

(1989) 03 AP CK 0002

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 1295 and 1432 of 1989

S. Kanyalal

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 23-03-1989

Acts Referred:

Arbitration Act, 1940 — Section 24, 30, 34, 43
Constitution of India, 1950 — Article 226
Telegraph Act, 1885 — Section 5, 7

Citation : AIR 1990 AP 1

Hon'ble Judges : Jagannadha Rao, J

Bench : Single Bench

Advocate : J.V. Lakshman Rao, for the Appellant; S. Venkateswara Rao, Central Govt. Standing Counsel, for the Respondent

Judgement

1. In these two writ petitions a question of apprehension of bias of an arbitrator appointed under the provisions of S. 7-B of the Indian Telegraph Act has been raised.

2. In these two writ petitions the petitioner prays for the appointment of any member of the Telephone Advisory Committee or Consultative Committee or any officer from any other Central Government Department or any Central Government Pleader as an arbitrator under S. 7-B in cancellation of the appointment of the 3rd respondent who is the Deputy General Manager (Administration) and who has been appointed for conducting arbitration proceedings in these two cases.

3. Section 7-B of the Telegraph Act 1885 deals with arbitration of disputes including those arising between a person having a telephone and the department in connection with alleged excess billing of telephones. The said section reads as follows:

"Section 7-B.-- (1) Except as otherwise expressly provided in this Act, if any dispute concerning any telegraph line, appliance or apparatus arises between the

telegraph authority and the person for whose benefit the line, appliance or apparatus is, or has been, provided, the dispute shall be referred to an arbitrator appointed by the Central Government either specially for determination of that dispute or generally for the determination of disputes under this section.

(2) The award of the arbitrator appointed under sub-sec. (1) shall be conclusive between the parties to the dispute and shall not be questioned in any Court."

4. In the affidavit filed in support of the writ petition the petitioner alleged that the 3rd respondent being a departmental officer in charge of the administration and working in the office of the General Manager, Hyderabad Telephones, he cannot be expected to have the required open-mindedness and impartiality to render justice to the petitioner. The petitioner submitted a representation dt. 19-1-1989 to the Union of India (1st respondent) with a copy to the 3rd respondent requesting that anybody else as is now referred to in the writ petition, be appointed as arbitrator. It is contended that the 3rd respondent being a Deputy General Manager, Administration, cannot act as an arbitrator over a dispute raised by the petitioner inasmuch as the 3rd respondent is employed by the department. This, it is stated, has created a reasonable apprehension in the mind of the petitioner that he will not get justice at the hands of the 3rd respondent. The appointment, it is said, is in violation of basic principles of natural justice.

5. It is argued by the learned counsel for the petitioner, Sri J. V. Lakshmana Rao, that the appointment of the arbitrator under S. 7-B is made under the statute itself and not by way of any agreement between the parties and that therefore any action taken administratively for appointment of an arbitrator is subject to the principles of natural justice known to administrative law. It is argued that in that context the law relating to applicability of principles of bias of appointment of arbitrator under the Arbitration Act, 1940 cannot be applied to appointments of arbitrator under the Telegraph Act. On the other hand, it is contended by Sri S. Venkateswara Rao, the Additional Standing Counsel for the Central Government that even assuming that the appointment of the arbitrator is not by way of an agreement between the parties governed by the Arbitration Act, still the same principles are, by and large, attracted and unless it is shown by the petitioner that the appointee was disqualified in some manner the Court cannot set aside the appointment and direct somebody else to be appointed.

6. A plain reading of S. 7-B shows that the Central Government has a wide discretion in appointing a person as an arbitrator generally for the determination of disputes under S. 7-B or specially for determination of a particular dispute. We are not here concerned with the validity of the abovesaid provision but we are concerned with the limited question as to whether the Central Government could appoint one of its own subordinates as an arbitrator.

7. We are all familiar with clauses in arbitration contracts governed by the Arbitration Act which confer wide power on a government or authority to appoint

one of its subordinates as an arbitrator. Of course there the aggrieved party consents to such a power being given to the opposite party subject no doubt to the power of the Court to remove the arbitrator on the ground of bias or for other good reason under S. 5 of the said Act. Further, in certain other cases, a party to a contract can even file a suit in a civil court ignoring the arbitration clause and plead bias and successfully oppose an application filed under S. 34 of the Arbitration Act for stay of the suit.

8. What the agreement of the party achieves in the above cases in permitting an arbitrator of the choice of one of the parties to the dispute, to be appointed is achieved, in the present case by the statutory provision in S. 7-B of the Telegraph Act. Thus under the Telegraph Act also, the opposite party's power to appoint an arbitrator of its own choice cannot be questioned except for good reason and inclusive of the ground of bias, under Art. 226 of the Constitution.

