
(1965) 03 CAL CK 0016
In the Calcutta High Court
Case No : Award No. 4 of 1965

Pherumal and Co.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 08-03-1965

Acts Referred:

Arbitration Act, 1940 — Section 30

Citation : AIR 1966 Cal 461 : (1966) 1 ILR (Cal) 208

Hon'ble Judges : P.C. Mallick, J

Bench : Single Bench

Advocate : M. Hazra and A.C. Bhabra, for the Appellant; W.K. De, for the Respondent

Final Decision : Allowed

Judgement

P.C. Mallick, J.—This is an application for removal of an arbitrator and for appointment of a new arbitrator in his place and stead. The petitioner is a firm of contractors who did certain works for the South Eastern Railway under a contract. The contract contains an arbitration clause being clause No. 34 whereby the dispute between the parties under the contract shall be referred to the arbitration of such railway officer retired or in service as shall be nominated to be the arbitrator by the General Manager, South Eastern Railway for the time being in his absolute discretion." The petitioner instituted a suit in this Court being Suit No. 965 of 1960, inter alia, for recovery of the balance of his claim for works done and for refund of security deposit. On the application of the Government u/s 34 of the Indian Arbitration Act the suit was stayed on February 6, 1961. Against this order of stay an appeal was preferred but ultimately the appeal was withdrawn by consent. On February 25, 1963 the General Manager, South Eastern Railway appointed Mr. N.K. Mitra, a superannuated Chief Engineer of the South Eastern Railway, as arbitrator. Unfortunately in the letter of nomination he specified five disputed claims for adjudication. The petitioner's case is that apart from the 5 claims referred to, the petitioner had other claims exceeding more

than Rs. 2 lacs. In the state of facts filed by the petitioner before Shri N.K. Mitra, the Arbitrator, the petitioner not merely included the 5 claims specified in the letter but their other claims as well. The Government in its counter state of facts contended that the additional claims made in the petitioner's state of facts were outside the scope of reference and the Arbitrator had no jurisdiction to adjudicate their claims. I should have noted that before filing the state of facts the petitioner requested the General Manager by their letter dated April 4, 1963 to clarify the position to the effect that other claims of the contractor were intended to be adjusted by arbitration. The General Manager by his letter of July 3, 1963 contended that the reference was in terms of the order passed by me staying the suit and the question of additional claims did not arise. On July 19/27, 1963 the General Manager appointed Shri N. Hazra, the present Chief Engineer, as arbitrator in place of Shri N.K. Mitra who died in June 1963. The letter of appointment was in the same terms as in the case of appointment of Shri N.K. Mitra, i.e., the letter specified the 5 disputed claims. Thereupon the petitioner took out a notice u/s 33 of the Arbitration Act for determination of the effect of the arbitration agreement and for a direction that all other disputes are referable. There was a further prayer for removal of Shri Hazra and/or declaring his appointment to be invalid. The application ended by a consent order whereby it was agreed that Shri Hazra was not to act as arbitrator and the petitioner will be at liberty to raise such disputes as they please and the Railway would be entitled to object to the same on the ground that the disputes did not exist before the original reference. Thereupon the General Manager made a third nomination in favour of Shri P.V. Raghava Rao, Engineer-in-Chief. The letter of nomination is in the same terms as before, i.e. it specified the 5 items of disputed claim only though it indicated that the petitioner would be entitled to other reliefs. Along with the letter of appointment a copy of the consent order was sent by the General Manager to Shri Rao, the new Arbitrator. On August 18, 1964 Shri Rao directed the petitioner to file his statement of claim. The last paragraph of that letter reads as follows:

"Will you please let me have a complete statement of your case item wise (in duplicate) on the items of claims mentioned in G. M.'s above quoted letter (extract enclosed) within a fortnight of receipt of this letter sending a copy of your statement of facts direct to the General Manager, South Eastern Railway, Garden Reach. Calcutta."

The extract of the General Manager's letter referred to and enclosed to the said letter consists of the following items of claims:--

Item of claims : Amounts claimed

1. Claims for balance dues against works done : Rs. 1,59,757.00 P
2. Refund of Security deposit : Rs. 58,000.00 P
3. Refund of Security Deposit recovered from Running bills : Rs. 1,48,327.00 P

4. Interest : Amount not mentioned

5. Other reliefs : Amount not mentioned

In reply the petitioner addressed a letter to the Arbitrator on September 1 1964 which reads as follows:

"Ref. Your letter No. ARB/8 dt. 18th Aug. 1964.

