
(1970) 09 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : Arbitration Petn No. 30 of 1969

M/s. Roshan Lal Sethi

APPELLANT

Vs

The Chief Secretary and others

RESPONDENT

Date of Decision : 28-09-1970

Acts Referred:

Arbitration Act, 1940 — Section 20, 5

Citation : AIR 1971 J&K 91

Hon'ble Judges : Janki Nath Bhat, J

Bench : Single Bench

Advocate : R.S. Mehta, for the Appellant; Amar Chand, for the Respondent

Judgement

J.N. Bhat, J.—This is an application under Ss. 20 and 5 of the Arbitration Act directing the non-applicants to file the agreement in the Court

and for removal of the Arbitrator designate, the Chief Conservator of Forests and for referring the matter in dispute to an independent Arbitrator.

The petition states that the petitioner entered into an agreement on 15-5-1965 for working, extracting and removal of sawing from Compartment

No. 291 of Mandhar Range, Poonch Division against a tendered royalty of Rs. 6,85,629-51. The duration of the lease was three years subject to

such extensions as would be granted by the Chief Conservator of Forests. The petitioner started operating the lease when on 14th of August 1965

armed infiltrators from Pakistan occupied the forest under the operation of the petitioner. This resulted in complete dislocation of the working of the

petitioner and huge loss to them. Then the petitioner by means of various letters sought out reliefs from the forest department but to no avail.

On the representation of the petitioner the Conservator of Forests concerned who is the respondent No. 3 in the petition, by means of his letter

No. 2108-09 dated 3-2-1966 referred the petitioner to Clause 30 of the agreement intimating to them that the timber extracted from the trees

marked and sold to the lessee would lie at the risk of the petitioner and the department was not responsible for any loss sustained by the petitioner.

The Government had earmarked Rupees twenty-five lacs for the lessees affected by the war. The petitioner also requested the Chief Conservator

of Forests by means of letters dated 10-1-1966 and 7-7-1966 for grant of a loan as a relief measure. This was ignored by the Chief Conservator

of Forests who is the respondent No. 2 in this petition. In another letter dated 7th July, 1966 the petitioners requested the Chief Conservator of

Forests to permit them to transport the extracted timber from the launching ghat without payment of the first instalment of proportionate royalty but

this request of the petitioner was rejected by the Chief Conservator of Forests vide his letter No. 1672/C dated 10-7-1966 who drew the

attention of the applicant to clause 3 of the agreement.

Then further correspondence ensued between the parties. Bank loan was also refused to the petitioner as contained in the letter No. 1159/vii

23/27 dated 19-2-1966. This was done after the telephonic talk by the Conservator of Forests with the Chief Conservator of Forests. The

petitioner's grievance is that a launching ghat was not fixed by the D.F.O. as required under clause 8 of the agreement. According to the petitioner

as he had filed an application against the Conservator of Forests in the Anti-corruption Commission, the Conservator of Forests was inimically

disposed towards him. It is further stated that on the representation of the petitioner the then Minister for Forest, Shri D.P. Dhar, verbally directed

the Chief Conservator of Forests to transfer this case of the petitioner to another Conservator but the Chief Conservator of Forests did not do so.

Extension was requested for but the Conservator of Forests in consultation with the Chief Conservator of Forests vide letter No. 105/c-II, dated

20-5-1969 decided to quash the lease of the petitioner and resell the same and directed the D.F.O. concerned to take over the lease compartment

from the petitioner. Then in para No. 9 of the petition the points of difference between the parties are mentioned. It is emphasized that the

Conservator of Forests and the Chief Conservator of Forests mala fide passed the orders, which they did to ruin the petitioner. In para No. 10 of

the petition he mentions the grounds how the Chief Conservator of Forests, the Arbitrator designate in the agreement forfeited the confidence of

the petitioner. These grounds may be summarised as follows:

(i) that the arbitrator has been a party to all the decisions taken by the Conservator of Forests:

(ii) that the petitioner was refused loan facilities under the direction of the Chief Conservator of Forests:

(iii) that the question of terminating the lease and reselling the forest was taken under the direction and with the consultation of the Chief

Conservator of Forest;

