

(1949) 02 BOM CK 0003

In the Bombay High Court

Case No : Civil Revision Application No. 434 of 1948

The Central Government of India

APPELLANT

Vs

Chhotalal Chhaganlal Modi

RESPONDENT

Date of Decision : 02-02-1949

Acts Referred:

Arbitration Act, 1940 — Section 34

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 1949 Bom 359 : (1949) 51 BOMLR 615

Hon'ble Judges : Rajadhyaksha, J;Chainani, J

Bench : Division Bench

Judgement

Rajadhyaksha, J.—This is an application in revision against an order passed by the Assistant Judge at Ahmedabad confirming the decision of the Civil Judge, Senior Division, Ahmedabad, refusing to stay the proceedings in a suit filed by the plaintiff against the Central Government of India. The plaintiff was a subscriber of telephone No. 5019 and had executed a telephone hiring contract in respect of that telephone. It was signed by him in his personal capacity and not on behalf of any partnership firm. It appears that the telephone was used by other parties who had printed its number on their business letters. The Executive Engineer thereupon served the plaintiff a notice under Clause 15 of the conditions of agreement determining the contract on the expiration of seven days thereof. The telephone was accordingly disconnected on October 28, 1946. On November 2, 1946, the plaintiff gave a notice of a suit u/s 80 of the Civil Procedure Code. The Director General of Posts and Telegraphs replied to that notice on December 19, 1946, giving reasons for the disconnection of the telephone. The Assistant Deputy Director General of Posts and Telegraphs informed the plaintiff by a letter dated February 4, 1947, to refer the dispute to arbitration in accordance with condition 19 of the hiring contract. The plaintiff was also informed that Government would apply for stay of the suit, if any suit was filed by the plaintiff. The plaintiff denied having received any such intimation and proceeded to file a suit on February 9, 1947, in the Court of the Civil Judge,

Senior Division, Ahmedabad, praying for (1) a declaration that the determination of the contract of hiring of the telephone No. 5019 at Ahmedabad and the subsequent disconnection and removal of the telephone instrument are illegal and ultra vires, and (2) a decree for Rs. 900 as damages for inconvenience, mental worry and loss of earnings suffered on account of the disconnection and further damages at Rs. 1,000 per month from the date of the suit till restoration of the said telephone. After the suit was filed, an application was made on behalf of the Central Government that the suit might be stayed u/s 34 of the Indian Arbitration Act, because there existed a clause in the agreement by which any dispute between the parties had to be referred for decision to the Director General of Posts and Telegraphs. The plaintiff opposed the application on two grounds : (1) that the suit involved complicated questions of fact, and (2) the Director General of Posts and Telegraphs would not be a proper person to decide the question as to whether the action of his own department was wrongful. The learned Judge held that the question involved was not complicated, but was of opinion that the stay could not be granted for two reasons : (1) that there was no provision in the agreement under which the plaintiff would be entitled to claim damages if the dispute was referred for the decision of the Posts and Telegraphs Department, and (2) that a reference to the Director General of Posts and Telegraphs, who was the head of the Posts and Telegraphs Department, was in effect a reference to a person who was one of the contracting parties and thus one of the contracting parties itself would be acting as arbitrator in the case. He therefore thought that it would not be fair to force the plaintiff to go to arbitration. The application was accordingly rejected.

2. Against that order an appeal was preferred to the District Court of Ahmedabad and was heard by the learned Assistant Judge. The learned Assistant Judge saw no reason why the matter should not be referred to the Director General of Posts and Telegraphs in accordance with the arbitration agreement. But he held that this reference to the Director General of Posts and Telegraphs was not in fact a reference to arbitration. He thought that an official of the department which is responsible for the observance of this contract was certainly in the position of a party to the contract, and that no one could be a judge of his own cause. He seems to have been further of the opinion that a reference to arbitration did not come within the compass of the exception to Section 28 of the Indian Contract Act, and that therefore the agreement was void under that section. He, therefore, agreed with the view of the trial Court that the proceedings should not be stayed and dismissed the appeal with costs. Against that order this application has been filed in revision.