With reference to your letter quoted above, we beg to send herewith a copy of order of Hon"ble High Court of Calcutta dated 39th July, 1964 in Matter No. 69 of 1964 from which you will find that the General Manager has no right or authority to mention the items of our claims and we are at liberty to raise such disputes before the learned Arbitrator as we please. As such we request you to please amend your order or direction given in your letter under reply on receipt of which we shall file our statement of fact.

We further hope that you will expedite your reply to this letter amending your order or direction as early as possible.

Thanking you."

On receipt of this letter the Arbitrator addressed a private D. O. letter to. the Deputy General Manager South Eastern Railway on September 5, which reads as follows:

"Ref. My No. ARB/8 dated 18-8-64.

Your attention is invited to Contractors, Pherumal and Co's letter dated 1-9-64. It is contended by the contractors that the General Manager has no right or authority to mention the items of their claims and they are at liberty to raise such disputes before the learned Arbitrator as they please. Although such an order is contained in the Hon"ble High Court's order copy sent to me as enclosure, as there is a definite order in the letter appointing me as Arbitrator or arbitrate on claims mentioned therein, I did not think it proper to go beyond the direction given in the letter of the General Manager. If the General Manager wishes to abide by the order given by the Court, a fresh letter appointing me as an Arbitrator and asking me to adjudicate on all disputes--preferred by the contractor before me, may please be issued to enable me to take further action in this case."

A copy of this letter was not sent to the petitioner. This letter was replied to on September 29, 1964 and reads as follows:--

"Ref. Your letter No. ARB/8 dt. 18th Aug. 1964.

With reference to your letter quoted above we beg to send herewith a copy of order of Hon"ble high Court of Calcutta dated 29th July, 1964 in Matter No. 69 of 1964 from which you will find that the General Manager has no right or authority to mention the items of our claims and we are at liberty to raise such disputes before the learned Arbitrator as we please. As such we request you to please

amend your order or direction given in your letter under reply on receipt of which we shall file our statement of fact.

We further hope that you will expedite your reply to this letter amending your order or direction as early as possible. Thanking you."

A copy of this letter was sent to the petitioner. On October 19, 1964 the Arbitrator directed the petitioner to file its statement of fact within a fortnight in writing. The letter reads as follows:

"Re. Arbitration: Ref. Your letter dated 1-9-1964.

Your attention is invited to General Manager, South Eastern Railway, Garden Beach's letter No. AW/9B/1/99/19048 dated 29-9-64. Since the 5 items of claims preferred to me for Arbitration contain as item "Other reliefs--Amount not mentioned", you are at liberty to put up such claims as you please. As such, there is no need of amending my order given under this office letter No. ARB/8 dated 18-8-1964.

Will you please now let me have a complete statement of your case item wise (in duplicate) within a fortnight of receipt of this letter sending a copy of your statement of facts direct to the General Manager, South Eastern Railway, Garden Reach, Calcutta.

Receipt of this may please be acknowledged."

On November 4, 1964 the petitioner by its letter requested the Arbitrator to kindly give time up to November 25, 1964 to consider the position and also the direction given by the Arbitrator in the letter under reply. The request was complied with and time to file statement extended till November 25, 1964.

2. On November 19, 1964 the petitioner addressed the following letter to the Arbitrator requesting him to stay his hands.

"With reference to your letters Nos. ARB/ 8/10 and ARB/8 dated 19-10-64 and 12/ 13-11-64 respectively, we beg to state that it appears from a copy of letter No. AW/19043/ 9B/1/99 dated 29-9-64 from Sri S.C. Banerjee for the General Manager to you that on or about 5th Sept. 1964 you had addressed a private D.O. letter No. ARB/8/8 to Sri S.C. Banerjee, Deputy General Manager (General) without sending a copy of the same to us. In order to enable us to decide our future course of action including the filing of statement of facts, we have been advised to ask for a demand from you a copy of your said D.O. letter No. ARB/8/8 dated 5-9-64 to Shri S. C. Banerjee.

We, therefore, request you to send immediately a copy of the said D. O. letter on receipt of which we shall decide our future course of action.

You will appreciate that by your letter dated 4-11-64, we had asked for time up to 25th Novr. 1964 in order to consider our position after consulting our lawyers who were out of station at that time as mentioned in the said letter. As such it

will not be possible for us until and unless we get a copy of your aforesaid D. O. letter to Sri S.C. Banerjee to carry out your direction for submission of statement of fact.

