
(1957) 11 MAD CK 0015
In the Madras High Court

The Union of India (UOI)

APPELLANT

Vs

Mangaldas N. Varma

RESPONDENT

Date of Decision : 18-11-1957

Acts Referred:

Arbitration Act, 1940 — Section 8(2)

Citation : AIR 1958 Mad 296 : (1958) ILR (Mad) 420 : (1958) 71 LW 141 : (1958) 2 MLJ 16

Hon'ble Judges : P. Rajagopalan, O.C.J.; Rajagopala Ayyangar, J

Bench : Division Bench

Judgement

P. Rajagopalan, Offg.C.J.

1. Sri M.N. Varma (hereinafter referred to as the contractor) entered into a contract with the Government of India to construct huts in the Avadi

camp for the use of the military authorities. It was what was known as a lump sum contract. The amount was over Rs. 20 lakhs. The works were

completed in 1945. Disputes about the quantum still payable to the contractor were referred to arbitrators in accordance with clause 35 of the

contract between the contractor and the Government. Since the two arbitrators differed they referred the questions at issue between the parties to

an umpire. The award of the umpire Sri C.G. Modi, dated 29th July, 1953, ran:

The Union of India, the opponents, do pay to the claimant Shri Mangaldas N. Varma the sum of Rs. 6,05,000 (rupees six lakhs and five thousand

only) in respect of the claim. I do further award that the opponents do pay to the claimant Rs. 20,000 (rupees twenty thousands only) for costs of

this reference.

2. Though the arbitration proceedings were at Bombay, Avadi, it should be

remembered, ay within the territorial jurisdiction of the District Court of Chingleput. The contractor preferred O.P. No. 38 of 1953 to the District Judge of Chingleput to file the award and pass a decree in terms thereof.

The Government in its turn filed O.P. No. 48 of 1953 to set aside the award of the umpire. The learned District Judge allowed O.P. No. 38 of 1953 and dismissed O.P. No. 48 of 1953. Against these decisions C.M.A. Nos. 275 of 1955 and 76 of 1955 respectively were preferred by the Government.

3. To appreciate the scope of the contentions of Mr. Rege, the learned Counsel for the Government appellant, what preceded the umpire's award has to be set out. These facts themselves were never in dispute. The arbitration clause in the contract between the contractor and the Government provided for the settlement of disputes by the Major-General (Administration) as arbitrator. It was common ground that that office was abolished and it ceased to exist even by August, 1948. In September, 1951, the contractor and the Government agreed to submit the disputes between them for settlement by the two arbitrators, Mr. Section K. Patil and Brigadier Halloway. The reference to arbitration specifically provided that if there was any difference between the arbitrators the disputes should be referred to an umpire (Exhibit A-2). Exhibit A-2 itself listed the points of difference between the Government and the contractor

4. The arbitrators entered upon their duties. Exhibit B-15 was the detailed claim presented to the arbitrators by the contractor. The total of his claim against the Government was Rs. 57,78,929-4-0. The heads of claims were marked A to E. Of these item A was a claim for Rs. 98,211-7-0 which the contractor claimed was the balance due to him under the contract itself for the work done. Items B-1 to B-12 represented claims for compensation. The total of the claims under items A and B-1 to B-12 came to Rs. 6,03,049-11-0. Item C was a claim for Rs. "3,52,855-9-9 which according to the contractor represented the interest on the said sum of Rs. 6,03,049-11-0 at 9 per cent, per annum from 1st April, 1945 till 30th September, 1951. The contractor claimed that further interest would be payable on the total sum awarded at 9 per cent, from 30th September, 1951, till the date of payment. Under item D the contractor claimed Rs. 72,366 as compensation, because he had to maintain as

establishment to finalise his claims against the Government and to recover what was lawfully due to him. The basis of the claim under item E, Rs.

47,49,658 was that if the contractor had been paid what was lawfully due to him on the dates when they fell due, he would have been in a position

to invest these sums in his contract business and he would have been able to earn considerable profits. Exhibit A-12 Was only a summary of these

claims. In Exhibit A-1 3 the details of the counter-claim made by : the Government against the contractor amounting to Rs. 1,16,602-6-0 were set

out.

