

(1974) 04 GAU CK 0002
In the Gauhati High Court
Case No : First Appeal No. 4 of 1969

Makhan Lal Lodh

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-04-1974

Acts Referred:

Arbitration Act, 1940 — Section 14, 2(a), 2(e)

Citation : AIR 1976 Guw 65

Hon'ble Judges : R.S. Bindra, J

Bench : Single Bench

Advocate : S. Deb, for the Appellant; H.C. Nath, Advocate-General and R. Ghosh, Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Bindra, J.—Shri Makhan Lal Lodh of Agartala entered into a contract with the Union of India for construction of barracks meant for bachelor officers at Agartala sometime in the year 1961-62. The formal agreement executed between the parties contained an arbitration clause providing that in case of any dispute between the parties the matter shall be referred for arbitration to the Administrator of Tripura. It was also provided in that clause that if for any reason the Administrator found any difficulty to do the arbitration himself he could appoint some one else as an arbitrator. On 12th September, 1966, the contractor petitioned the Administrator "to arbitrate or kindly appoint some other person for the purpose", and mentioned in his petition the various heads of dispute which had cropped up between the parties. By an order dated 21-11-1966 the Administrator appointed Shri A.K. Dasgupta, Superintendent Engineer, Additional Circle, Agartala as sole arbitrator "for the purpose of making the award on the points of disputes referred to in the above petition". It was on 20th January, 1967, that Shri A.K. Dasgupta called upon the parties to submit statements of facts relating to the disputes between the parties. After receiving the statements of facts from the parties Shri A.K. Dasgupta heard the parties and gave his

award which he happened to sign on 18-5-1967. The award was to the effect that it was the contractor who had to pay Rs. 10,093.06 to the Union of India. The arbitrator communicated the fact of his having signed the award to the parties and also sent to them each a copy of the award.

2. It appears that some officer of the Government wrote to the arbitrator on 12-9-1967 requesting the latter to file the award in Court so that a decree in terms thereof may be made in favour of the Government against the contractor. The arbitrator consequently moved the Court on 16-9-1967 but he produced the award in original before that Court on 15-1-1968. The Court apprised the parties that the arbitrator had filed the award in Court and called upon them to put in their objections, if any. The contractor filed objections challenging the validity of the award and contending that no decree in terms thereof could be made against him in favour of the Union of India. The Court on rejecting the objections filed by the contractor made an order on 21-2-69 making the award a rule of the Court and passing a decree in terms thereof. The present appeal by the contractor is directed against that order of the Court.

3. Shri S. Deb levelled a three pronged attack on the order made by the Court and the award given by the arbitrator. In the first place he urged that the arbitrator having not forwarded to the Court, along with the award, the records of the arbitration proceedings the award is rendered irregular if not invalid, and as such it cannot form the basis of a decree against his client. The second point urged by the counsel was that the award having been filed in the Court more than 30 days after the date of service on the parties of the notice of making of the award, the Court should have rejected the prayer for making the award the rule of the Court rather entertain the proceedings and pass a judgment on the basis of that award. The last and the most important point urged by Shri Deb was that reference to the arbitrator having been made at the instance of the contractor the arbitrator lacked jurisdiction to entertain any claim made by the Union of India or to make an award in favour of Union of India. The learned Advocate-General entered the lists with Shri Deb on all the three points canvassed by the latter. I proceed to examine the validity or otherwise of those points *seriatim*.

4. The Advocate General did not dispute the point of fact that the arbitrator did not forward to the Court the records of arbitration proceedings along with the award. On the authority of sub-section (2) of Section 14 of the Arbitration Act, Shri Deb urged that the Court could not have taken note of the award submitted by the arbitrator or to pass any judgment on the basis thereof for the reason of" non-submission of records to it by the arbitrator. Sub-section (2) of Section 14 provides that the arbitrators or umpire shall at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or signed copy of it, together with any depositions and documents which