(iv) that on the interpretation of Clause 30, the Chief Conservator of Forests has pre-judged the issue against the petitioner and in favour of the

Department by his letter No. 1633-34/c dated 28-12-1965;

(v) that the taking over of the compartment by the D.F.O. under the orders of the Conservator of Forests is the direct result of the Chief

Conservator of Forests' directions to the Conservator of Forests;

2. A number of documents referred to in the petition have been placed on the file which will be discussed later. Objections were filed against this

petition by the respondents, and it is stated therein that there was a misjoinder of parties, statement of irrelevant matters and mis-representation of

facts. The petitioner has prayed for the removal of the Arbitrator when the proceedings have not yet been initiated. About the facts it is stated that

the lease mentioned in the petition was sanctioned in favour of the petitioner and an agreement was executed and the petitioner had not been

working out the lease earnestly. Pakistani raid is admitted but the rest of the contentions of the petition in this para are denied. The applications

presented by the petitioner to the department are not denied but it is stated that the disposal of the applications was legally correct and factually

justified. Some paras of the petition are described as irrelevant. The question of mala fide is denied. The order of the Minister directing the Chief

Conservator of Forests to transfer the case of the petitioner to another Conservator is also denied. It is stated that the Chief Conservator of

Forests is the Arbitrator and he cannot be removed as he is the Arbitrator appointed by the parties with their full consent.

3. Arguments were heard in this petition more than once. At one stage the

Additional Advocate General who argued the case ultimately put in an affidavit of Mr. G. Naqishbund, the Chief Conservator of Forests wherein it is stated that the letters which he had written were written by him as the Head of the Department and not as Arbitrator. The letters and orders referred to in the petition were written by him bona fide. The collusion alleged by the petitioner was denied. About the telephonic talk it is stated that he has no recollections and he makes a statement that he will approach the matter with an open and unbiased mind in case he is appointed the Arbitrator.

4. There is no dispute between the parties that the matter may be referred to an Arbitrator. The differences have arisen between the parties and an

Arbitrator as contemplated in the agreement has to be appointed. The sole question is whether the Arbitrator designate namely the Chief

Conservator of Forests should be the Arbitrator or somebody else. Mr. Raina Advocate General formerly and later on Mr. Amarchand, the

Additional Advocate General argued with vehemence that the parties have chosen their own Arbitrator knowing full well at the time of the

execution of the agreement that the Arbitrator designate was the head of the Forest Department therefore they are bound by this commitment of

theirs and the matter should be referred to the Arbitration of theirs and the matters should be referred to the Arbitration of the said Chief

Conservator of Forests and nobody else. The learned Advocate General has referred me to the following authorities:

Bhuwarka Bros. Ltd. Vs. Fatehchand Murlidhar, , AIR 1926 Sind 27, AIR 1933 Sind 75, Kovur Parvathamma Vs. Kovur Subbamma and

Another, , Daulat Ram Rala Ram Vs. State of Punjab, and to an English Authority Jackson v. Barry Rly. Co., reported as The Law Report (1893)

I Ch. 238, which has been referred to by the petitioner also. He has further referred to a case decided by the Hon'ble Mr. Justice Jaswant Singh

M/s. Handa and Co. v. State of Jammu and Kashmir on 27th May, 1969.

5. The petitioner's counsel referred to the following authorities: Fertilizer Corporation of India Limited Vs. Domestic Engineering Installation, , Uttar

Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi, , AIR 1913 AC 241, AIR 1937 436 (Oudh) .

Before discussing the law on the point let us see what are the letters written by

the Chief Conservator of Forests or under his directions which according to the petitioner disqualify him from acting as an Arbitrator. As I said earlier a number of letters that were exchanged between the forest department and the petitioner were placed on the file. These are not denied but I may refer only to a few of them for the disposal of this point.

6. In letter No. 1159/vii 23/72 dated 19-2-1966, which is Annexure G to the petition, the Conservator of Forests writes to the petitioner that due thought and consideration has been given to the request of the petitioner for loan of Rupees One Lac and regrets his inability to sanction the loan for the reasons contained in the letter. At the end of letter is an endorsement to the following effect:-

Copy to Chief Conservator of Forests, J. and K. Government for information and necessary action in reference to his telephonic talk of today 17-2-1966.

