

(1983) 08 GUJ CK 0006

In the Gujarat High Court

Case No : Civil Revision Application No. 799 of 1981

The District Panchayal, Bhavnagar and Another

APPELLANT

Vs

Mahmad Haji Gafur and Co.

RESPONDENT

Date of Decision : 03-08-1983

Acts Referred:

Arbitration Act, 1940 — Section 2
Constitution of India, 1950 — Article 141

Citation : AIR 1984 Guj 98 : (1984) GLH 169

Hon'ble Judges : D.H. Shukla, J

Bench : Single Bench

Advocate : P.V. Hathi, for the Appellant; G.K. Sukhwani, for the Respondent

Judgement

1. The applicants were the opponents in Civil Misc, Application No. 200 of 1976 filed by the respondent in the Court of the Civil Judge (S. D.) :it Bhavnagar for the appointment of an Arbitrator in lieu of the Superintending Engineer, who was to act as an Arbitrator under Clause 30 of the contract between the parties in B-2 Form and who had allegedly neglected or refused to work as such.

2. A short resume of facts - may be stated as under:-

The applicant No, I-District Panchayat, Bhavnagar, acting through its Executive Engineer, District Panchayat Division, invited tenders for the work of flood damage repairs to Botad Turkha Road in B-2 form in the month of November 1970. The respondent, M/s. Mohmad Haji Gafur & Co-.. a registered Partnership firm), having its Office at Bhavnagar submitted the tender which was accepted by the Executive Engineer, District Panchayat Division. Bhavnagar on 4-12-1970. The applicants paid the security deposit as per the terms of the B-2 form which came to the tune of Rupees 2,320/- on 4-12-1970. The respondent completed the contractual work, but in the meantime certain disputes had arisen between the parties. It was alleged that the applicants failed to) give the detailed programme of the work as per the provision of Clause 2 of the B-2 formats well as the applicants failed to supply the materials to the respondent in time. It was

also alleged that the drawings and detailed drawings were also) not supplied by the applicants, in time and the respondent was not given the full possession of site also in time. In other words, the allegation is that it was because of the defaults on the part of the applicants that the completion of the work was delayed. It is further alleged that the delay in the completion of the work caused damage to the respondent. It is also the case-of the respondent that it is entitled to the refund of the security deposit amount (4) Rs. 4640/- since the work was completed without any complaint on the part of the applicants but the refund is not made. 11 is also the allegation of the respondent that the applicants had deducted a sum of Rs. 1000/- from the running account bill of the respondent illegally and unjustifiably. In other words, the respondent assessed its claim against the applicants to the tune of Rs. 16,000/- on several counts.

3. The respondent called upon the Superintending Engineer, Panchayat Circle, (Applicant No. 2 herein) to start arbitration proceedings in regard to the .several disputes outlined above, lie being the sole Arbitrator Under Clause 30 of B-2 form which constituted 1he agreement between the parties. However, the allegation of the respondent is that the Superintending Engineer failed to take Lip the reference in hand within one month from the receipt of the communication dated 1-7-1976. The applicant No. 9 neglected and/or refused to work as a sole arbitrator. On account of his refusal and/or neglect the respondent (, Shri S. A. Desai, B. E. (Civil), A. M 1. E., retired Deputy Chief Engineer Western Railway, the sole Arbitrator as per the provisions of Section 9 of the Indian Arbitration Act. 1910, The respondent demanded from the applicants to concur in the same appointment of Shri S. A. Desai as the sole Arbitrator. The applicants duly received the notice from the respondent on 24-8-1976 but failed to concur in the appointment of Shri Desai U the sole Arbitrator. It is, therefore, that the respondent applied to the Civil Court for revoking the authority of the Superintending Engineer to work , as a sole Arbitrator under the contract and to have an appointment of Shri S. A. Desai as a sole Arbitrator in place of the-Superintending Engineer, It is submitted that the respondent is still ready and willing to resolve the dispute by resorting to arbitration.

4. Notice was issued to the present applicants in response to which a written statement signed by the District Development Officer was filed on 30-11-1976 (vide UK 11). Several contentions against the maintainability of the, application were raised in the written statement filed by the applicants, but all the contentions are not germane for the decision of the present Civil Revision Application. So far as the relevant contentions are concerned, one of them is that the respondent has not followed the relevant provisions of the Indian Arbitration Act as no notice under the provisions of that Act was given to the applicants. It is contended that the provision about notices obligatory and hence for want of it the application was liable to be rejected. It is also contended that lite respondent is not entitled to revoke the authority of the named Arbitrator. and it "is also not entitled to get Shri S. A. Desai appointed 111 place of the Superintending Engineer. According to) the applicants, Shri Desai is a man of the respondent. It

is also contended that applicant No. 2, the Superintending Engineer, never refused to act as an Arbitrator.