We, therefore, request you to stay your hands and particularly regarding directions for filing of our statement of fact till at least a fortnight after receipt of a copy of your aforesaid D. O. letter to Sri S.C. Banerjee.

This is without prejudice to our contention that such private correspondence by D. O. letters to an officer of the Railway Administration behind our back and without any copy to us is highly objectionable and we protest against the same. Thanking you".

This was replied to by the Arbitrator on December 15, 1964 and reads as follows:

"Ref Your letter dated 16-11-1964.

I am of the opinion that the D. O. referred to in C. M s letter of 29-9-64 is now not relevant so far as the issue raised by you in your letter of 1-9-64 is concerned. You were already permitted to put up such claims before the Arbitrator as you please, vide my No. ARB/8/10 dated 19-10-64.

You are, therefore, advised to expedite submission of a complete statement of your case item wise (in duplicate) without further loss of time, sending a copy of your statement of fact direct to the General Manager, S.E. Railway, Garden Reach, Calcutta.

Receipt of this may please be acknowledged."

3. On June 6, 1965 the instant notice was taken out by the petitioner for removal of the Arbitrator. Mr. Hazra, learned counsel appearing in support of the petition contends that the Arbitrator had misconducted himself in the proceedings in writing a D. O. letter to the Deputy General Manager on September 5, 1964 above referred to and in not furnishing the petitioner with a copy even when requested to do so. This indicates that failure to send a copy was not by inadvertence. It was a deliberate act on the part of the Arbitrator. Mr. Hazra further contended that there is intrinsic evidence in the letter itself that the Arbitrator would not be able to act impartially and that he is apt to think that as a subordinate officer of the General Manager he is to comply with the orders of the General Manager. The petitioner, therefore, has reasonable apprehension that the Arbitrator will not be able to act impartially and that the petitioner will not get justice from him.

4. Mr. Debi De, learned counsel for the respondent submitted that the Arbitrator, in fact has accepted the contention of the petitioner and allowed him to make claims other than the 5 items referred to in the letter of nomination. The petitioner, therefore, has no grievance on that score. In Mr. De's submission the petitioner has therefore no occasion to make a fuss and make a mountain out of a molehill of this letter. The General Manager is no doubt the head of the Railway

Administration and as such, a party to proceeding. But he has under the arbitration agreement another function to discharge. He is the authority to nominate an arbitrator. The offending letter was addressed to the General Manager not in his capacity as head of the Railway Administration but as the nominating authority. On receipt of the petitioner's letter dated September 1, 1964 the Arbitrator felt that the letter of nomination was not in order and he wanted to have it clarified and corrected. The concluding sentence of the letter proves conclusively that that was the object of the letter. The Arbitrator felt rightly or wrongly that the letter runs counter to the High Court order and that in order to invest him with jurisdiction it was necessary to state that apart from the 5 items specified in this letter the petitioner was entitled to make other claims. Undue importance should not be attached to the next preceding sentence in which the Arbitrator made an observation that he did not think it proper to go beyond the direction given in the letter of the General Manager. The letter is absolutely innocuous according to Mr. De, It does indicate that the Arbitrator would not be impartial. On the other hand, it indicates that the Arbitrator accepted the contention of the petitioner in preference to what he believed to be the viewpoint of the General Manager. Mr. De emphasized that the offending letter is not a communication by a party to the Arbitrator but it is a communication by the Arbitrator to the nominating authorities. It is a bona fide attempt by a lay arbitrator to understand and clarify the letter of nomination and nothing more. Mr. De submitted that at the time of writing the letter the Arbitrator had no knowledge of what the disputes were. His re-action on a first look of the letter addressed by the petitioner on Sept. 1, 1964 was that the letter of nomination of the General Manager required clarification. Hence he wrote the offending letter. The letter had no reference to the dispute the Arbitrator had to adjudicate. Hence it was not imperative for the Arbitrator either to give the petitioner a copy or intimate to the petitioner that he addressed such a letter to the Arbitrator. In writing the offending letter and not furnishing the petitioner with a copy the Arbitrator cannot be held to have misconducted in the proceeding.

