

(1957) 05 PAT CK 0005
In the Patna High Court
Case No : A.F.O.O. No. 279 of 1952

Lakhmir Singh

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 08-05-1957

Acts Referred:

Arbitration Act, 1940 — Section 2, 28
Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Evidence Act, 1872 — Section 114, 115
Limitation Act, 1908 — Article 158

Citation : AIR 1957 Patna 633 : (1957) 5 BLJR 608

Hon'ble Judges : Sinha, J;Dayal, J

Bench : Division Bench

Advocate : Lalnarayan Sinha and K.D. De, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

Dayal, J.—This appeal is u/s 39, Arbitration Act, 1940, by the plaintiff.

2. The facts and circumstances giving rise to this appeal are these: The plaintiff entered into a contract (vide Ext. 6) with the Government of India for strengthening taxitracks and approaches at job No. 170, Bihta Aerodrome. The estimated cost of the work was nearly Rs. 6,64,765. The entire work could not be done and the plaintiff submitted a claim, amounting to Rs. 90,508 on 20th April, 1945 (Ext. 5).

The claim was not accepted and the matter was therefore referred to arbitration. Mr. Sethi, Superintending Engineer of Delhi Aviation Circle was the sole arbitrator. The plaintiff alleged that the award given by the arbitrator had not been filed in Court nor had it been made a rule of the Court. The plaintiff, therefore, applied u/s 33 of the Arbitration Act before the Subordinate Judge First Court, Patna," and prayed for the following reliefs:

"* * * . (a) The award dated 27-6-1947 be set aside.

(b) The arbitrator be removed.

(c) That a new and independent arbitrator should be appointed to decide the difference between the parties.

(d) Costs of this petition be awarded to the petitioner."

The contention of the plaintiff, amongst others, was that the award was bad in law and was liable to be set aside because it was made more than four months after the arbitrator entered on the reference. Another ground on which the award was challenged to be inoperative was that the appointment of Mr. Sethi as arbitrator was illegal as he was not the Superintending Engineer to whom the matter should have been referred for arbitration under Clause 25 of the agreement (vide Ext. 6).

3. The present respondents filed a rejoinder to the claim and contended that the award was in order. It was given by a competent authority and was binding on the plaintiff. It was further contended that the plaintiff having agreed to Mr. Sethi being appointed as arbitrator and having preferred fresh claim before him during the pendency of the matter, he was estopped from contending that Mr. Sethi was not the competent authority to be appointed arbitrator or that the award was given more than four months after the arbitrator entered on the reference. The action was resisted also on the grounds of limitation, jurisdiction, maintainability and want of notice u/s 80, Code of Civil Procedure.

4. This matter was registered as Title Suit No. 30/12 of 1950/51 and the parties went to trial on the following issues;

"1. Is the suit maintainable?

2. Has the Court jurisdiction, to entertain and try the suit?

3. Is the suit bad for non-compliance of Section 80 of the Code of Civil Procedure? Is that section applicable to the suit.

4. Is the suit barred by limitation?

5. Is the award in question liable to be set aside on any of the grounds as alleged?

6. Is the plaintiff estopped from raising the question of limitation?"

5. Issues Nos. 1 to 4 have been decided in favour of the appellant. But the plaintiff has been non-suited by virtue of the decision of the Court below on issues Nos. 5 and 6.

6. Being thus aggrieved, the present appeal has been filed by the plaintiff-appellant. Mr. Lal narayan Sinha learned Government Advocate, appearing for the appellant in support of the appeal, has raised the following points:

1. The reference was invalid, as Mr. Sethi, the arbitrator, had no jurisdiction under the contract (Ext. 6) to arbitrate; the contract in this regard, was ambiguous and vague.
2. The award was hit by paragraph (3) of Schedule T to the Arbitration Act being beyond four months and was therefore, unenforceable;
3. There was no estoppel against the statute and the amendment to the claim dated 9th May, 1947 was not in the nature of a fresh reference: and
4. In the circumstances, the court below was not justified in extending the time u/s 28 of the Act.
7. Mr. Sinha also referred to Exts. 5, 5 (a) and P as illustrations of the losses suffered by the plaintiff for no fault of his.
8. As to the first point, Mr. Sinha referred to Clause 25 of the Contract (Ext. 6), which runs as follows:

"Clause 25 -- Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings, and instructions, hereinbefore mentioned and as to the quality of workmanship, or materials used on the work, or as to any other question, claim, right, matter or thing, whatsoever, in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions, or otherwise concerning the works, or the execution, or failure to execute the same, whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to the arbitration of the superintending Engineer of the Circle for the time being in the manner provided by law relating to arbitration for the time being in force who after such investigation as he may think proper shall deliver his award which shall be final, conclusive and binding on all parties to this contract."

