

(1975) 06 KL CK 0016
In the High Court Of Kerala
Case No : Writ Appeal No. 210 of 1973

State of Kerala and Others

APPELLANT

Vs

M.C. Joseph

RESPONDENT

Date of Decision : 03-06-1975

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1975 Ker 189

Hon'ble Judges : V.P. Gopalan Nambiyar, J; George Vadakkal, J

Bench : Division Bench

Advocate : Govt. Pleader, for the Appellant; K. Chandrasekharan and K. Vijayan, for the Respondent

Final Decision : Allowed

Judgement

Gopalan Nambiyar, J.—This appeal is against the judgment of a learned Judge of this Court in O. P. No. 748 of 1970, reported in M.C. Joseph Vs. The State of Kerala and Others, . The writ petition sought to Quash Ext. P-19 order of the State Government and certain other proceedings taken by it. These proceedings were taken against the writ petitioner (Respondent in the appeal) holding him liable for shortage of a stock of rice which he as a godown keeper in the foodgrains depot, at Ponnani, under the Civil Supplies Department, had brought about on account of his neglect, carelessness or misconduct. The contract between the writ petitioner and the Government evidenced by Ext, P-1 contained Clause (4) as follows:

"4. That the said bounden doth hereby covenant and agree with the party hereto of the second part that, in the event of any loss or damage being caused to the Government by any act, omission, neglect, carelessness, misconduct or dishonesty on the part of the said bounden, he the said bounden shall make good to the Government such loss or damage in full, immediately on receipt of notice in writing from the Government as to the amount of such loss or damage and that on his failure to so pay up the amount, it shall be lawful and competent

to the Government to recover same from him as arrears of Public Revenue under the provisions of the Revenue Recovery Act for the time being in force or in any other manner that may commend itself to the Government."

On its being found that there was shortage of stock, which the Government was inclined to attribute to the negligence or misconduct of the 1st Respondent, proceedings were started invoking the above clause and notices and representations were exchanged between the 1st Respondent and the Government. By Ext. P-7 G. O. dated 12-7-1951 intimation was given among others to the 1st Respondent, of the Government, having written off the admissible shortage and having decided for recovery of the costs of the excess shortage from certain persons. Ext. P-7

appended a statement showing the details of shortage noticed at the time of physical verification. Against the name of the petitioner, the excess shortage or its value to be recovered was indicated with particularity and clearness. It would appear that although the petitioner kept quiet for a long time, thereafter, he made repeated and prolonged representations which were considered and dealt with in detail by Government orders; and eventually, Ext. P-12 order dated 5-2-1964 and Ext. P-16 order dated 26-9-1966 were passed by the Board of Revenue. These had been preceded, as stated, by representations of the petitioner. Ext. P-16 was challenged in a writ petition which went up in Writ Appeal No. 229 of 1966. by Ext. P-17 judgment, it was stated that the 1st Respondent proposed to move the Government for suitable relief and that his representation when made, may be disposed of, applying a fresh mind. Exhibit P-17 is a copy of the judgment. Accordingly the 1st Respondent submitted Ext. P-18 representation and this was dealt with and disposed of by Ext. P-19 order challenged in the writ petition. The learned Judge allowed the writ petition holding that Clause (4) of Ex. P-1 offended the rules of natural justice and that the decision of the Government fixing liability on the petitioner was arbitrary.

2. We regret we are unable to sustain the reasoning and the conclusion of the learned Judge. The learned Judge was of the view that no man can be a Judge in his own cause, and that this elementary rule of natural justice was contravened by Clause (4) in Ext. P-I, which clothed the Government, one of the contracting parties, to decide for itself the disputes between it and the 1st Respondent. The learned Judge was of the view that a provision dispensing with the rule of natural justice cannot be readily inferred in the case of even legislative enactments, and that stronger reasons for similar dispensation in case of contracts with similar provision as in Ext. P-I was necessary. The learned Judge has noticed the passage from the 10th Edition of Broom's Legal Maxims at page 72. That passage itself has sufficiently emphasised that "the legislature can and no doubt in a proper case would, depart from the general rule, and an intention to do so being clearly expressed, the Courts give effect to the enactment." Therefore, if the principle of applicability of rules of natural justice were to be extended to the region of contract, we have little doubt that the clearly expressed intention in

Clause (4) in Ext. P-I must have its full sway and operation, and cannot be allowed to be overridden by the rules of natural justice.