may have been taken and proved before them, to be filed in Court and the Court shall thereupon give notice to the parties of the filing of the award. Indisputably sub-section (2) enjoins upon the arbitrator to send to the Court the "depositions and documents which may have been taken and proved before him along with the award. However, the section does not proceed to state further that if such depositions and documents are not forwarded to the Court along with the award, the award would lose validity or the Court would have no jurisdiction to adjudge claim based on the award. Indeed such a provision could not have been incorporated in section 14 for any lapse on the part of an arbitrator in the matter of despatch of depositions and documents to the Court along with the award cannot retrospectively have the effect of depriving the award of its validity, if it was otherwise valid by the time it was signed. The validity or otherwise of the award will have to be determined on the basis of factors and circumstances preceding the signing of the award rather than what follows that event. If, as in the present case, the arbitrator omits to send the depositions and documents to the Court along with the award it would at the best be a case of an inconsequential omission on the part of the arbitrator and such an omission can always be got over by the Court directing the arbitrator to produce the depositions and the documents either at the instance of the parties or even suo motu. Therefore, I see no merit in the first point canvassed by Shri Deb.

5. I now take up the second objection raised by Shri Deb, viz., that of limitation. Article 119 of the Limitation Act, 1963, relates to two varieties of applications, namely, (a) an application for the filing in Court of an award, and (b) an application for setting aside an award or getting an award remitted for reconsideration. The period prescribed for each application is 30 days and qua application of (a) variety the period begins to run from "The date of service of the notice of the making of the award", and in respect of applications of (b) variety the period begins to run from "The date of service of the notice of the filing of the award". The question for decision is whether Article 119 envisages an application by an arbitrator to the Court for taking proceedings to give practical shape to the award made by him. This Article falls under Third Division of the schedule appended to the Limitation Act and it bears the caption "Applications". Obviously the applications contemplated by Article 119 are those which may be made by a party who seeks some relief from the Court against another, and this conclusion I believe is in accord with the objective behind suits contemplated by First Division and the appeals contemplated by the Second Division of the schedule. Suits are filed by one party claiming relief against another except the suits falling in the category of interpleader suits, and likewise appeals are filed by one party claiming relief against another. In that background it is legitimate to presume that Article 119 relates to applications by a party who seeks some relief against another and since arbitrator is not interested personally in the award given by him, the Parliament could not have visualised an application by an arbitrator to the Court respecting an award made by him to fall within the ambit of Article 119. Respecting (a) variety of applications, the period of limitation,

according to column 3, begins from the date of the service of the notice of the making of the award. It looks clear from the wording of column 3 that an application under Article 119(a) could be made only by a party to the award and not by an arbitrator because, firstly, no provision of the Arbitration Act enjoins service of notice of making of the award on the arbitrator and, secondly, the service of the notice of the making of the award on the arbitrator, the author of the award, makes no sense. An application of (b) variety can have for its objective either setting aside of the award or getting the award remitted for re-consideration. Arbitrator being not interested in the outcome of the award he is not expected to make an application to the Court for setting aside the award made by him. Nor can his prayer that the award be remitted to him for re-consideration sound rational or credible. Nor again there would be any purpose behind, or practical utility in, serving on the arbitrator a notice of the filing of the award as contemplated by entry in column 3 against entry in column I of Article 119(b). Therefore, the intrinsic evidence furnished by the phraseology of Article 119 militates against the contention urged by Shri Deb.

6. The point at anvil is not barren of authority. The Supreme Court held in the case of Champalal Vs. Mst. Samrath Bai, , that Article 178 of the Limitation Act, 1908, applies to applications made by the parties and not to the filing of the award by the arbitrator. Article 178 of the old Act corresponds to (a) variety of applications mentioned in Article 119 of the new Act. Therefore, qua such applications the matter is concluded and so not open for debate. The applications of variety (b), as concluded already, can never be made by an arbitrator as the phraseology employed cannot sustain any other view. Therefore, on repelling the submission made by Shri Deb I hold that since the award had been filed in Court by the arbitrator and not by any of the parties to the dispute, the filing of the award is not hit by Article 119. The mere fact that the arbitrator had been requested by the Government to file the award in Court would not convert his act of filing the award in Court to an application by the Government within the meaning of Article 119. Lachhmi Prasad Vs. Gobardhan Das and Others, , is an authority for the proposition that Article 178 Limitation Act, 1908, comes into play when one of the parties or both of them file an application in Court u/s 14 of the Arbitration Act and that that Article has no reference to the time when the arbitrators or umpire may be requested by the parties to file the award. Therefore, the fact of the Union of India having requested the arbitrator to file the award in Court is of no legal consequence.