3. A preliminary objection has been taken by Mr. N.C. Shah that no revision lies against an order passed by the appellate Court on an application for the stay of proceedings u/s 34 of the Indian Arbitration Act. He invited our attention to Section 39 of the Act under which there is an appeal from an order refusing to stay legal proceedings where there is an arbitration agreement. He argued that even u/s 115 of the Civil Procedure Code, this Court had no jurisdiction to

entertain an application in revision. u/s 115 of the Civil Procedure Code,

the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears (a) to have exercised a jurisdiction not vested in it by law, or (6) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.

So far as Clause (c) of the section is concerned, it is settled law that where a Court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity, because it has come to an erroneous decision on a question of fact or even of law. Although Clause (c) of Section 115 would not apply to the present case, we are of the opinion that the present case is governed by Clause (b) of Section 115 inasmuch as we think that the learned Assistant Judge has failed to exercise the jurisdiction vested in him. According to the judgment of the learned Assistant Judge, he was prepared to order stay of the proceedings but for the fact that he considered that there was no valid arbitration agreement to which the plaintiff was a party. u/s 34 of the Indian Arbitration Act, it is only

where any party to an arbitration agreement commences any legal proceedings against any other party to the agreement, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

According to the learned Judge, the condition requisite for the making of an application for stay of proceedings was not satisfied because he considered that there was no valid reference to arbitration. It is because of this view of his that he declined to exercise jurisdiction and stay the proceedings which he was otherwise inclined to do. His view therefore of the nature of the reference to arbitration has resulted in his failure to exercise jurisdiction u/s 34 of the Indian Arbitration Act, and in our opinion the case falls within Clause (b) of Section 115 of the Civil Procedure Code. In this connection we may refer to a decision of the Allahabad High Court where an application in revision was entertained in respect of applications for the stay of proceedings. In *Charan Das v. Gur Saran Das* [1945] All. 162 it was held that,

The objection as to jurisdiction has to be taken by the defendant relying upon the arbitration clause before the filing of the written statement. The Court should look at the plaint and see for itself whether the arbitration clause applies to the

dispute, and if it does, whether the nature of the dispute is such that the ends of justice would be better met by the decision of the Court than by that of a private forum.

There is nothing in Section 39 or Section 41 of the Arbitration Act to deprive the High Court of the powers conferred on it by Section 115 of the Civil Procedure Code.

4. The learned Assistant Judge in the present case has clearly declined to exercise jurisdiction because of his view that there is no valid reference to arbitration. As we are of opinion that the view of the learned Assistant Judge as regards the nature of the reference to arbitration is incorrect, we think that we are entitled to interfere in revision as the learned Judge appears to have failed to exercise the jurisdiction which is vested in him by law.

5. The main question therefore which arises in this case is whether there has been a valid reference to arbitration. Clause 19, under which the parties were bound to refer the dispute for the decision of the Director General of Posts and Telegraphs, reads as follows :

If any dispute shall arise touching the effect of this Contract or in any way relating thereto, the decision of which is not expressly provided herein or in the conditions, the same shall be referred for decision to the Director General of Posts and Telegraphs and his decision thereon shall be final and binding on the parties.

Both the lower Courts have taken the view that this is not a proper reference for arbitration because the person to whom the dispute has to be referred for decision is the head of the very department which is in effect, though not in form,, a party to the dispute. The agreement itself has been entered into between the plaintiff on the one hand and the Governor-General of India on the other. The agreement was executed on behalf of the Governor-General by the Executive Engineer of the Posts and Telegraphs Department in accordance with the Rules of Business. The question therefore for consideration is whether this reference to arbitration, of the Director General of Posts and Telegraphs is vitiated by the fact that he happens to be the head of the department with whom the contract has been entered into by the plaintiff for the hiring of the telephone. The learned Assistant Judge was inclined to consider that this clause does not come within the scope of Exception 1 to Section 28 of the Indian Contract Act. Under that Exception?