3. The learned Government Pleader was asked to investigate and submit his argument on the Question; and after a good amount of research, brought to our notice the decision in *Secretary of State for India in Council v. Augustus John Arathoon*. ILR (1882) Mad 173 . which we consider quite apposite on the point. At page 180, Muthuswami Iyer, J. who agreed with the Officiating Chief Justice (Innes, J.), stated thus:

"Here I may refer to the principle laid down by Lord Campbell in the lead-ins case of *Dimes v. The Grand Junction Canal Co.* (1852) 3 HL 794 and which may at first sight, seem to favour the plaintiff's contention, viz., that no man is to be a Judge in his own cause. This rule certainly applied in the case of *Dersons* constituted Judges without the option of the parties. In *Banger v. The Great Western Railway Co.*, (1854) 5 HL 72 the principle was held not to apply to avoid the award of a referee, to whom though necessarily interested in the result, the parties had contracted to submit their differences though ordinarily it is contrary to reason that an arbitrator or umpire should be the sole and uncontrolled Judge in his own cause. Again in *Ellis v. Hopper* (1858) 3 HN 766 in which one of the conditions of a race was that all disputes should be settled by the stewards, whose decision should be final, and one of the stewards had betted against the defendant's mare Baron Bramwell said, "the Question put by my brother Watson in the course of the argument seems to be decisive, viz., is there any implied condition that the appointed arbitrators or Judges shall be without power if one of them becomes interested in the event of the race ? If none exists, then, is there any general proposition of law that whenever a dispute is referred to one or several persons, his or their power shall cease if any of them becomes interested in the event ? I know of no such rule. When parties agree to refer a matter, they may, if they please, insert a condition to that effect; but if they do not, why should we make such a condition for them ?". My judgment proceeds on the ground that there was no implied condition that being interested should take away the power to act. The result is that where there is contract, it is the intention of the parties that governs, and that there is no general proposition of law that one of the contracting Parties should not refer a matter to the judgment of the other by reason of the other being interested."

The principle of the above decision was followed in this country in *Burma Oil Co. v. Naraindas Dayal Singh* AIR 1927 Sind 253: AIR 1930 Sind 17: AIR 1933 Sind 93 and *D.L. Miller and Co. Ltd. Vs. Daluram Goganmull*, at p. 364. In

Eckersley v. The Mersey Docks and Harbour Board. (1894) 2 QB 667, observed Lord Esher, M.R. at page 671.

"It must, therefore, be shown in the present case that it is at least probable that the engineer would be biased. Now, what is relied on by the plaintiffs in order to show that ? It seems to be admitted that, if the engineer had to consider

whether he had himself given a negligent or unskilful or incompetent order, it could not be said that the Court would be justified in directing that the matter should not be referred to him; but the Court is asked to say that he should not be the arbitrator because the negligent, unskilful, or incompetent order was given by his son. That involves our saying that a man who, it is certain, would not be biased in judging of his own acts, would probably be biased to give a decision in favour of his son which he knew to be wrong. I cannot take that view of human nature. Where you have a man of high character, one whose character for impartiality cannot be impeached when he has to decide as to his own conduct, to say that such a man would not have enough honesty and strength of mind to act impartially where his son's conduct came in Question is a statement which I cannot accept. I do not believe it in this particular case."