Mr. Sinha submitted that the words "for the time being" in Clause 25 were vague and indefinite and the agreement therefore, was unenforceable. In support of his contention, he referred to *governor-General v. Simla Banking and Industrial Co Ltd.*, New Delhi AIR 1947 Lah 215 (A). In that case, a clause in the agreement between the Government and a party provided that the decision of the Superintending Engineer of the Circle for the time being shall be final as to any question, claim, etc., arising between the parties. A suit having been filed by the party, it was contended in defence that the dispute must be referred to arbitration of the Superintending Engineer. Their Lordships of the Lahore High Court held that:

"The words "for the time being" were ambiguous and it was not clear whether they referred to "the circle" or to the "Superintending Engineer." Even if the expression "Superintending Engineer of the Circle" was to be taken collectively, it was not clear whether it was the person who held that office at the time of the institution of the " suit or the person holding the office when the cause of action

arose that was to be the arbitrator. The words in the agreement were too vague and indefinite and the agreement was unenforceable for want of certainty."

Mr. Rai Parasnath, learned Government Pleader, appearing for the Union of India, tried to distinguish this case on the ground that the words "for the time being" must refer to the time when the dispute arose. He has not cited any authority in support of his submission. Be that as it may, there are other unsurmountable difficulties in his way on this point. Clause 25 referred to above, says that

"all questions and disputes shall be referred to the arbitration of the Superintending Engineer of the Circle for the time being"

Mr. Sethi, who arbitrated in this case, was examined on commission. He has said in his deposition as, follows:

"..... The Central Patna Aviation Division was included in the Calcutta Circle. I was never a Superintending Engineer of the Calcutta Circle Bihta must have a subdivision in Calcutta Circle"

So, on this evidence, it is clear that he was not the Superintending Engineer of the circle and, therefore, under the contract, he had no jurisdiction to arbitrate. The learned Government Pleader has referred to portions of the evidence of D. W. 1. The relevant deposition of this witness, runs as follows;

"1. I am at present Superintending Engineer, Hijli Project Circle.

2. I took part in the arbitration proceeding in question as a witness.

3. Mr. Sethi was incharge of Allahabad Division also. At that time the Bihta Airfield was under Allahabad Aviation Division.

Cross-examination:

4. There are records which would show that Bihta Airfield was under Allahabad Aviation Division. I cannot give from memory the exact dates between which Bihta Airfield was under Allahabad Aviation Division"

Curiously enough, this has not been produced. Besides D. W. 1 is unable to say from memory the exact dates between which Bihta Airfield was under the Allahabad Aviation Division. Again, Exbt. 1, letter from the Chief Engineer to the plaintiff, referred to in this regard by the respondents" learned lawyer, reads as follows:

".....A copy of your plaint, sent to the arbitrator -- who in this case will be Superintending Engineer, Delhi Aviation Circle, New Delhi, may also please be sent to this office, so that Government may be able to place their view of the case before the arbitrator."

This clearly supports Mr. Sethi when he says that Bihta Airfield was not under him and that it was included in Calcutta Circle and that he was never the Superintending Engineer of the Calcutta Circle. The learned Government pleader

then referred to the following deposition of Mr. Sethi.

".. ... I do not remember exactly if Bihta was ever in my charge but for a short time Allahabad Division was added to my charge while I was Superintending Engineer Delhi Division. It is quite possible that in this reorganisation, Bihta might have been transferred to Allahabad Division.. ..."