5. A further written statement was filed, Exh. 14, with the permission (if the Court and a further contention was raised that. clause 30 of the-B-2 form is not an arbitration clause, The interpretation put upon Clause 30 by the respondent is - not correct. In certain matters, the :Executive Engineer is I he final authority and the decision of t fie Executive Engineer is to be treated as final and it is excluded from the purview of Clause 30, In the present matter the decision of the Executive Engineer was final and there was no scope for the arbitration of the Superintending Engineer. It, was contended that the points which the respondent wanted to agitate are not real disputes and cannot be referred to arbitration. It was only the Executive Engineer or the department which could proceed in regard to those disputes and that so far as the Civil Court was concerned, they were beyond its jurisdiction.

6. The superintending. Engineer, applicant No. 2 herein, also filed hi& objections through the Government Pleader, Bhavnagar. The applicant NO. 2, adopted the written statement filed by the applicant No. 1 For brevity sake. I have not reproduced all the contentions raised by the Superintending Engineer in his written statement; they are outlined in the, judgment of the trial Court.

7. The learned trial Judge framed issues as under:-

"1. Whether the authority of opponent No. 2 be revoked as arbitrator?

2. Whether Mr. S. A, Desai should be appointed as a sole arbitrator? It so whether any other, person should be appointed as the sole arbitrator as contended by the applicant?

3. What order?"

8. : The trial Judge answered issue No. I in tile affirmative and in answering issue No. 2, he held that one Shri G. G. Vaidya. retired Superintending Engineer, be appointed as sole arbitrator.

9. The relevant point to he noticed in the judgment of the trial Court is as regards the interpretation of Clause 30 of B-2 form. The trial Judge has followed the judgment of a Division Bench of this Court in C. R. A. No. "298/70.with C. R. A. No. 299/70, decided on 19120-11971. wherein the Division Bench held that Clause 30 of B-2 form Was an arbitration clause. The trial Judge has followed this Division Bench judgment, He further held that the disputes which the respondent wanted to be referred to the Arbitrator were covered within Clause 30 (if the B-2 form and hence they were. required to be referred to an Arbitrator. The trial Judge further held that he was satisfied by the materials placed before him by the respondent that the applicant No. 2 the Superintending Engineer, had neglected used to act as an Arbitrator and that therefore his authority to act as such under Clause 30 should be revoked. It was pointed out to him during the course of the hearing that the list of approved Arbitration maintained by the

Government was revised, and taking that list into consideration, the trial Judge appointed one Mr. G. G. Vaidya as an Arbitrator for resolving the dispute between the parties. He accordingly directed by his final order that the application was allowed and Shri G. G. Vaidya was appointed as a sole Arbitrator in place of the present applicant No. 2, the Superintending Engineer. With the terms of appointment. I am not concerned and hence I do not go into them.

10. Mr. P. V. Hathi, the learned Advocate for the applicants,, submitted before me that the, judgment of the Division Bench of this Court in C. R. A. No. 298/70 with C.R.A. No. 299/70 delivered on 19/ 10-1-1971 will not provide any guidance on the question of interpretation of Clause 30 of the B-2 form now as a contrary view is taken by a Bench of three Judges of the Supreme Court in the case State of U. P. V. Tipper Chand AIR 1980 1522. It is a short judgment and the relevant observations therein are required to be noted. Before, however, I proceed to note the observations, I may reproduce Clause 22 of the agreement which came up for interpretation by the Supreme Court in the aforesaid judgment. Clause 22 runs as under:-

"Except where otherwise specified In the contract the decision of the Superintending Engineer for the time being shall be binding on all parties to the contract upon all questions relating to meaning of the specifications, design, drawing and instructions hereinbefore mentioned. The decision of Such Engineer as to the quality of work-manship, or materials used on the work, or as to any other question. claim right, matter or whatsoever, in any way arising out of or relating to the designs, drawing specifications, estimates, orders or these conditions, otherwise concerning the works or the execution or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment of the contract by the contractor shall also be final, conclusive and binding on the contractor."