7. This takes me to the most knotty problem raised by Shri Deb, viz., that when initiative for arbitration is taken by one party the other party to the dispute cannot put any counter-claim. Shri Deb and the Advocate General very candidly conceded that they had not been able to lay hand on any judicial pronouncement, Indian or foreign, bearing on that proposition. In other words, according to them the proposition is *res integra* or *res nova*. Hence the reply to the proposition has to be found on examining the relevant provisions of the Arbitration Act and the facts of the case in hand.

8. The Indian Arbitration Act, 1899, which was repealed by the Arbitration Act of 1940, defined the word "submission" to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. That expression "submission" was held by the various High Courts in India as including an "agreement to refer to arbitration" and a "reference". However, the Act of 1940 has split up the term "submission" used in the previous Act and has separately defined an "arbitration agreement" and a "reference". According to Section 2(a) of the new Act "Arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether the arbitrator is named therein or not, and in Section 2(e) the expression "reference" is defined as meaning a reference to arbitration. The two legal expressions are clearly distinguishable for they relate to separate transactions. While arbitration agreement is a contract by which the parties undertake to submit their present or future difference to arbitration, a "reference" is a delegation of authority by the parties to an arbitration agreement to a named arbitrator with implied agreement that they shall be bound by his award. The arbitration agreement may precede a reference to arbitration or it may be simultaneously therewith but a reference to an arbitration like an arbitration agreement is normally a bilateral and not a unilateral act. Of course one can visualise cases where a party out to refer a dispute to the arbitrator fails to enlist the willing consent of the opposite party for joining him in making a reference to the arbitrator. In such an event the party out for settlement of dispute by arbitration will have to serve notice on the other party intimating him that in case the latter fails to join him in making the reference he would do so all by himself or move the appropriate Court for making a reference to arbitrator. Arbitrator, it is common place to say, has to decide a particular dispute or disputes that have cropped up between the parties and have been referred to him and such dispute or disputes must fall within and not outside the ambit of the arbitration agreement concluded between the parties. It must, therefore, follow as a corollary that before the arbitrator proceeds with the work of arbitration he should ascertain from the parties what are the points of conflict between them, and this obviously can be done either by perusal of the joint reference made by the parties in conflict or by ascertaining points of dispute from questioning the parties or examining their pleadings, if any. In either eventuality the points of dispute have to be identified before the proceedings in the arbitration can be embarked upon with meaningful consequences. It may be that in some cases one of the parties chooses not to appear before the arbitrator despite notice, and in such an event the points of dispute may have to be ascertained ex parte. The High Court of Lahore held in AIR 1944 149 (Lahore) , that when it is desired to take advantage of an arbitration clause, it is necessary that the party seeking the reference should first call upon the other party to join in the submission and that a one sided reference is illegal until and unless the other party has refused to join in the reference. I am in respectful agreement with these observations for they are clearly in accord with the natural principles governing arbitration. On page 68 of Russell on Arbitration, Eighteenth Edition, it

is stated that a reference "of a cause" and "of all matters in difference in a cause", mean exactly the same thing, and only give the arbitrator power to decide on the questions raised by the pleadings which are necessary for the determination of the cause. All this discussion leads me to the conclusions that a reference to arbitration is primarily a bilateral affair, that one sided reference can be made only if the other party refuses to join despite notice, and that arbitrator has to give his award on the disputes ascertained from the parties pleadings except in the case where the proceedings are ex parte. Reference in this respect may usefully be made to Jagannath Kapoor and Another Vs. Premier Credit and Instalment Corporation (P) Ltd.,