7. Letter No. 1672/C dated 7-7-1966 written on behalf of the Chief Conservator of Forests to the petitioner. In this letter it is stated that the attention of the lessee is invited to Clause 8 of the agreement under which no permission for removal of any timber without payment of first instalment of royalty can be permitted. As such no accommodation could be shown to the petitioner.

8. Then there is another letter No. 857/vii 23/72 dated 13-10-1967 which is from the Conservator of Forests to the petitioner. It is a notice that the petitioner should start work in right earnest, pay the royalty; otherwise he would be liable to action under Cl. 14 of the agreement. This again would be without prejudice to any action that may be taken against the petitioner for any default or defaults under the terms of the agreement. A copy of this letter has been sent to the Chief Conservator of Forests in reference to his D.O. Letter No. 1287-94 dated 9-9-1967. This D.O. No. 1287-94 dated 9-9-1967 has not been made available by the department to the court.

9. In another letter No. 1633-34/C dated 29-12-1965 from the Chief Conservator of Forests to the petitioner, he has referred the petitioner to Clause 13 of the agreement under which it is clearly laid down that the timber extracted from the trees marked and sold would remain at the purchaser's risk and the lessor would not be responsible for any loss or damage.

A copy of this letter has been sent to the Conservator of Forests for information.

10. There is then letter No. 360 dated 8-10-1969 addressed to the Conservator of Forests from the Chief Conservator of Forests, which reads as under:-

As reported and recommended by you. Administration approval is hereby accorded as under in respect of the compartment 292 Mendhar.

Since the lessee shows no interest in the work and period of working has expired the lease be sold afresh after taking over coupe enlisting all the stocks at various steps. A writ of demand may be made against the firm for recovery of the balance due through the Collector. Auction notice be sent to this office for check.

291 Mendhar:

Since the period is over and the only course now left is to resell this lease and send writ of demand for total amount that has become due to the Collector.

These are a few among the many letters placed on record by the petitioner.

11. I shall have to consider in the light of these letters whether the Arbitrator designate, the Chief Conservator of Forests, should be appointed as

an Arbitrator or has he rendered himself unfit for taking over this arbitration. It has been argued at great length by the learned counsel for the

petitioner that the Chief Conservator of Forests has conducted himself in such a way as has completely disintitiled him to act as an Arbitrator. He

has argued that the Chief Conservator of Forests has exercised powers which he could not do under the agreement and passed a number of

orders against the interests of the petitioner, which he was not at all under the law competent to pass. As such also the disqualification that he has

incurred is aggravated. It has been argued that the act of the Chief Conservator of Forests in his last letter No. CCF-360 dated 8-10-1969 in

which he has terminated the lease of the petitioner and ordered that the lease be sold afresh, stocks be taken over and a writ of demand be issued

against the petitioner for recovery of the balance, is an act which he the Chief Conservator of Forests was not empowered to do. The relevant

clauses in the agreement are clauses 8 and 14 which read as under:-

8. The purchaser (s) shall not launch, remove, beyond the limits of leased area or such place or depot as the D.F.O. concerned may fix any part of

timber extracted from trees sold under this agreement, before he/they has/have paid the first instalment provided for in clause 6 or the

proportionate amount to cover the quantity of timber intended to be removed.

Explanation: ""Launching"" covers both launching into the side streams as well as into the main river.

Note: For calculating the value of the timber launched or removed the proportion of sawn timber will generally be taken by D.F.O. upto 60 and 50

Cft. in case of Deodar and Kail respectively and 40 Cft. in the case of Chir and Fir and 75 Cft. log timber shall be considered to be equivalent to

10 Cft. of standing volume. The Conservator of Forests may, however', vary its proportion on his personal responsibility on the basis of such

factors as crop quality, soundness of timber expected for each coupe and thoroughness of conversion. His decision will in this respect be binding

on the lessee.