9. I shall first refer to two cases of an arbitrator appointed under a statutory power wherein the Supreme Court applied the principle of bias or likelihood of bias.

10. In *The Registrar, Co-operative Societies Vs. Dharam Chand and Others*, under R.18 made under the Co-operative Societies Act, 1912, the Registrar could either conduct the arbitration himself or appoint another person as an arbitrator. That was a case of misappropriation by a paid manager and the managing committee was initially suspended by the Registrar. The Registrar himself issued notice for taking action against the Managing Committee as an arbitrator. It was argued that the Registrar was disqualified on account of his bias. The Supreme Court rejected the contention of the petitioners and held that the Registrar did not suffer from any actual bias nor could it be said that he would not be impartial merely because he had earlier given a notice for suspension of the committee or was the administrative head over the societies. The question whether general principles of natural justice could be applied in the case of such an arbitrator appointed under a statutory rule was raised but not decided. After referring to the decision of the Supreme Court in *Gullapalli Nageswara Rao etc. Vs. The State of Andhra Pradesh and Others*, their Lordships left open the question of applicability of principles of natural justice enunciated in *Gullapalli Nageswara Rao's* case. They observed (at p. 1746 of AIR) :--

"We do not wish, however, to be understood as having made any pronouncement that if it had been proved that the Registrar was suffering from any bias, then the present would have been a fit case for the issue of a writ of prohibition as asked by the respondent. Before the writ could be issued a further question would have to be decided whether in view of the statute, that is, R. 18 of the Rules framed under S. 43 of the Act, there was any scope for applying the rule of natural justice on which the contesting respondent relied. A question of this kind was mentioned in *Gullapalli Nageswara Rao v. State of A.P.* In the view that we have taken it is unnecessary to go into that question and we do not do so."

Further, from the judgment in *The Registrar, Co-operative Societies Vs. Dharam Chand and Others*, above referred to it is not clear whether their Lordships were considering an allegation of actual bias or an allegation regarding a reasonable apprehension of bias. On facts, the Supreme Court allowed the Registrar to go ahead with the arbitration and did not accept the plea of bias.

11. The Supreme Court had an occasion to consider the case of another arbitrator appointed under the provisions of the Cooperative Societies Act 1912 in *Uttar Pradesh Co-operative Federation Ltd. Vs. Sunder Brothers of Delhi*, . In this case their Lordships allowed the civil suit to proceed and did not grant any stay under S. 34 of the Arbitration Act on the ground that the allegation of a reasonable apprehension of bias was substantiated by the aggrieved party. They held, following the decision of the *Bristol Corporation v. John Aird & Co.*, (1913) AC 241 that an arbitrator who is placed in the position of a witness as well as a Judge could not be allowed to take up arbitration. A reasonable prospect of bias, it was held, was sufficient to release the parties from arbitration. The Supreme Court quoted the following observations of Lord Atkinson in the above case, which read as follows (at P. 252 of AIR) :--

"Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the Judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that notwithstanding those pre-formed views of the engineer, that gentleman shall listen, to argument and determine the matter, submitted to him as fairly as he can as an honest man; and if it be shown in fact that there is any reasonable prospect that he will be so biased as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of law and they are entitled to say, in answer to an application to the Court to exercise the discretion which the 4th section of the Arbitration Act vests in them. "We are not satisfied that there is not some reason for not submitting these questions to the arbitrator". In the present case the question is, has that taken place?"

Their Lordships also referred to the following observations of Lord Moulton (at Pp. 252-253 of AIR):--

"But, My Lords, it must be remembered that these arbitration clauses must be taken to have been inserted with due regard to the existing law of the land, and the law of the land applicable to them is, as I have said, that it does not prevent the parties coming to the Court, but only gives to the Court the power to refuse its assistance in proper cases. Therefore to say that if we refuse to stay an action we are not carrying out the bargain between the parties does not fairly describe

the position. We are carrying out the bargain between the parties, because that bargain to substitute for the Courts of the land a domestic tribunal was a bargain into which was written, by reason of the existing legislation, the condition that it should only be enforced if the Court thought it a proper case for its being so enforced."

Applying the said principles, the Supreme Court allowed the suit to go on in the civil Court rather than compelling the parties to go for arbitration. Their Lordships observed (at p. 253 of AIR):

"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 reasons to suspect that he will act unfairly or that he has been guilty of continued unreasonable conduct."

They held that inasmuch as the Registrar had approved the termination of the contract of managing agency with the plaintiff and the Registrar was the Chairman of the defendant society, the case was not a fit one for allowing arbitration, and permitted the suit to go on. Thus in the above case the arbitrator appointed under the powers arising in a statute viz., the Co-operative Societies Act, 1912 was held governed by the same principles of bias or reasonable likelihood of bias.