In view of what I have said above, it appears to me that these statements under stress of cross-examination are not of much assistance to the respondents. The material evidence in the case were the documents showing that Bihta Airfield was in charge of Mr. Sethi at the relevant time. These were withheld and, therefore, the natural inference will be adverse to the case of the defence. And the categorical statement of the arbitrator that Bihta Airfield was not under him clearly establishes that, under Clause 25 of exhibit 6, he had no jurisdiction to arbitrate.

9. The learned Government Pleader then relied on portions of the Judgment of the Court below, which runs as follows:

"Moreover as would appear from the above the Plaintiff had not only agreed to the appointment of Mr. Sethi as an arbitrator but also took part in the proceedings before him from beginning to end and never raised the question about his appointment being illegal. As a matter of fact no objection was ever taken by the plaintiff against the appointment of Mr. Sethi as an arbitrator. The objection was not taken even at the time the plaint was filed. It was taken for the first time through a petition dated 23-1-1952 through which the plaintiff sought to get his original application amended by inserting this ground."

The Court below is wrong in holding that the plaintiff had not only agreed to the appointment." There is nothing on the record to show that the plaintiff had signified his assent to the appointment of Mr. Sethi as the arbitrator in the case. The learned Government Pleader was not able to show any such letter or petition of the plaintiff.

10. There is no force in the objection that this point of Mr. Sethi's jurisdiction to arbitrate was taken by amendment petition of the 23rd January, 1952, whereas the original application was filed on the 11th April, 1950, True, this objection was raised by amendment but no prejudice has been caused to the respondents. They, thereafter, filed objection petition and after five dates the hearing of the matter and the petition was taken up on the 27th March, 1952 when D.W. 1 was examined to refute the allegation of the plaintiff.

The defendants filed all their documentary evidence thereafter but they did not care to file the documents which D.W. 1 admitted in his evidence were in existence. The defendants had to show that Bihta Airfield was under Mr. Sethi. For reasons best known to the respondents, that document was not filed. Later, the hearing continued and the judgment was delivered on the 31st May, 1952. So, the defence had nearly four months in which these material documents could

have been filed.

However, the defendants were not taken by surprise and they were fully heard. The plaintiff, as appears from his evidence and his petition, has fully explained the position as to why this point was not taken before. Mr. Sethi was examined in December, 1951 when it leaked out from his deposition that Bihta Airfield was not under him. Therefore, the amendment application was filed in January, 1952. The plaintiff, who was examined on the 27th March, 1952, has said:

"1. I am the plaintiff (petitioner). 2. It is not a fact that I proposed the name of Mr. Sethi for acting as arbitrator in the matter in Question. I was under the impression that Mr. Sethi was Superintending Engineer of this Circle.

3. The Bihta Taxi Track Strengthening Job was under the Calcutta aviation Circle at Calcutta. I have now come to know that Mr. Sethi was never the Superintending Engineer of Calcutta aviation Circle.

4. I never accepted the award of Mr. Sethi. He did not examine any witness.

5. I had written a letter for referring the matter to an arbitrator and for appointing an arbitrator. (Refers to letter dated 2-12-1946)".

Thus, I find that this point of Mr. Sethi's jurisdiction to arbitrate was fully gone into and the defendants had ample time and opportunity to meet this point and there was nothing wrong in the appellant applying for the amendment of the original claim petition (the plaint). Such amendments have been allowed even at appeal and second appeal stage. In my judgment, the action should succeed on this point alone.

11. However, I propose to discuss shortly the other points raised in this case.

12. Regarding Mr. Sinha's second and third points, it is admitted by both sides that it was on the 8th January, 1947 that the arbitrator entered on the reference and it was on the 27th June, 1947 that the award was made. On simple calculation, it is beyond four months of the arbitrator entering on the reference and was, therefore, clearly hit by paragraph 3 of Schedule 1 to the Act, The learned Government pleader submitted that four months expired on 8th May, 1947 and, on the 9th May, 1947, the claim of the appellant was permitted to be amended before the arbitrator and, therefore, the plaintiff was estopped by his own conduct from challenging it. Mr. Sinha submitted that there was no estoppel against the statute and he referred to Kamta Pd. Nigam Vs. Ram Dayal and Others, , in which a Division Bench of the Allahabad High Court held:

"Where a party seeks to set aside the award on the ground that it is delivered after the time fixed, it is not open to the other party to plead that the first party is estopped by conduct from challenging the award on that ground, as there can be no estoppel against the statute".