Section 28 shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

It is not quite clear from the judgment of the learned Assistant Judge why this agreement to refer the dispute for the decision of the Director General, of Posts

and Telegraphs does not come within the scope of Exception 1 to Section 28 of the Contract Act. Section 28 is intended to make agreements in restraint of legal proceedings void. There is nothing in Clause 19 of the agreement which precludes one of the parties from going to Court, and Section 34 of the Indian Arbitration Act merely says that

if one of the parties commences any legal proceedings, the other party may at any time before filing a written statement apply to the judicial authority before which the proceedings are pending to stay the proceedings.

It is open to the party against whom, the proceedings are instituted not to insist upon the right which the agreement gives for making a reference to arbitration, and have the matter decided by way of a regular suit. It cannot therefore be said that the contract is void because it is in restraint of any legal proceedings. The agreement in question is not an agreement by which any party thereto is restrained absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings before the ordinary tribunals, and even if it were, in our opinion, Exception 1 to Section 28 would save such an agreement.

6. The real question therefore for consideration is whether there is a good reference to arbitration in virtue of Clause 19 of the agreement. The only reason why the two lower Courts seem to consider that it is a bad reference is that the person to whom the dispute has been referred is the head of the department dealing with telephone connections. The question therefore arises how far this alleged interest of the Director General of Posts and Telegraphs as the head of the department disqualifies him from being an arbitrator in this dispute.

An arbitrator who has an interest dependent upon his decision is disqualified if either party at the time of his appointment was ignorant of the fact that this would be so, and the interest is of such a nature that it ought to have been disclosed.... But if the parties, with full knowledge of the facts, selected an arbitrator who was not an impartial person, or who had to perform other duties which would not permit of his being an impartial person, the Court would not release them from the bargain upon which they had agreed; and if a party to a contract submitted to the jurisdiction of a tribunal which had an interest of its own in the decision the Court would not on that account release him from the bargain, however improvident it was considered to be, so long as the Court was satisfied that he was aware or ought to have been aware of the terms of the bargain he had entered into." (See "Russell on Arbitration and Award ", 13th Edn., p. 475. See also Halsbury's Laws of England, Volume I, p. 680).

7. In Jackson v. Barry Railway Co. [1893] 1 Ch. 238 a contract by which the plaintiff undertook to construct a dock for the defendant company provided that 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 dispute arose whether the contract required the interior of a certain embankment

to be made of stone, or whether rocky marl was allowable, so that, if the contractor by the direction of the engineer used stone, he would be entitled to be paid for it as an extra. 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. The company then referred the dispute to the arbitration of the engineer. After this reference, and on the day for which the first appointment had been made, the engineer wrote to the contractor a letter in which he repeated his former view. The plaintiff brought his action to restrain the company from proceeding further with the arbitration. It was held on appeal

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 construction of the letter, it appeared that he had made up his mind so as not to be open to change it upon argument.

In delivering the judgment of the Court Bowen L.J. observed (p. 247) :

Technically, the controversy is one between the plaintiff and the railway company; but,, virtually, the engineer, on such an occasion, must be the judge, so to speak, in his own quarrel. Employers 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 knew 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 view, 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.

Lord Justice Smith, who gave a dissenting judgment, generally agreed with the view as to the nature of the reference to arbitration, but was of the opinion that in the circumstances of that particular case the letter written by the engineer did not, upon a fair construction, show that the engineer was prepared to keep his

mind open. At p. 250 he observed :

...he (the engineer) was in duty bound as far as possible to do so and to keep an open mind as to the matters upon which he was called upon to adjudicate, and if it be shown that he had failed in this duty, then,...he is not fit or competent to adjudicate upon the case.

Applying the principles of this case to the case before us, there is nothing on the record to show that if the matter was referred for the decision of the Director General of Posts and Telegraphs, he would not bring to bear upon the case an independent judgment and decide the dispute fairly and impartially. To the same effect are the observations in *Ives and Barker v. Willans* [1894] 2 Ch. 478 where it was held.

that an arbitration clause referring disputes to the engineer of one party cannot be disregarded on the ground that the engineer is in substance a judge in his own case unless there is sufficient reason to suspect that he will act unfairly.