On the basis of the above-quoted C. 22, the defendant respondent had submitted u/s 34 of the

Arbitration Act to the trial Court on the plea that the above extracted clause 22 amounted to an arbitration agreement. The pleas found favour with the trial Court as well as the appellate Court, but was rejected by the High Court, in revision on the ground that it merely conferred power on the Superintending Engineer to take decision on his (own and that-it did not authorise the parties to refer any matter to his arbitration. The Supreme Court after perusing the contents (of the said clause and hearing the learned Counsel for the parties, agreed with the view taken by the High court. The Supreme Court then proceeded:14" to observe as under

"Admittedly the clause does not contain any express arbitration agreement. Nor can such an agreement be spelled out from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof On the other hand, the purpose of the clause clearly appears to be to vest the Superintending

Engineer with supervision of the execution of the work and administrative control over it from time to time. The judgment in the case of *Dewan Chand v. State of J and K* AIR 1961 J & K 58 and certain other judgments were submitted for consideration of the Supreme Court, but the Supreme Court held that the interpretation put upon the clause in that judgment was not correct. The Supreme Court reiterated that as pointed out by the Jammu & Kashmir High Court such a clause can be interpreted only as, to take decisions all by himself and not by reason of any reference which the parties might make to him. The Supreme Court considered the impugned clause in the judgment of *Dewan Chand's* case (supra) and observed, that the language of that clause was different from the clause which was for consideration before it. The Supreme Court observed in that connection thus:-

"The language of this clause is materially different from the clause in the pre-sent case and in our opinion was correctly interpreted as amounting to an arbitration agreement. In this connection, the use of the words "any dispute between the contractor and the Department" are significant."

Referring to the case of *Ram Lal Jagan Nath Vs. Punjab State and Another*, the Supreme Court observed that the observations made with regard to the case of *Dewan* (supra) were also true as regard the clause in *Ram Lal's* case (supra). With these observations, the Supreme Court dismissed the appeal.

11. Mr. Hathi then referred me to the later ruling of the Supreme Court in the case of *Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others*, decided by the Division Bench of the Supreme Court consisting of D. A. Desai and R. S. Pathak, JJ. It is pertinent to note that the judgment in the case (it *State of U. P. v. Tipper Chand* (supra) was not cited before the Division Bench. The clause in question before the Division Bench in *Smt. Rukmanibai's* case, (supra) runs as under:-

"15. Whenever any doubt, difference or dispute shall hereafter arise touching the construction of the represents or any or any matter or things connected with the said lands or the working or non-working thereof or the amount or payment of any rent or royalty reserved or made payable hereunder the matter in difference shall be decided by the lessor whose decision shall be final".

D. A. Desai, J. speaking for the Division Bench observed that the reference has to be made to the lessor and the lessor is the Governor.. His decision is declared final by the terms of the contract. His decision has to be in respect of a dispute or difference that may arise either touching the construction of the terms of the lease deed or disputes or difference arising out of the working or non-working of the lease of any dispute about the payment of rent or royalty payable under the lease deed. The Division Bench held that clause 15 was an arbitration agreement. It is observed therein as under:-

Therefore clause 15 read as a provides for referring" future to the arbitration of the Governor. agreement is not required to be in any particular form. What is

required to, be ascertained is whether they have agreed that if disputes arise between them in respect of the subject matter of contract such dispute shall be referred to arbitration then such an arrangement would spell out an arbitration agreement."

12. Mr. Hathi submitted that in the first place, the carrier ruling in the case of State of U.P. Vs. Tipper Chand, is more the present case as Clause 20 which was interpreted by a three member bench of the Supreme Court is in pari materia with clause 30 of the B-2 form. Mr. Hathi submitted that a close scrutiny of clause 15 which is reproduced in Rukmanibai's case (supra) shows that it is not in terms similar or identical with clause 30 of the B. 2 form. Mr. Hathi submitted that the case of State of U. P. v. Tipper Chand (supra) was not cited before the three-member Bench in Rukmanibai's case (supra). Mr. Hathi further submitted that judgment in the case of Union of India (UOI) and Another Vs. K.S. Subramanian, is an authority for the proposition that the proper course for a High Court is to try to find out and follow the opinions expressed by larger benches of the Supreme Court in preference to those expressed by smaller benches of the court. This practice has now crystallized into a rule of law declared by the Supreme Court. If however the High Court is of opinion that the views expressed by larger benches of the Supreme Court are not applicable to the facts of the case it should say so giving reasons supporting its point of view. Mr. Hathi submitted that clause 22 reproduced in the case of the State of U. P. v. Tipper Chand (supra) and clause 30 of the present case are identical and for all practical purposes in pari materia. Mr. Hathi submitted that in view of this legal position, the judgment of the Division Bench of this Court in C. R. A, No. 298,,170 with C. R. A.299/79 decided on 19/20-1-1971 cannot be looked into as, the Supreme Court in the case of the State (if U. P. v. Tipper Chand (supra) has taken a view contrary to it.