13. Regarding the position of the amendment of the 9th May 1947, Mr. Sinha has referred to Clause 25 of Exhibit 6 and Russel on Arbitration, 15th edition, pages

136-137. Russel on Arbitration runs thus :

"The arbitrator has a discretion (except in so far as his discretion may be limited by the terms of the arbitration agreement) to refuse or allow amendments during the proceedings in the claim or defence, if application is made to him for that purpose.

It must always be borne in mind that the arbitrator has no power to allow an amendment the effect of which would be to alter the terms of the submission under which his powers arise; that is to say, he cannot, without the agreement of the parties in writing, allow a fresh dispute to be introduced as an amendment which is not comprised in the submission.

* * * * If, however, the submission is wide enough to cover all disputes which may arise, he may, and indeed must, hear all such disputes, and may therefore allow disputes to be brought before him during the proceedings.

* * * * The term of submission is very wide. It refers to all questions" and disputes vide Clause 25 of exhibit 6. Such amendment cannot be termed ,as fresh dispute and, therefore, a fresh reference. Fresh reference cannot be unilateral. In this view of the matter, there appears to me that Mr. Sinha's points Nos. 2 and 3 ought to succeed.

14. Regarding Mr. Sinha's fourth point, he has conceded that the powers of the Court u/s 28 are unlimited and the Court has ample power to extend the period of four months. But he has submitted that that power must be exercised with judicial discretion. It is true that a drastic power of the Court should be exercised with proper discretion. The Court must decide the rights of the parties in the cause and not that it should change the cause without giving any opportunity to the other side to contest the petition and decide the rights of the parties on the change.

15. Now, let us see the ground for extending the time. The award is dated the 27th June, 1947. No application was made, either by the arbitrator or the parties, for enlarging the time till the point was urged by the defendants in argument and, after the close of arguments, the petition for extension of time was filed on the 9th April, 1952 by the defendants. The Court below has dealt with this matter in its order No. 65, which runs as follows :

"9-4-52.--Arguments on behalf of the plaintiff resumed, continued and finished. Defendants replied. To 18-4-52 for judgment. A petition on behalf of the defendants is filed praying to exercise the discretionary power given by Section 28 of the Arbitration Act and condone the delay, if any, and extend the time, although the award has been made already on the grounds mentioned in the petition. The petition shall be considered in the judgment".

The time was ultimately extended by the judgment. No opportunity even to contest the position was given to the plaintiff and time was extended. No reason for the delay in making the award has been given as appears clearly from Mr.

Sethi"s evidence. Mr. Sethi says :

"....I entered upon reference on 8-1-47. I gave my award on the 26th of June, 1947. I cannot tell you the reasons for delay in giving the award, I must have been busy otherwise...."

This, in my judgment, is not at all proper and cannot be said to be a judicial exercise of discretion. The Court, in these circumstances, was not justified in extending the time.

16. Besides, under Article 158, Limitation Act, the limitation for setting aside the award or for getting it remitted for reconsideration is thirty days from the date of service of I notice of the filing of the award. Here the award was made on the 27th June, 1947. It was not filed in Court and, therefore, no notice of its filing was ever given with the result that, on the 11th April, 1850, the present action, was commenced and then the Court below, at the time of judgment enlarged the time u/s 28 of the Arbitration Act. This, on the very face of it, appears to be unjust and improper.

17. The learned Government Pleader has referred to Nani Bala Saha Vs. Ram Gopal Saha and Another represented by pleader guardian Babu Kumar Gurukrama Mozumdar and Another, , Amar Nath Vs. Uggar Sen and Others, , Radha Kishen Vs. Madho Krishna and Another, and Narsing Das Hiralal Ltd. and Another Vs. Bisandayal Satyanarain Firm, . All these cases come clearly within the section; and emphasis is laid for extending time in a proper case. None of these cases are in point. In none of them the "position, as described above, has been examined and discussed.

18. The learned Government pleader has urged no other point in support of the Judgment of the Court below.

19. In the result, the appeal is allowed with costs, the order of the Court below is reversed and the award is set aside, and the suit decreed with costs.

Sinha, J.

20. I agree.