14. If in the opinion of the Conservator of Forests, the purchaser (s) has/ have not begun their work in an earnest and thorough manner before end

of May 1965 or having begun his/their work does/do not prosecute it in the same spirit or in the event of any amounts, payable under this

agreement being arrears for more than three months or of repeated delays in the payment of instalments of the purchase money the Conservator of

Forests may declare this agreement cancelled and recall the timber and confiscate the security money and all other money already paid by or on

behalf of the purchaser (s) under this agreement. In the event of timber being resold under this clause of the agreement, the purchaser/purchaser (s)

shall be liable to make good, to the lessor any loss that may occur through the purchaser (s) failure to carry out the agreement. Final action under

this clause will, however, be taken by the Conservator of Forests after serving one month's notice in writing to the purchaser (s).

Clause 8 quoted above empowers the D.F.O. to fix the limit beyond which the timber cannot be taken unless the royalty is paid. The D.F.O. has

further the power to take upto 60 and 50 Cft. in case of Deodar and Kail respectively and 40 Cft. in case of Chir and Fir and 75 Cft. log timber

equivalent to 100 Cft. of standing volume and the Conservator of Forests has

power to vary its proportion on his personal responsibility. The Chief Conservator of Forests does not come into the picture at all.

12. Similarly the final authority under the specified conditions mentioned in Clause 14 quoted above, for cancelling the lease and to recall the timber and confiscate security money is the Conservator and again the Chief Conservator of Forests does not come in the picture at all so far as the cancellation or determination of the lease is concerned. Therefore it is argued by the learned counsel for the petitioner. that any order of

cancellation of lease passed by the Chief Conservator of Forests is ultra vires, beyond his powers under the agreement but only shows the bias in his mind and will result in his disqualification of being appointed as an arbitrator in this dispute. In my opinion this argument is sound. There is a

definite agreement between the parties laying down the conditions of the working of the lease. Specified authorities have been given powers to do certain acts under the agreement. The Chief Conservator of Forests also figures in the agreement for instance in Clauses Nos. 3, 4, 5(2), 6, 26 etc.

But the Chief Conservator of Forests does not come in at all so far as Clauses 8 and 14 are concerned. The relationship of the parties is governed by the terms of the agreement and only those officers who have been mentioned in any particular clause can exercise powers and none else, may

be superior or inferior. It is a contractual matter and not an administrative one, so neither party can act outside the terms of the contract. In an administrative matter if the powers are vested in the inferior officer, his superior also can exercise them but not so in the case of a matter which is

embodied in a contract. It seems administrative powers have been confused with contractual ones. Therefore interpreting the terms of this

agreement, the Chief Conservator of Forests' final order as contained in his letter No. 360 was beyond the scope of the terms of the agreement

and he was not under law empowered to pass it. The Conservator of Forests could have terminated or cancelled the lease of the petitioner. The

case of the petitioner is that his lease has been wrongfully and mala fide terminated. In this case the argument of the petitioner becomes stronger

because it has been terminated by the Arbitrator designate without having any power to do so under the agreement or as put by the learned

counsel for the petitioner he has prejudged the whole matter which had to come

to him as an Arbitrator and which had been made very much a grievance of, in this petition.

13. Not only from the final letter terminating the lease of the petitioner and ordering its resale has the Arbitrator designate prejudged the matter but

the other letters also referred to by me earlier, indicate that whatever was being done was being done in consultation and with the approval of the

Chief Conservator of Forests. In the first letter of 19-2-1966 a reference is made to the telephonic talk of the Chief Conservator of Forests of 17-

2-1966. Similarly letter No. 1672/C, dated 7-7-1967 conveys to the petitioner from the Chief Conservator of Forests that he cannot remove the

timber unless royalty is paid. In the same way has the Arbitrator designate made certain remarks in his letter No. 857/vii/72, dated 13-10-1967

and No. 1633-34/C, dated 29-12-1965.

14. On these brief facts which emerge from the admitted correspondence of the parties, I do not think that it would be proper at all to appoint the

Chief Conservator of Forests as an Arbitrator. Here now I must cite the authorities cited by the parties and others that have come to my hand on

this point. First let me quote the authorities cited by the respondent's learned counsel.

AIR 1954 Mys 46 is not relevant.

