

(1996) 01 DEL CK 0026

In the Delhi High Court

Case No : I.A. No. 9573/94 and OMP No. 137/94

M/s. M. R. Warerkar and Associates (P.) Ltd.

APPELLANT

Vs

Mahanagar Telephone Nigam Ltd. and others

RESPONDENT

Date of Decision : 17-01-1996

Acts Referred:

Citation : (1996) 36 DRJ 522

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : Atul Y. Chitley and Mr. Ravikesh Sinha, for the Appellant; A.K. Sikri and Mr. Shailesh Kapur, for the Respondent

Judgement

S.K. Mahajan, J.—The petitioner was appointed an architect in relation to the construction of multi-storied telephone exchange building for the respondent at envelop No. 9, C.G.O. Complex, Lodhi Road, New Delhi. Certain disputes having arisen between the parties under the agreement appointing him as the Architectural Consultant, the petitioner by letter dated 14th September, 1993 called upon the Managing Director of the respondent corporation to either function as an arbitrator or to nominate a person to act as Arbitrator. The notice was given in terms of Clause 17 of the agreement entered into between the parties. Though it is written in the said notice that in case the Managing Director did not take upon himself the function of an Arbitrator or did not appoint any other Arbitrator within a period of 15 days from the date of receipt of the said letter, it will be considered that the Managing Director was not interested in appointing an Arbitrator and the petitioner would then, in such an event, approach the court for appointment of an Arbitrator. However, no such petition was made in court by the petitioner.

2. By an order passed on 29th April, 1994 the Managing Director of the respondent corporation acting under clause 17 of the agreement appointed Shri Surendra Nath, Chief Engineer (Civil), Department of Telecommunications, Bombay as the sole arbitrator to decide the disputes and make and publish his

award in respect of claims/disputes between the parties. On 23rd September, 1994 a letter was written by the petitioner to the Chairman and Managing Director of the respondent corporation informing him that 4 months and 27 days had expired from the date of appointment of the arbitrator but still no proceedings had been initiated by the arbitrator and thus he had become functions officio. The Managing Director was, Therefore, requested to appoint another arbitrator from amongst the fellows of Indian Council of Arbitration and from that panel of arbitrators in the category of engineers. By a notice issued on 30th September, 1994 the arbitrator called upon the petitioner to file statement of claim within 15 days from the receipt of the said notice. After receipt of the said notice from the arbitrator, the petitioner filed this petition under Sections 11 and 12 of the Arbitration Act for removal of Sh. Surendra Nath as the sole arbitrator and for appointment of any other person from the panel of arbitrators, Indian Council of Arbitration in the category of engineers to decide the disputes which had arisen between the parties.

3. The removal of the arbitrator is sought on two grounds, namely, (i) that the petitioner did not expect a fair and just hearing to be given to him either by the Managing Director of the respondent corporation or any of his nominees, as according to the petitioner it was settled law that a party cannot be a judge in his own cause; and (ii) that the arbitrator has failed to use all reasonable dispatch in entering upon and proceedings with the reference and making an award.

4. On the first submission, the contention of the petitioner is that there is inherent bias in the Managing Director or his nominee against the petitioner, as the Managing Director and his nominee will be judge in his own cause. The submission is that it should have been specifically written in the agreement that the petitioner would have no objection to the appointment of the Managing Director or any of his nominees as an arbitrator in the matter and as these words were missing in the agreement, the appointment of Mr. Surendra Nath as the sole arbitrator cannot be sustained. To appreciate the contention of the petitioner, it will be useful to incorporate below the exact provisions of clause 17 of the agreement under which the arbitrator has been appointed :

"All disputes or differences whatsoever arising between the parties out of or relating to the construction, alteration or effects of this agreement or the breach thereof shall be referred for the sole arbitration of the Managing Director, Mahanagar Telephone Nigam Ltd., or his nominee and the award made by him or his nominee as the case may be shall be binding on the parties."