Lopes, L. J. in the same case said:

"Now it is to be observed that "the rule to be applied to a case of this kind is entirely different to that which is applied to Judges. Magistrates or any person in a judicial capacity, where the tribunal is not chosen by the parties who are sending their disputes to be settled by it, but is a tribunal constituted apart from any agreement or consent of the parties. Where the tribunal is not chosen by the parties, no doubt the rule is very strict. There is no principle better recognised than that a man is not to be a Judge in his own cause; and in the case of Magistrates it is well established that, if there is any reason which, it can be suggested, would influence the minds at ordinary persons, and induce them to think that the Magistrates might be biased, that will be sufficient to render the tribunal incompetent. But where the parties choose their own tribunal the case is very different. In the present case it is of the essence of the submission that questions shall be submitted to the engineer as arbitrator which must involve the decision of matters connected with his own competency, care, and caution and with the way in which he discharged his duties under the contract. The parties agree that the arbitrator is to adjudicate on matters in which he has an interest."

Davey, L. J. agreed and said:

"No doubt in a certain sense the engineer will be the Judge of his own conduct, and no doubt that is a position which, prima facie, raises some surprise in a judicial mind; but that is the contract of the parties. They have contracted that the servant of one of the parties to the contract shall be the arbitrator, and it appears to me that they have contracted that he shall be the arbitrator in cases which necessarily involve the correctness of his own opinion, the competency of his own advice and opinion as engineer, and the regularity of his own proceedings."

In *Iyes and Barker v. Willans* (1894) 2 Ch 478, Lindley, L. J. stated;

"Now, that is a very stringent provision, and one is surprised at first that any contractor should submit to be bound so tightly, because we know perfectly well, that a dispute between the contractor and the company is in substance in this

business a dispute between the contractor and the engineer whose business it is to see that the works are done for the company according to the agreement and the plans and specifications: so that the real agreement between the contractor and the company is this, that if there is any dispute between them, although the engineer is to tell the contractor what to do and order him to do what he likes consistently with the agreement, his decision must be final. Now what is the real explanation of that ? How does it happen that a man will agree to be bound by such a very stringent provision ? The explanation of it is to be found in two circumstances. First, of all, competition for this kind of work is very keen, and contractors compete with each other and in the second place, it has been ascertained by long experience that engineers of the highest character may be trusted, and when a contractor enters into such a very stringent provision as this, he knows the man he has to deal with. I take it that a contractor such as Mr. Williams would not submit to be bound by a Clause of that kind unless he had confidence in the engineers, and unless the engineers were persons of the highest character. If he had not confidence he would not submit to it; but knowing the engineers he does submit to it, because he has confidence in them and knows that they can be trusted, even although it is their duty to look after the work of the contractor, to deal fairly with him in case of a dispute which is in substance, although not in form, a dispute between the contractor and themselves." Lopes, L. J. agreed and recalled the words of Bowen L. J. in *Jackson v. Barry Railway Company*. (1893) 1 Ch 238 to which we will make reference a little

later. The other learned Judge Kav. L. J.

said:

"That these parties with their eyes open entered into this contract: they agreed that the engineers' approval of the materials should be sufficient as between the contracting parties; and they agreed that in any question that arose which was submitted to arbitration, those engineers should be the arbitrators. Now after that agreement, when they turn round and say, we cannot accuse you of having acted honestly, we can only say that you approved of the materials, and we allege that those materials were not good notwithstanding your approval, and therefore you cannot properly sit as arbitrators, they are not fulfilling that obligation which is incumbent upon them, namely, to make out that those arbitrators, to use the language of the Master of the Rolls in the case of *Eckersley v. Mersey Docks and Harbour Board*. (1894) 2 QB 667 would be so biassed when they come to exercise their duty as arbitrators that they are unfit to sit in that position."