9. Coming now to the factual part of the story between the parties I find that the contractor had set out in his petition dated 12-9-1966, addressed to the Administrator, the various heads of dispute and had requested the Administrator to act as an arbitrator between the parties respecting those heads of dispute. The Administrator having authority in terms of the arbitration clause between the parties to appoint some one else as an arbitrator, he appointed Shri A.K. Dasgupta as the sole arbitrator by an order dated 21-11-1966. On 20th January, 1967, the arbitrator sent notices both to the contractor and the Union of India communicating to them that he had been appointed as an arbitrator by the Administrator and that he had entered upon the reference. He called upon the contractor to submit a clear and detailed statement of facts on the point or points of dispute together with copies of documents on which he intended to rely upon in support of his claim. He directed the contractor to furnish copies of the statement of facts and the documents on which he meant to rely to the Executive Engineer, Agartala Division No. II. The directive which the arbitrator issued per the same letter to the Executive Engineer was that within 15 days of the receipt by him of the statement of facts from the contractor he should submit counter-statement of facts on behalf of the Union of India supported by the copies of documents, if any. The Executive Engineer was also directed to furnish a copy of the counter-statement of facts as also the copies of the documents relied upon by him to the contractor. By para 3 of that notice the arbitrator told the Executive Engineer that the latter may also include in the counter-statement of facts the detailed statement of the case with regard to claim or claims, if any, which Union of India may have against the contractor, and that if any such counter-claim was made then the Executive Engineer shall send a copy of counter-statement of facts to the contractor. On receipt of the notices from the arbitrator, the contractor submitted his statement of facts to the arbitrator on 8-2-1967 and the Executive Engineer did so on 3rd/4th March 1967. Towards the close of his statement of facts submitted to the arbitrator, the contractor happened to state that "As Chief Commissioner wanted arbitration on points given by me, your Para (3) may not arise." The Executive Engineer laid a claim for recovery of Rs. 12,900.11 against the contractor in the statement of facts submitted by him to the arbitrator and a copy of which was forwarded by him to the contractor. The arbitrator then probably recorded some evidence and ultimately gave his award

on 18-5-1967, holding that the contractor owed a sum of Rs. 10,093.06 to the Union of India.

10. Shri Deb was unable to satisfy this Court that his client had raised a dispute before the arbitrator that the Union of India could not make a counter-claim against the contractor in view of the fact that it was he who had initiated the proceedings culminating in the award. The award itself is completely silent on that point. A relevant matter that requires emphasis is that the amount found due from the contractor to the Government is in respect of the heads of dispute mentioned by the contractor firstly in his petition, dated 12-9-1966 addressed to the Administrator and then in his statement of facts dated 8-2-1967 submitted by him to the arbitrator in response to the latter's notice. If the contractor did not raise issue relevant to the counter-claim made by the Union of India against him before the arbitrator and if the arbitrator gave his findings on the heads of dispute which had been referred to him by the contractor and on which the latter sought his adjudication, I find no merit in the contention of Shri Deb that the arbitrator had exceeded his jurisdiction in reaching the conclusion that actually some money was due by the contractor to the Union of India rather the other way about. The heads of dispute having been settled between the parties it was obligatory on the arbitrator to give his findings thereon, and if the findings were that the money was due from the contractor to the other party rather due to him from the latter, those findings had to be set out in the award. When such findings were actually incorporated in the award, the award would become enforceable against the vanquished party at the instance of the other irrespective of the fact who had taken the initiative in making a reference to the arbitrator. I see no escape from that conclusion.

11. The matter may appropriately be examined from another standpoint. The petition, dated 12-9-1966, addressed by the contractor to the Administrator cannot be described as a reference, strictly speaking. In the last para of that petition the prayer made by the contractor was: "Please arbitrate or kindly appoint some other person for the purpose." The Administrator undoubtedly had the right in terms of Clause 25 of the contract between the parties to do the arbitration himself or to name some one else as an arbitrator. The Administrator actually entrusted the job of arbitration to Shri A.K. Dasgupta and the latter after entering upon the reference called upon the parties to submit the statement of facts in regard to dispute or disputes between them. It is Shri A.K. Dasgupta who evidently acted as an arbitrator and not the Administrator. Shri A.K. Dasgupta very rightly called upon the parties to submit to him the points of dispute between them and he was equally justified in directing the parties to exchange their respective statements of facts and that was done. It is out of those statements of facts of the parties that the arbitrator ascertained the points of dispute between them and then proceeded to determine the same. It is sheer coincidence that the heads of the dispute between the parties did not go beyond what had been set out by the contractor in his petition addressed to the Administrator on 12-9-1966, though under the same heads the Union of India