Lord Justice Lindley says (p. 488) :

They agree to be bound in all disputes between them and the contractor, that is Willans by the decision of the engineers of the company. They knew the arbitration clauses contained in the original contract, and they knew what the duties of those engineers were, and they knew that amongst other duties was that of passing or rejecting the materials. The sub-contractors agreed to put up the materials which were to be supplied, relying upon the honour and character of the engineers to reject such as were unfit, and they were willing, as the contractor himself was willing, to submit any difference between them and the company, which indirectly is really a difference between them and the engineers to the arbitration of those engineers themselves. That is what is contemplated, and that is the substance of the bargain.

Lord Justice Lopes says as follows (p. 492) :

I will deal shortly with the two main attacks which are made against these engineers and arbitrators. I think the chief one is this. It is said that they are not fit to be trusted, because they have prejudged a certain question with regard to the action, the quality and fitness of certain materials. The answer to that, to my mind, is this : that the parties perfectly well knew, when they consented that these engineers should be arbitrators, that difficulties such as these which are now suggested might arise; they perfectly well knew that these engineers were the persons who were to determine the quality and character of the materials in question; they knew that these engineers had to do that as well as to act as arbitrators in what is termed the larger arbitration. Knowing that, they agreed that they would accept the arbitrators, and it appears to me now that they cannot turn round and say that, because their judgment is erroneous, therefore they are not bound to accept it. They agreed to be bound by their judgment, however erroneous it might be, provided it was honest, provided it was not

tainted with fraud or with misconduct.

8. In *Eckersley v. Mersey Docks and Harbour Board* [1894] 2 Q.B. 667 it was held that, "where, however, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employers in respect of the carrying out of the contract."

When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer because he might be suspected of being biassed, although in truth he would not be biassed. It is an attempt to apply the doctrine which is applied to judges, not merely of the Superior Courts, but to all judges?"that, not only must they be not biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people?not necessarily reasonable people, but many people would suspect them of being biassed. Is that a rule which can be applied to such contracts as this, where, as between the contractor and his. principal, both parties agree that the chief servant of one of them shall be the arbitrator ? If it was not for the agreement of the parties?if the rule applicable to judges were to be applied?it is obvious that it would be impossible to say that the engineer, under whose superintendence the work has to be done, could act as arbitrator, because some persons would suspect him of being biassed in favour of the parties whose servant he was. But that cannot be the case here, because both parties have agreed that the engineer, though he might be so suspected, shall be the arbitrator. A stronger case than that must, therefore, be shown, it must in my opinion be shown, if not that he would be biassed, that at least there is a probability that he would be biassed.

To the same effect are the observations of Lord Justice Lopes at p. 678. In the case of *Aghore Nauth Bannerjee v. The Calcutta Tramways Co. Ltd.* ILR (1885) Cal. 232 the following observations occur (p. 235) :

It has been argued for the plaintiff, that the Manager in this case is virtually the Company. But this is not so. The Manager here is no more the Company than the engineer or the architect in the cases to which I have just referred is the employer. Both parties have faith in the Manager and are content to place themselves in his hands, as an arbitrator between them, in the event of dispute.

In *Secretary of State for India in Council v. Saran Brothers & Co.* ILR (1932) Luck. 98 the Deputy-Commissioner of a district invited tenders for some work of the Government. The plaintiff's tender was accepted and he entered into a contract with the Secretary of State for India in Council through the Deputy Commissioner. The agreement provided that if owing to breach of any condition of the agreement the work is taken away from the executant, then the Deputy

Commissioner would have the power to decide the amount to which he is entitled in respect of the work already done, and that the executant would be bound by the decision of the Deputy Commissioner in all matters relating to the contract. The plaintiff brought a suit against the Secretary of State for India in Council for a certain amount on account of work done under the said contract. It was held that?

The Deputy Commissioner represented the Secretary of State and acted as his agent. It cannot be said that the contract was made with the Deputy Commissioner on his own behalf. The agreement must, therefore, be regarded as an agreement executed by the plaintiff in favour of the Secretary of State. Therefore, the agreement for reference to the arbitration of the Deputy Commissioner cannot be regarded as an agreement for reference to a party to the contract. The case, therefore, fell within exception 1 of Section 28 of the Contract Act, and the agreement to abide by the decision of the Deputy Commissioner must be regarded as an agreement for reference to arbitration and the suit was barred by Section 21 of the Specific Relief Act.