5. On a bare reading of the arbitration agreement, it is clear that parties to the suit had agreed the disputes to be referred to the sole arbitration of Managing Director or Mahanagar Telephone Nigam Limited or his nominee. In my opinion, the consent of the petitioner to the appointment of the Managing Director or his nominee as sole arbitrator is specifically recorded in the agreement and that the petitioner will have to objection to such appointment, is Therefore, implied in the agreement itself. Mr. Chitley, appearing on behalf of the petitioner, has referred

to the case reported as State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli, , to support his contention that a party cannot be a judge of his cause.

6. In State of Karnataka v. Shree Rameshwara Rice Mills, (supra), the question involved was whether the Deputy-Commissioner was competent to adjudicate upon a disputed question of breach of conditions of the agreement as well as to assess the damages arising from the breach. The court in that case was interpreting clause 12 of the agreement which existed in that case and the said clause was worded as under :

"In token of the first party's willingness to abide by the above conditions, the first party has hereby deposited as security a sum of Five Hundred Rupees only with the second party and for any breach of conditions set forth hereinbefore, the first party shall be liable to pay damages to the second party as may be assessed by the second party, in addition to the forfeiture in part or whole of the amount deposited by him. Any amount that may become due or payable by the first party to the second party under any part of the agreement, shall be deemed to be and may be recovered from the first party as if they were arrears of land revenue".

7. While interpreting this clause, the court had held as under :

"On a plain reading of the words it is clear that the rights of the second party to assess damages would arise only if the breach of conditions is admitted or if no issue is made of it. If it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions the wording of clause 12 would have been entirely different. It cannot also be argued that a right to adjudicate upon an issue relating to a breach of conditions of the contract would flow from or is inherent in the right conferred to assess the damages arising from a breach of conditions. The power to assess damages, as pointed out by the Full Bench, is a subsidiary and consequential power and not the primary power. Even assuming for argument's sake that the terms of clause 12 afford scope for being construed as empowering the officer of the State to decide upon the question of breach as well as assess the quantum of damages, we do not think that adjudication by the Officer regarding the breach of the contract can be sustained under law because a party to the agreement cannot be an arbiter in his own cause. Interests of justice and equity require that where a party to a contract disputes the committing of any breach of conditions the adjudication should be by an independent person or body and not by the other party to the contract."

8. On the basis of the above finding it is contended by Mr. Chitley that the respondent cannot be an arbiter of its own cause and an independent person, Therefore, should be appointed as an arbitrator. I am afraid, the interpretation given by Mr. Chitley is not correct. It was not an arbitration agreement which was interpreted by the court. It was the power of the State which were being

interpreted in the facts and circumstances of that case. Moreover, the petitioner had not challenged the appointment of Sh. Surendra Nath as an arbitrator till the filing of the present petition. Even in notice dated 23rd September, 1994 the grievance of the petitioner was not that the arbitrator was biased or the Managing Director did not have the power to appoint an arbitrator but the grievance was that the arbitrator had not acted with reasonable dispatch in entering upon the reference. The arbitrator is even not an employee of Mahanagar Telephone Nigam Limited. He is Chief Engineer (Civil) in the Department of Telecommunications and in my opinion, there should not be any apprehension in the mind of the petitioner that the arbitrator is biased. I, Therefore, do not agree with the contention of the petitioner that the arbitrator is likely to be removed on the ground that he is biased.

9. Coming to the next contention of the petitioner that the arbitrator has not acted with reasonable despatch, the contention of the petitioner is that the Arbitrator has slept over the matter for about 5 months which clearly prove that he has not acted with reasonable dispatch and he is, Therefore, liable to be removed and a new Arbitrator is to be appointed. Mr. Chitley has placed reliance upon the judgments reported as Kalicharan and Co. Vs. State of Uttar Pradesh, , Excalcer v. The State of West Bengal AIR 1980 Cal 80, and Sarkar & Sarkar v. State of West Bengal 1993 1 ALR 169, in support of his contention that in case the arbitrator does not act with reasonable dispatch and he is liable to be removed.