5. Mr. Hazra, learned counsel appearing in support of the petition, cited a number of authorities which need only be referred to but need not be fully discussed. The first case cited is the case of *Harvey v. Shelton* reported in (1844) 7 Beav. 455. It is held in this case that it was extremely wrong for one party to write a letter to the arbitrator without furnishing copy to the other party. Such act, in the opinion of the Master of the Rolls who delivered judgment, amounted to misconduct in the Proceeding. In the case reported in *Payyavula Vengamma Vs. Payyavula Kesanna and Others*, the Supreme Court cited with approval the observations made in (1844) 7 Beav. 455. It was held that a communication made by one party behind the back of other party amounted to misconduct in proceedings.

6. In the case of *Hari Singh Nehalchand v. Kankinarah Co. Ltd.*, reported in 34 Cal LJ 89: (AIR 1921 Cal 657) it was held that taking evidence by the arbitrator behind the back of the other party amounts to misconduct.

7. In the case of Husein Ebrahim Vs. Kesardeo Kanoria and Co., S. R. Das Gupta, J., held that directing third party to give rates which are relevant for the purpose of adjudication before the Arbitrator without the knowledge and consent of the parties amounts to misconduct in proceedings. On that ground amongst others he set aside the award.

8. Mr. Debi De, learned counsel appearing for the Government, however, submitted that distinction should be drawn between a communication made by a party to the arbitrator and a communication by the arbitrator himself. All the authorities cited by Mr. Hazra and relied on by him are cases in which the parties gave communication to the arbitrator behind the back of other side. It has been held that this amounts to misconduct in law. But not a single authority has been cited in which a communication made by the Arbitrator to the other party has been held to be misconduct. I am unable to accept this contention of Mr. De. An act of misconduct lies not in one of the parties making representation to the other side for which an award is liable to be vitiated but the offending act consists in the Arbitrator allowing a party to make communication behind the back of the other side. It is the act of the Arbitrator in allowing this communication that is considered to be misconduct and which vitiates the proceedings. If that is so, positive act of the Arbitrator to communicate with the other side behind the back of one party must be held to be misconduct on the same reasoning. A communication by the Arbitrator to a party behind the back of the other party, in my judgment, amounts to misconduct. This communication, however, must have reference and must be relevant to the dispute to be adjudicated by the Arbitrator. In the instant case one of the disputes to be adjudicated by the Arbitrator is whether apart from the 5 disputed claims referred to in the letter of nomination other disputed claims should be adjudicated by the Arbitrator. The offending letter does have reference to the said question. The fact that the arbitrator agreed with the contention of the petitioner is wholly immaterial. If it be one of the disputes to be adjudicated by the arbitrator, any communication by or to the arbitrator, of and relating to the same, is per se wrong and amounts to misconduct. I am not impressed by the argument that the General Manager has been addressed only in his capacity as the authority empowered to nominate an arbitrator and not in his capacity as the head of Railway Administration.

9. The fact is that the General Manager is the head of the Railway administration--a party to the arbitration. Whatever communication to be made to him by any party or the arbitrator must be made with notice to the other party. The Deputy General Manager was therefore right in sending a copy of the reply to the offending letter to the petitioner. The arbitrator in my judgment was not justified in not sending a copy of the letter to the petitioner while he wrote the same. He was equally unjustified in not sending a copy when so requested later to do so. Mr. Hazra is entitled to submit that from the tone of the letter his clients have become apprehensive that the arbitrator may not act impartially. The arbitrator did not think it proper to go beyond the direction given by the

General Manager in his letter of appointment. The petitioner may have reason to think that in discharging his duties, the arbitrator may consider himself still to be a subordinate officer under the General Manager. The apprehension that the arbitrator may not act judicially as an impartial judicial officer cannot be said to be without foundation. In my judgment Sri P.V. Raghava Rao should not be allowed to act as arbitrator. Under the agreement the General Manager is the nominating authority and before making an appointment in place and stead of Sri Raghava Rao I think it proper to give an opportunity to the General Manager to place before me three names who in his judgment should be appointed. I direct the matter to appear in my fist for final order on Tuesday fortnight. In the meantime the names are to be furnished by the General Manager and placed before the Court.

10. I make it clear that I do not myself think that Sri Raghava Rao would have acted with partiality in the instant case and no reflection in his integrity is intended by this judgment. This is an error of judgment on the part of Sri Raghava Rao which has given ground for apprehension in the mind of the petitioner. I cannot hold that the apprehension is wholly unfounded. It is imperative that the litigants should feel that justice would be done to the case.

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