laid claim for no less than Rupees 12,900.11 against the contractor. As mentioned above, the contractor does not appear to have raised an objection before the arbitrator that the latter could not look into and adjudicate upon the claim of Rs. 12,900.11 made by the Union of India against him (the contractor). Therefore, the history of the case leaves no room for doubt that the actual reference made to the arbitrator was whether any, and if so what, amount is due by the contractor to the Union of India or vice versa in respect of the heads of dispute mentioned in the statements of facts submitted by the parties to the arbitrator. The High Court of Madras held in the case of R.K. Thirumalai Chettiar Vs. K.N. Nanjaya Gowder and Another, , that reference to arbitration "should be read not in any pedantic spirit but so as to interpret broadly the intention of the parties". Indeed, it should be so. By and large, the arbitration references are made to persons not trained in judicial proceedings and the parties before them seldom take help of Advocates, and so it is for the Courts to determine in the light of the available material what was the true intention of the parties respecting a particular reference.

12. Shri Deb cited 1948 (2) All ER 186, *Mediterranean v. Fortress*, in support of the contention that counter-claim cannot be subject of adjudication by an arbitrator. However, nothing said in the report lends weight to that contention. What happened in the case was that the sellers had claimed the price of the goods which they had agreed to sell to the buyers and of which the buyers had refused to take delivery on the contention that they were unmerchantable as well as unfit for the purpose for which they were required. The arbitrator reached the findings that the property in the goods had not passed to the buyers though the goods were clearly of merchantable variety. In consequence of these findings the arbitrator made an award in favour of the sellers declaring the latter entitled to certain amount not on account of the price of the goods but on account of damages for reason of non-acceptance of goods by the buyers. The buyers then moved the Court to set aside the award primarily on the footing that the sellers having claimed the price of the goods the arbitrator had no jurisdiction to award them damages for breach of the contract. The High Court held, repelling the contention of the buyers, that the arbitrator was obviously right in forming the opinion that property in the goods having not passed to the buyers the sellers were not entitled to recover the price of the goods, and that since all disputes had been referred to him the arbitrator was well within his rights in awarding damages to the sellers for breach of contract committed by the buyers. The High Court observed that simply because the sellers had put forward a claim on a wrong basis it cannot be said that the arbitrator was not entitled to award compensation on the true basis. The actual decision in that case does not lend any help in finding solution to the point urged on behalf of the contractor. On the other hand, it lends support to the view that the arbitrator can go to the bottom of the dispute between the parties and find out which way the justice of the dispute lies, and this is exactly what appears to have been done by the arbitrator Shri A.K. Dasgupta of our case.

13. Shri Deb read to the Court number of passages from Russell's Arbitration in a bid to buttress his standpoint. I find that on page 68 of the book it is mentioned, on the authority of an old decision, that an arbitrator to whom all matters in difference in the action were referred had jurisdiction to deal with the counter-claim. The decision cited in support of this proposition is (1893) 68 LT 54, Weall v. James. It is a dispute or disputes between the parties which are referred for decision to the arbitrator, and obviously any question on which the parties join issue is raised to the level of a dispute or a difference within the meaning of the expression "arbitration agreement" as defined in Section 2(a) of the Arbitration Act. Since the statement of facts submitted by the Government to the arbitrator contained a counter-claim made by it against the contractor and since that counterclaim was not contested before the arbitration as beyond his jurisdiction and he happened to adjudge that counter-claim, the arbitrator cannot be said to have acted beyond his jurisdiction. Therefore, the third and the last point raised by Shri Deb cannot be sustained like the other two points urged by him.

14. In the result, this appeal fails and is dismissed. However, I leave the parties to bear their own costs in this Court.