12. In recent times, the question has been raised whether the dominant test is "reasonable suspicion" or "real likelihood" of bias. In *Metropolitan Properties Co. v. Lannon*, (1969) 1 QB 577 the Court of Appeal quashed the Kensington determination in regard to fair rent of a flat because it was thought that the Chairman's position might have led to a prejudice against landlords since he was living in a flat elsewhere of which his father was the tenant and of which the landlord was a company associated with the Kensington landlords.

13. Jain, in his "Principles of Administrative Law" (4th Ed. 1986 at p. 224) says that some confusion has arisen because of the concurrent use of the two phrases "reasonable suspicion" and "real likelihood" of bias in several cases. According to Wade also, some confusion has been introduced into the English law by the simultaneous use of the above words, But he says that "in the great majority of cases either test will lead to the same result. This might be so in all cases if "likelihood" is given the meaning of "possibility" rather than probability. For if there is no real possibility of bias, no reasonable person would suspect it."(Wade, Administrative Law (5th Ed. 1985) Pp. 430-431). Professor De Smith explains that the "reasonable suspicion" test looks mainly to outward appearances while "real likelihood" test focusses on one's own evaluation of the probabilities. (Judicial Review of Administrative Action, 1980, p. 264). Jackson thinks that there is no antithesis between the two tests of "reasonable suspicion" and "real likelihood" (Natural Justice, 1977, p. 50). Jain points out that the Supreme Court has observed in *S. Parthasarathi Vs. State of Andhra Pradesh*, that these two tests are inconsistent with each other. There the Supreme Court

applied the tests of "real likelihood" of bias but this was to be based on the "reasonable apprehension of a reasonable man fully cognisant of the facts". Later, he says, that in *G. Sarana Vs. University of Lucknow and Others*, the Supreme Court observed that the real question was not whether a member of the Administrative Board while exercising quasi-judicial powers was biased for it was difficult to prove the state of the mind of the person. What had to be seen was whether there was reasonable ground for believing that he was likely to have been biased. At another place the court observed that the question was whether there was a substantial possibility of bias animating the mind of the member in the Board against the aggrieved person. (See Jain, Principles of Administrative Law (4th Ed. 1986) at p. 224).

14. In recent times, however, in cases arising under the law of arbitration, the Supreme Court has made more significant observations and explained the words "reasonable suspicion" and "real likelihood" very clearly in *International Airports Authority of India Vs. K.D. Bali and Anr*, . While rejecting the plea of bias the Supreme Court quoted the observations of "Lord O'Brien L.C.J. in *King (De Vesci) v. Justices of Queen's County*, (1908) 2 LR 285 as follows (at p. 1103 of AIR):-

"By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the vague suspicions of whimsical capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds, was reasonably generated and but certainly mere flimsy ground elusively generated and morbid suspicions should not be permitted to form ground of decision."

15. Sabyasachi Mukherji, J. speaking for the Court observed that in the words of Lord O'Brien, LCJ there must be "a real likelihood" of bias. It is well settled, he observed that there must be a real likelihood of bias and not mere suspicion of bias before the proceedings can be quashed on the ground that the person conducting the proceeding is disqualified by interest. The learned Judge referred to *Gullapalli Nageswara Rao etc. Vs. The State of Andhra Pradesh and Others*, and to *Mineral Development Limited v. State of Bihar*, AIR 1968 SC 468. Having so observed, the learned Judge referred to an earlier decision in *Ranjit Thakur Vs. Union of India (UOI) and Others*, wherein Venkatachaliah, J. had observed as follows (at Pp. 2390-91 of AIR):-

"As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly, "am I biased?", but to look at the mind of the party before him."

In that context Venkatachaliah, J. had referred to the decisions in *Metropolitan Properties Co. (FGC) Ltd. v. Lannon*, (1969 1 QB 577), *Public Utilities*

Commission of the District of Columbia v. Pollak, (1951) 343 US 451 and to Regina v. Liverpool City Justices, Ex parte Topping, (1983) 1 WLR 119. After quoting the above observations of Venkatachaliah, J. Sabyasachi Mukherji, J. clarified, in the International Airports Authority of India Vs. K.D. Bali and Anr, referred to above, as follows (at Pp. 1103-04 of AIR): -

"But there must be reasonableness of the apprehension of bias in the mind of the party. The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party. But we agree with the learned Judge of the High Court that it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased. The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person..... Vague suspicions of whimsical, capricious and unreasonable belief are not our standard to regulate our vision. It is the reasonableness and the apprehension of an average, honest man that must be taken note of."

Sabyasachi Mukherji, J. reiterated (at p. 1105) that the Supreme Court had no difficulty in endorsing and maintaining the integrity of the principle "justice should not only be done but should manifestly be seen to be done" (a quotation of Lord Hewart in R. v. Sussex Justices, (1924) 1 KB 256, but that it is equally important to remember that the principle should not lead to the erroneous impression that "justice should merely appear to be done than it should in fact be done" as stated by Slade, J. in R. v. Camborne Justices Ex-parte Pearce, (1954) 2 All ER 850 at 855.