This case is almost on all fours with the case before us. The contract in this case has been made with the Governor-General, and the reference to the arbitration of the Director General of Posts and Telegraphs cannot be regarded as an agreement for reference to a party to the contract. As we have stated above, such a reference falls within Exception 1 to Section 28 of the Indian Contract Act, and is therefore a valid reference.

9. In view of these authorities it appears to us to be perfectly clear that the reference to arbitration of the Director General of Posts and Telegraphs in any matters arising out of the contract is a valid reference and one in which the parties have entered with their eyes open. It is not unlikely that the plaintiff entered into this agreement relying upon the sense of duty and the impartiality of the Director General of Posts and Telegraphs and had perfect confidence in him that he would, not do anything unjust or unfair in the decision of any dispute between the parties. Such an agreement entered into by the plaintiff with the Governor-General, agreeing to refer the dispute to the Director General of Posts and Telegraphs, constitutes, in our opinion, a valid reference.

10. As against this series of authorities, the only decision to which our attention has been invited is one in *Goverdhandas v. Ramchand* AIR [1918] Sind 41 of the Report there are observations of Pratt J.C. that:

an arbitration tribunal in which the ultimate decision rests with the nominee of the class having such an interest is not an impartial tribunal.

It appears, however, that in the circumstances of that case there were adequate and reasonable grounds for the anticipation that the arbitrator would act with a bias. The case would therefore fall within the dictum of Lord Esher M.R. quoted above, viz. a stronger case than mere suspicion apparent in the very factum of appointment must be made out, i.e. there is a probability that the arbitrator

would be biased. Moreover, the authorities to which I have referred above were not considered in the judgment of either of the two learned Judges who decided the case. In the present instance it is not suggested that the Director General of Posts and Telegraphs would act with a bias or that there was reasonable probability of his doing so. The learned Assistant Judge himself observes in his judgment that nothing was alleged personally against the Director General of Posts and Telegraphs, and there is no reason to apprehend that he would not bring to bear upon the decision in dispute a fair and impartial judgment and decide the case with justice and equity. In our opinion therefore the reference to the arbitration of the Director General of Posts and Telegraphs is not a bad reference merely by reason of the fact that the Director General happens to be the head of the department which was responsible for hiring the telephone connection to the plaintiff.

11. It was next urged by Mr. N.C. Shah on behalf of the plaintiff that there was no provision in the arbitration agreement which would enable the Director General to award damages if he thought fit. In our opinion this argument cannot be accepted. Whether the Assistant Director of Posts and Telegraphs was right or wrong in ordering the disconnection, is a matter which would arise in the dispute and would fall to be determined by the Director General. It would also be within the competence of the Director General to give any relief which a decision in favour of the plaintiff would necessitate. Clause 19 refers to "all disputes which are in any way related to the contract," The demand for compensation for wrongful disconnection of the telephone would be considered as a demand relating to the contract. It could hardly have been intended that the Director General should decide whether the telephone connection was rightly or wrongly disconnected and then leave it to the parties to ask for damages in a civil Court.

12. It was lastly urged by Mr. Shah that we should not in exercise of our revisional powers interfere with the exercise of discretion of the learned Assistant Judge in refusing the stay. The learned Assistant Judge had in exercise of his discretion come to the conclusion that the stay application should be granted. But it was merely because he thought that there was no valid reference to arbitration that he did not feel himself competent to allow the application. Now that we are of the opinion that there is a valid reference to arbitration, we accept the view taken by the Assistant Judge that this is a case in which the stay application should be granted. We are therefore not interfering with the exercise of his discretion on the merits of the case.

13. We, therefore, set aside the order of the learned Assistant Judge and direct that the suit be stayed pending the decision of the Director General of Posts and Telegraphs on an application made to him under Clause 19 of the agreement.

14. We accordingly make the rule absolute and direct that the opponent should pay the costs of the applicant both in this Court and in the lower Courts.