contract in favour of the said firm was determined absolutely at their cost and risk. The respondent filed a suit in the City Civil Court, Madras being O.S. No. 3996 of 1982 claiming damages alleged to have been caused as a result of such determination of the said contract and for refund of earnest money deposit etc. In view of the arbitration clause in the agreement between parties, the appellant State filed a petitioner for referring the dispute to arbitrator. The City Civil Court, Madras, accepting the prayer, passed orders directing both the parties to refer the dispute

to the arbitrator and stayed the suit. As per the orders of the City Civil Court, the respondent filed claim petition before the arbitrator namely the Superintending Engineer (Highways and Rural Works), Trichi, being the second respondent herein. During the pendency of the claim before the said arbitrator, the respondent contractor filed another application seeking to change the arbitrator on the ground that the arbitrator being the employee of the State Government, an Engineer from any sector other than the sector of Tamil Nadu or a retired engineer of the State Government might be appointed as an arbitrator. The learned Judge passed order sought to revoke the authority of the named arbitrator. In the order the learned Judge, City Civil Court, stated that the Chief Engineer of the circle concerned was in favour of the cancellation of the contract in question and the contract entrusted to the petitioner came to be terminated and the construction was sought to be entrusted at the risk and cost of the petitioner on the advice of the proposal of the Chief Engineer. The learned Judge of the City Civil Court came to the conclusion that there could be legitimately a bias in the mind of the arbitrator who was the Superintending Engineer against the appellant before the Supreme Court. The Madras High Court also did not examine this aspect and dismissed the appeal in limine. Hence the appeal to the Supreme Court. The Supreme Court while allowing the appeal filed by the Secretary to Government, Department of Transport observed:

When the parties entered into the contract, the parties knew the terms of the contract including the 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 or 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.

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.

The Supreme Court in the above judgment also has referred to the decision reported in International Airports Authority of India Vs. K.D. Bali and Anr, , and held that.

There must be a reasonable evidence to satisfy that there was a real likelihood"

of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regular normal human conduct. In this country in numerous contracts with the Government clauses requiring the Superintending Engineer or some official of the Government to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such, cannot be entrusted with the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal. No other ground for the alleged apprehension was indicated in the pleadings before the learned Judge or the decision of the learned Judge. There was, in our opinion, no ground for removal of the arbitrator. Mere imagination of a ground cannot be an excuse for apprehending bias in the mind of the chosen arbitrator.

13. As observed by me in the paragraphs above in this judgment, there is no allegation against the named arbitrators either against their honesty or capacity or mala fide or interest in the subject matter or reasonable apprehension of the bias. There is no material placed before this Court to come to the conclusion that the reasonable apprehension has been made out on cogent materials. No ground for the alleged apprehension was ever indicated in the pleadings in O.P. No. 21 of 1989 C.S. No. 970 of 1990 A.A. In my opinion, no ground for changing the arbitrator against the terms of the contract has been made out and hence, the plaintiff/contractor has to necessarily fail in this suit.

14. However, as agreed to by Mr. V.R. Gopalan, the learned Counsel for the defendant at the time of hearing, the railway administration will refer the dispute under the terms of the contract and the relevant clause mentioned in the general conditions of the contract to appoint two arbitrators to resolve the disputes and differences that has arisen between the parties. The parties are at liberty to file their claim and counter claims and proceed with the arbitration proceedings under the terms of the contract.

15. Before concluding, I deem it necessary to observe the following: It is hardly necessary to emphasise that the ultimate rule of natural justice that a person trying a case, though in a quasi-judicial proceedings should not suffer from a personal bias. This is the ultimate rule of natural justice that a person who tries a case should be able to deal with the matter before him objectively, fairly and impartially. It is not necessary for this Court to say or direct the arbitrators to adjudicate between the parties to the proceedings, they must come to adjudication with their independent mind without any inclination or bias towards one side or the other in dispute. Hence, I direct the two arbitrators to be nominated, to dispose of the matter in question without being influenced by any of the proceedings initiated by the plaintiff against the railway administration or without being influenced by any other extraneous consideration and dispose of the matter on merits and in accordance with law. Since the matter is being agitated in various forums and that the matter in question was of the year 1988, the railway administration will immediately appoint two arbitrators as

contemplated under the provisions of the general conditions of the contract and the entire matter shall be disposed of on merits by the two arbitrators within four months from the date of entering upon the arbitration reference. The railway administration will nominate the two arbitrators within 4 weeks from the date of this order. Taking into consideration of the circumstances, of the case, I say no costs.