16. In my opinion, the abovesaid principles applied by the Supreme Court to cases of an arbitrator appointed under an agreement of arbitration are equally applicable to arbitration by an arbitrator appointed under a statutory power exercised by one of the parties such as S. 7-B of the Telegraph Act. These principles can be summarised as follows.:

An arbitrator appointed under S. 7-B of the Telegraph Act, 1885 by the Central Government could be an official belonging to the Government and indeed an official belonging to the telephone department itself. The arbitrator so appointed has to act in a judicial and fair manner and free from departmental bias. He can be removed by the Court in exercise of powers under Art. 226 of the Constitution if a case of actual bias is established. He can also be removed if a case of a reasonable apprehension of bias is made out by the aggrieved party. The reasonable apprehension here that of the aggrieved party and not that of the Court but the court has to see whether the apprehension is merely whimsical and imaginary or real. The court has necessarily to be satisfied that the apprehension of the aggrieved party is comparable to that of an average, honest, reasonable person.

17. In fact, the amended English law of arbitration by contract, contains

beneficent provisions. These provisions were introduced in 1934 and have been continued by S. 24 of the 1950 Act. Sub-clause(1) of that section provides that where a party to an arbitration agreement applies to the court for removal of the arbitrator on the ground that the arbitrator "is not or may not be impartial", it shall not be a defence to contend that the party to the agreement "knew or ought to have known" that the arbitrator by reason of his relation towards any other party to the agreement or of his connection with the subject referred, might not be capable of impartiality. The Arbitration Act, 1940 has unfortunately not been brought in line with the above English amendment.

18. But one thing is dear. So far as the arbitrator appointed under S. 7-B of the Telegraph Act, 1885 is concerned, his decision is not liable, because of sub-cl. (2) of that section, to be questioned in any Court of law and therefore not liable to be questioned under S. 30 of the Arbitration Act, 1940 bill is liable to be questioned, as already stated, under Art. 226 of the Constitution (see Smt. Makhani Devi Banka Vs. Union of India (UOI), . For that reason, the decision must necessarily be a reasoned decision. It cannot enjoy the same protection which an award without reasons enjoys under (he Arbitration Act, 1940. It is neither possible nor desirable to extend to the decision of the arbitrator under S. 7-B of the Telegraph Act, 1885 the same protection as an unreasoned award under the Arbitration Act enjoys, particularly when the matter, even so far as arbitrations under the Arbitration Act arc concerned, is under review by the Supreme Court and also when the amended English law in this behalf permits the affected party to ask the arbitrator to state a special case for the opinion of the court on a question of law.

19. Bearing the above principles of law and safeguards in mind, could it be stated that no departmental officer of the telephone department could be appointed as an arbitrator under S. 7-B? In my opinion, not. The section does not prohibit a departmental official being appointed. However, if it is established that such an official has actual bias in fact or that the aggrieved party has a reasonable apprehension of bias on the part of the official, such person can be prevented from acting as an arbitrator by resort to Art. 226 of the Constitution. The apprehension that is material is that of the aggrieved party and not of the Court. The apprehension must be reasonable and not fanciful or whimsical. Whether it is reasonable or not is for the Court to decide under Art. 226 of the Constitution. The Court has to apply the test whether a reasonable, honest and average man could have such an apprehension on those facts. If the Court thinks these tests are. satisfied it could, "under Art. 226, direct change of the arbitrator. The decision of the arbitrator has to be a reasoned one open for correction in a court of Gertiorari.

20. Let us now examine the facts of these two cases. The allegation in the original affidavit was that the Central Government could not appoint a departmental officer as an arbitrator u/s. 7-B. This submission does not satisfy the legal requirements above mentioned. But then an additional affidavit was

filed later to say that on account of certain endorsements made by the 3rd respondent, prior to his appointment, on these files, he is disqualified to decide these cases. The relevant files have been produced and the petitioner's counsel was allowed, to peruse the same and he could not state that there were any endorsements by the 3rd respondent. I am; satisfied that these endorsements are not those of the 3rd respondent. No other material is placed before me either in proof of actual bias or of a reasonable likelihood of bias. In any event, the need to give adequate grounds while giving the decision is, as already stated, an ample safeguard to the rights of the petitioners. The arbitrator cannot obviously adopt a standardised or stereotyped form of decisions in all cases. His decisions are liable to be scrutinised under Art. 226 of the Constitution.

21. I have dealt with this matter at some length because of the large number of writ petitions that are coming before me every week wherein telephone bills running to huge amounts, several of them exceeding Rs.20,000/-, are under attack.

22. The writ petitions are, accordingly dismissed. No costs.

23. Petitions dismissed.