10. In Kalicharan Sharma v. The State Uttar Pradesh (supra), the ground for removal of the arbitrator was that he had not used reasonable dispatch in entering upon and proceeding with the reference and making the award for more than two years and that he was in charge of the work in question and in his capacity as such he had expressed his opinion against the petitioner in respect of the payment of lawful and legal dues of the petitioner. The only answer given to the petition by the respondent was that there was no valid arbitration clause for which reason the arbitrator did not enter upon the reference. On these contentions of the parties, the court held that "the reason that there was no valid arbitration agreement between the parties was hardly a justification for the arbitrator to defer his entering upon the reference, proceeding with the arbitration proceedings and to make the award. This was not a matter to weigh with the arbitrator and it was entirely for respondents to challenge the validity of the arbitration clause in appropriate forum allowed to them under the law. The delay of two years on the part of the arbitrator to enter upon the reference was held to be palpably and obviously a gross neglect in that regard and he has failed to use all reasonable dispatch in entering upon and proceedings with the reference and he was, Therefore, liable to be removed u/s 11 of the Arbitration Act". The judgment, in my opinion, will not of any help to the petitioner in as much as the respondent has given a jurisdiction in the written statement as to why there was a delay of 5 months in the arbitrator entering upon the reference. It as been stated by the respondent that the arbitrator was the Chief Engineer

(Civil) in the Department of Telecommunication and as per the administrative procedure, he had to take clearance of the department for which he had written to the Department of Telecommunications. It took some time for the department to give clearance and immediately on receipt of the clearance, he wrote letter dated 30th September, 1994 to the parties calling upon them to file the statement of claim before him. In my opinion, it is a valid ground for the arbitrator not to enter upon the reference for a period of five months. The delay is not such a delay which would justify the removal of the arbitrator u/s 11 of the Arbitration Act.

11. In *Excalcer v. The State of West Bengal* (supra), the court was interpreting the provisions of Section 8 and 9 of the Arbitration Act and was not in any manner concerned with Section 11 of the Arbitration Act. It was held in that case that "Where a party called upon the Chief Engineer to enter upon the reference as the sole arbitrator but he kept silence for nearly about 5 months which implied that he accepted his position as an arbitrator but the fact that he did not take any steps to enter upon the reference raised the statutory presumption of negligence and refusal to act as an arbitrator within the meaning of Section 9 and in such a situation the party was held to be entitled to move the court for appointment of an arbitrator." This judgment is not applicable to the facts of the present case.

12. In *Sarkar & Sarkar v. State of West Bengal* (supra), the facts were that by a letter dated 17th May, 1984 the Chief Engineer was asked to arbitrate the claim within thirty days. When nothing was heard from him, the petitioner sent a reminder dated 8th February, 1989 but still the Chief Engineer neither commenced the arbitration proceedings himself nor appointed any arbitrator. On these facts it was held that Chief Engineer had failed, neglected or refused to act as an arbitrator and in those circumstances the authority of the said arbitrator was liable to be revoked and a fit and proper person was entitled to be appointed to act as sole arbitrator in place of the Chief Engineer." Reliance has been placed by the Calcutta High Court in that case upon the earlier judgment of the Court in *Excalcer v. The State of West Bengal* AIR 1980 Cal 80. The ratio of this case is also not applicable to the facts and circumstances of the present case. In the present case the undisputed facts are that on the petitioner invoking the arbitration agreement on 14th September, 1993 the arbitrator was appointed on 29th April, 1994 who entered upon the reference on 30th September, 1994. The present case is also not a case where the arbitrator had not commenced the proceedings before the filing of the petition for his removal. On the contrary, the present petition has been filed after the arbitrator had given notice to the petitioner to file its statement of claim before him.

13. On the basis of the material on record, I am of the considered opinion that there is no case made out by the petitioner nor there is anything on record to show that the arbitrator had not acted with reasonable dispatch in the conduct of the arbitration proceedings.

14. In my opinion, there is no case for removal of the arbitrator. The petitioner is not entitled to any relief in the petition and the same is, accordingly, dismissed.

15. Interim orders passed on 6th December, 1994 staying the proceedings before the arbitrator are hereby vacated.

16. In the circumstances of the case, I leave the parties to bear their own costs.