In *Jackson v. Barry Railway Company* (1893) 1 Ch 238 . Bowen L. J. stated:

"It was an essential feature in the contract between the Plaintiff and the railway company that a dispute such as that which has arisen between the Plaintiff and the company's engineer should be finally decided not by a stranger or a wholly

unbiased person but by the company's engineer himself. Technically, the controversy is one between the Plaintiff and the railway company : but, virtually, the engineer, on such an occasion, must be the Judge, as to speak, in his own quarrel. Employees find it necessary in their own interests, it seems, to impose such (terms) on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously-coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business. To an adjudication in such a peculiar reference, the engineer cannot be expected nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked, for, neither party to the contract proposed to exact from the arbitrator of their choice. They

know well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence; and the contractor certainly had a right to demand that whatever views the engineer might have formed, he would be ready to listen to argument, and, at the last moment, to determine as fairly as he could, after all had been said and heard." The above decisions sufficiently bring out the reason why the principle of that no man shall be a Judge in his own cause, cannot have application against a contractual term of the type of Clause (4) in Ext. P-1. In addition to the principles laid down in the above decisions, the law has been stated in the same form by Text Books Writers. We do not propose to multiply citations, but content ourselves by referring to the 3rd Edition of De Smith's Judicial Review of Administrative Action page 218.

4. Our Supreme Court in Seth Thawardas Pherumal Vs. The Union of India (UOI), at p. 472 stated as follows:

"If, with that in view. Government expressly stipulated and the contractor expressly agreed that Government was not to be liable for any loss occasioned by a consequence as remote as this, then that is an express term of the contract and the contractor must be tied down to it. If he chose to contract in absolute terms that was his affairs."

It is for this same reason that it has been recognised that no writ lies against an order passed in exercise of consensual jurisdiction. In R. v. Disputes Committee of the National Joint Council for the Craft of Dental Technicians. (1953) 1 All ER 327, Lord Goddard observed:

"That is simply a reference to an arbitrator, and I have never heard of certiorari or prohibition going to an arbitrator. Arbitration is a very old remedy in English

law, but in all the centuries that have passed since the decisions of English Courts first began there is no trace of an arbitrator being controlled by this Court by writ of either prohibition or certiorari. The bodies to which in modern times the remedies of these prerogative writs have been applied are all statutory bodies on whom Parliament has conferred statutory powers and duties the exercise of which may lead to the detriment of subjects as, for instance, where a statute gives a certain body power for the compulsory acquisition of land and an arbitrator is set up by Parliament to assess the compensation, and it is essential that the Courts should be able to control the exercise of the statutory jurisdiction within the limits imposed by

Parliament. There is no instance of which I know in the books where certiorari or prohibition has gone to any arbitrator except a statutory arbitrator, and a statutory arbitrator is a person to whom, by statute, the parties must resort. It would be an enormous departure from the Law relating to prerogative writs if we were to apply these remedies to an ordinary arbitrator, whether he be a single arbitrator or a body of gentlemen called a committee or council, and I am of opinion that we must dismiss these applications on the ground that they are wholly misconceived."

The principle of the above decision was followed in *C.K. Krishnan v Divisional Inspector of Schools, Coimbatore* 1957 Ker LT 739, In the light of these principles we have little hesitation in holding that Clause (4) to Ex. P-1 was valid and does not contravene the principles of natural justice that no one shall be a judge in his own cause,

5. We are also unable to share the view of the learned Judge that the decision of the Government was in any way arbitrary or unfair. We have been taken carefully through the series of notices and communications and representations that have been exchanged between the Government and the 1st Respondent. We are left in no doubt that the 1st Respondent had ample opportunity of placing his case and contesting the findings of the Government in regard to liability as well as Quantification of damage. He did so on a number of occasions. This Court in Ext. P-17 judgment gave him an additional chance to have his representation examined untrammelled by the previous orders. This was also done. There has been no element of arbitrariness. On the other hand the Government had examined the surfeit of representations of the 1st Respondent and had found against him.

6. We allow this appeal, set aside the judgment of the learned Judge and direct that O. P. No. 748 of 1970 will stand dismissed. There will be no order as to costs.