15. In AIR 1933 Sind 75 the fact that the Chief Engineer of one of the parties to the contract, who was nominated as arbitrator in the contract, had

a duty to which the works in respect of which contract was given and might already have formed an opinion upon the matter in dispute is not

enough, in the absence of any evidence that he would not act fairly, to prevent him from being the proper person to decide the dispute. The case is

distinguishable. The Engineer's role as an expert is different from that of a person who acts as an agent of the party and adjudicates on the merits of

the case.

16. Kovur Parvathamma Vs. Kovur Subbamma and Another, does not at all support the case of the respondents because in that case one of the

contracting parties was an illiterate woman. It was held that

.....it is incumbent upon the party desiring to uphold the reference, to show that not only was the plaintiff dimly conscious of the fact that the

arbitrator had an interest but that she thoroughly comprehended the transaction and was made aware of the implications and the consequences of her act.....

It is however significant to remark that the reference was revoked in that case.

17. AIR 1926 Sind 27 also is not very helpful to the respondents. This authority is based on (1893) 1 Ch 238 which will be referred to shortly.

This authority clearly says that if the Arbitrator has made up his mind so as not to be open to change it upon argument, or that he will most certainly

tilt the scales against the opponent, that person cannot be appointed as an Arbitrator.

18. Daulat Ram Rala Ram Vs. State of Punjab, again is a case of an Engineer. There also it has been held that:-

.....Where it has not been shown that the Superintending Engineer is biased or that there is a probability that he would be biased, the

presumption is that the gentleman, holding such a high office, would keep in mind the duties and responsibilities of an arbitrator and would act as a

honest, disinterested and impartial tribunal, absolutely uninfluenced by the fact that he is the head of the department to which the dispute relates.

The only allegation against the Arbitrator in that case was that he was the head of the department, which in the opinion of the learned Judge was

not sufficient to disqualify him from being an Arbitrator. So according to these) authorities also it is clear that an Arbitrator designate can be

removed if it is shown that he has some bias or has formed some opinion about the matter.

19. The last judgment referred to by the learned counsel for respondents is the judgment of my learned brother Justice Jaswant Singh in M/s

Handa and Co. v. The State of Jammu and Kashmir decided on 27-5-1969. But that judgment has been set aside by a Division Bench of this

court on appeal on 9th September, 1970.

20. Now let me refer to the authorities cited by the learned counsel for the petitioner and other authorities relevant on the point.

21. In Halsbury's Laws of England, Third Edition, 2 (1953) LE 525 (Paragraph 1041) it is stated that:

Where under the contract disputes are to be referred to the Engineer and there are serious allegations by the contractor of continued

unreasonableness against the Engineer or his conduct is challenged (this being the substantial question in dispute) the Court may refuse to stay the

contractor's action. The engineer or architect will be disqualified from acting as quasi-arbitrator if he ceased to be a free agent (for example by

acting) regardless of his own opinion, on instructions of his employers in reference to the matter submitted to him as quasi-arbitrator, and he will be

disqualified from acting as arbitrator, where the dispute is such that there will probably arise a conflict of evidence between himself and the

contractor by which he would necessarily be placed in the position of both witness and Judge.

In 1893 1 Ch 238 relied upon by the learned counsel for the respondent the finding is like this:

A contract by which the plaintiff undertook to construct a dock for the defendant company provided any dispute between the company and the

contractor as to the meaning of any part of the contract, or as to the quality or description of the materials to be used in the works, should be

referred to the company's Engineer as arbitrator..... A correspondence took place between the contractor and the engineer, in which the

engineer stated his view to be that the contract bound the contractor to use stone and that it was not an extra.

Kekewich J. held that the last letter showed that the engineer had finally made up his mind on the points and was, therefore, disqualified to act as

arbitrator and granted an injunction.

This judgment was set aside on appeal holding that considering the position of the engineer who as engineer of the company, must necessarily have

already expressed an opinion on the point in dispute his writing after the commencement of the arbitration a letter repeating the same opinion would

not disqualify him from acting as arbitrator unless on the fair consideration of the letter, it appeared that he had made up his mind so as not to be

open to change it upon argument.

Even in this authority the words underlined by me are significant. In Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi, it

has been held that:-

The strict principle of sanctity of contract is subject to the discretion of the Court u/s. 34 of the Indian Arbitration Act..... 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 act unfairly or that he has been guilty of continued unreasonable conduct.....