13. Mr. G. K. Sukhwani, the learned advocate for the respondent, submitted before me that in the case of Ms, Praharaj Partners v. State of Orissa AIR 1981 GAU 104, the learned Chief Justice had both the judgments in Rukmanibai's case (supra) and State of U. P. v. Tipper Chand (supra) before him, and he followed the later ruling of the Supreme Court in Rukmanibai's case (supra) observing as under:-

"Clear reason has been given in Smt. Rukmanibai Gupta Vs. Collector Jabalpur and Others, and tested by the reasoning indicated therein, in my opinion the provision contains an arbitration clause. The relevant clause in the contract under consideration contemplates of

parties, disputes and finally of These are the essential ingredients to bring in the provision of arbitration, and inclined to agree with the submission of the petitioner's counsel that this did constitute an arbitration clause."

14. In view of the observations cited above from the case of Union of India (UOI) and Another Vs. K.S. Subramanian, , it appears to me that if the clause for

interpretation by me is identical or for all practical purposes in parim I have no option but to follow the judgment in the case of the State of U.P. Vs. Tipper Chand, inasmuch as it was decided" by a three member Bench whereas Rukrnanibai"s can (supra) was decided by a two member Bench With respect, I find myself unable to, adopt the course" adopted by the learned Chief Justice in the case of Mrs. Praharaj Partners"v. State of Orissa (Supra)

15. Mr - Sukhwani, however, did attempt to make i distinction between the two clauses namely clause 21 in the case of State (of U . P; . v. Tipper Chand (supra) and clause 30 of the B2 form in this case. He submitted that the , marginal notes were different in the case of both of them. In clause 22, the marginal notes were, Direction to work whereas the marginal notes in clause 30 of the B-2 form ire "The decision of the attending Engineer to be final." The perusal of the Supreme Court judgment in the case of The State of U. P. v. Tipper Chand (3101pra) does not know that the interpretation put by it on clause 22.way guided by the marginal , notes. I - may reproduce the relevant part of the Supreme, court judgment to point out as to which factors in clause 22 appealed to it for its interpretation that it was not an arbitration clause. The observations are as under:-

After peru4ng the contents of the said clause -and hiring learned counsel for the parties. we find ourselves in complete agreement. with the view taken by - the High Court., Admittedly the clause does not, containing express arbitration argument. Nor such an agreement be called out, from its terms by implication, there being no mention in it of any dispute, much less of a reference thereof. On the other hand the superintending Engineer with supervision of the execution of the work and administrative control over it from time to time.

16. Mr. Sukhwani then submitted that there was some difference in the phraseology of the two clauses. He emphasised that in clause 22 the decision of the Superintending Engineer as to the quality of workmanship or materialised on the world etc., wag also to be final. conclusive and binding on the contractor. Mr. Sukhwani submitted that it was important to realise that in clause 3 of B-2 form the last part of it is in having the same phraseology, In case of both. I., e., to say in regard to all questions whether relating to the meaning of the identification etc., or whether regards the quality of workmanship etc., the decision of the Superintending Engineer is on, both the sides,. I appreciate the attempt of Mr. Sukhwani out some difference in the phraseology of both the clauses, but with - respect. I cannot accept his argument, since. I Ism of the view that both the clauses are.part materia in their effect.

17. In the result, I find myself in a position where I must follow the ratio of the judgment In the case of the State of U.P. Vs. Tipper Chand, . and in view of that position, I allow this Civil Revision, Application and quash and set aside the judgment and order dated 11th December 1980 passed. by the Civil Judge -(Sr. Dn).Bhavnagar in Civil Misc. Application No.200/76.

18. Rule is accordingly made absolute with no order for costs.

19. Revision allowed.