On page 252 para 7 it is remarked that

..... It is alleged by the respondent that the Registrar of Co-operative Societies is ex-officio President of the Society and it was with his

approval that the agreement in dispute was terminated. It was also pointed out that the Registrar was the chief controlling and supervising officer of

the Society under its bye-laws. It was submitted that the Registrar may not act fairly in the matter and it is improper that he should be an arbitrator

in the dispute between the parties. In our opinion there is much validity in this argument.....

In Fertilizer Corporation of India Limited Vs. Domestic Engineering Installation, it has been held that:-

A party is entitled to be released from a bargain if he could show that the selected arbitrator was likely to show bias or that there were sufficient

reasons to suspect that he would act unfairly or that he had been guilty of continued unreasonable conduct. This principle applies also to the

proceedings u/s 20.

In 1913 AC 241 the finding is:-

.....where the action embraces several items, all within the reference clause, as to some of which the arbitrator is disqualified from acting, the

Court should allow the action to proceed as to these items and allow the remaining items to be referred.

Bhuwarka Bros. Ltd. Vs. Fatehchand Murlidhar, was also referred to by the learned counsel for the respondents. In this authority two tests are laid

(1) the court should not lightly release the parties from their bargain, that follows from the sanctity the court attaches to contracts; and (2) the court

should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal to grant the leave..... ""Convenience and the

inconvenience of the parties must be balanced..... Before everything it is important that parties get adjudication of their disputes in an impartial

tribunal and in the situation of which no circumstance exists which tends to produce a bias in its mind.

In Corpus Juris Secundum Vol. VI (6 C.J.S.) page 187 it has been held that:

.....the fact that an arbitrator has previously formed and expressed his opinion on the matter submitted may be ground for setting aside the award.

Russell on Arbitration (1800 Edition) Eighth Edition page 79-80 writes:-

The arbitrator ought to be a person who stands indifferent between the parties. If he have any secret interest in the subject in question, or have any bad feeling towards either disputant, he is not a proper person to be a judge between them.

See Parker v. Burrough, Colle's Pari. Cas. 257, Earl v. Stocker, (1691) 2 Vern 251.

Thus if an architect engages with his employer or even if he assures his employer, though he expressly declines to guarantee his assurance that the cost of building a church or house will not exceed a certain sum, and the builder is not informed of this engagement the court will not allow him to decide as arbitrator on the builder's claim for extras.

See Kemp v. Rose, (1858) 1 Giff, 258. Kimberley v. Dick, (1872) 13 Eq. 1.

22. Taking all these things into consideration it has been decided by English as well as Indian authorities including the Supreme Court that a party

may be released from an arbitration clause if he can show that the selected arbitrator is likely to show bias or there is sufficient reason to suspect

that he will act unfairly or that he has been guilty of continued unreasonable conduct, or that he has prejudged or formed an opinion about any

matter likely to be referred to his arbitration. For deciding this point it is not necessary to prove that the Arbitrator designate will necessarily act

unfairly but all that is necessary is to prove that there is likelihood of a reasonable apprehension in the mind of one of the parties that the arbitrator

may not act fairly. If the Arbitrator has prejudged certain matters or his mind is made up on certain matters which are likely to come up for

adjudication before him, that by itself is a sufficient disqualification for the Arbitrator to act as such.

In the instance case I have no reason to disbelieve the affidavit of the Chief Conservator of Forests that he would approach the dispute with an

open mind. He may decide the matter with an open mind and I have expectations also that he would do so, but I have to look at the matter from all

points of view and decide the point as point of law and not as a matter which concerns the person of Mr. Naqushbund, The petitioner has a legal

justification for insisting that the Chief Conservator of Forests should not be appointed as an Arbitrator. He has made out a legal case that due to a

number of commitments by Mr. Naqushbund expressing his opinion on various important matters in issue in this case, there is a reasonable

apprehension in the mind of the petitioner that he would not get a fair deal from the Arbitrator designate.

23. In view of the above discussion, I decline to appoint Mr. G. Naqushbund, the Chief Conservator of Forests as Arbitrator in this case. A new

Arbitrator has to be appointed. The case will come up for that purpose on 23rd October, 1970.