5. The statutory allowance of four months to complete the arbitration was obviously insufficient. The parties to the arbitration as well as the

arbitrators applied in O.P. No. 9 of 1952 (Exhibit A-3) to the District Judge of Chingleput and obtained time till 10th May, 1952, for the

arbitrators to give their award. As recited in Exhibit B-1 the arbitrators failed to agree, and on 24th April, 1952, they appointed Mr. E. A. Nadir

Shaw as the umpire to decide the questions at issue between the parties. Mr. Nadir Shaw apparently entered upon his duties as umpire, but he had

to relinquish them in June, 1952, because he had to go abroad. Exhibit B-14 is the letter, dated 13-14 June, 1952, written by Mr. Nadir Shaw to

the parties. He asked them to appoint another umpire.

6. On 19th June, 1952, and 26th June, 1952, the contractor and the Government respectively wrote to the arbitrators to appoint a fresh umpire.

Exhibit A-6 was the letter that the Government addressed to the arbitrators.

7. The arbitrators, Mr. Patil and Brigadier Halloway, selected Mr. C.G. Modi, a Judge of the Court of Small Causes, Bombay, and requested him

in Exhibit B-i, dated 1st July, 1952, to accept the office of umpire. Intimation of this was given to both the contractor and the Government by

Exhibit A-7, dated 4th July, 1952. They were informed that Mr. Modi could enter upon his office as umpire only after obtaining the permission of

the Government of Bombay, and the parties were informed further that steps were being taken to obtain the requisite sanction. That sanction was

eventually accorded on 31st July, 1952. At the request of Mr. Patil conveyed by Exhibit B-i, dated 1st July, 1952, the other arbitrator Brigadier

Halloway informed both the Government and the contractor by Exhibit A-9, dated 5th August, 1952, that Mr. Modi had accepted the

appointment of umpire.

8. That was followed up by Exhibit A-10 also dated 5th August, 1952, the formal reference by the two arbitrators to the umpire, Mr. Modi.

Copies of Exhibit A-10. were communicated by the arbitrators both to the Government and to the contractor.

9. The umpire gave notice on 14th August, 1952, both to the Government and to the contractor fixing 30th August, 1952, for a preliminary

meeting to enquire into the matters in dispute (Exhibit A-11). Two days earlier than that, on 12th August, 1952, the Government sent Exhibit B-12

to the umpire in effect requesting him, to proceed with the enquiry.

10. Thus it should be clear that a new umpire was appointed by the arbitrators at the request of both the parties, the Government and the

contractor. Both of them accepted the appointment of Mr. Modi and the Government requested him. to proceed with the enquiry. No one up to

this stage questioned the validity of the appointment of Mr. Modi as umpire.

11. Exhibit A-18, dated 23rd August, 1952, showed that the Government Solicitor advised the Government that possibly the arbitrators had no

authority to appoint a fresh umpire. The umpire, Mr. Modi, it should be remembered, had fixed 30th August, 1952, presumably in response to

Exhibit B-12 for a preliminary enquiry. There were no proceedings that day and further proceedings were adjourned to 4th September, 1952, as

was shown in Exhibit B-8, the minutes of the proceedings, before the umpire. The umpire recorded on 4th September, 1952:

Mr. Jayakar (Solicitor for the Government) raised a point with regard to the legality of my appointment as also the date on which I am supposed to

have entered upon the reference. The parties; agreed to take the opinion of the Advocate-General on the two points raised. The matter adjourned

to 8th September, 1952, at 5pm.

12. The Government Solicitor, Mr. Jayakar, was certainly aware of the fact that the Advocate-General was the counsel for the contractor and yet

the Solicitor was prepared to abide by the opinion of the Advocate-General on the legality of the appointment of Mr. Modi as umpire. On 8th

September, 1952, the umpire recorded.

The respective Solicitors informed me that the required opinion was taken and that the date-for hearing may now be fixed to proceed with the

arbitration.

The matter adjourned to 30th September, 1953, at 11-30 am.

13. It should thus be clear that the Government at this stage gave up its attempt to challenge the jurisdiction of Mr. Modi to act as umpire. This was

followed up by the "umpire by his notice Exhibit B-13 issued to the Solicitors of both the Government and the contractor, informing them in writing

that 30th September, 1952, had been appointed as the date for proceeding with the arbitration. The umpire informed them:

This long date is fixed to suit the convenience of the Central Government on the understanding that the parties in the meantime will obtain extension

of time from the proper Court for making the award

14. On 30th September, 1952, Exhibit A-15 was filed on behalf of the Government before the umpire. It was signed by the counsel for the

Government and ran:

The respondent objects to the jurisdiction of Shri Champaklal G. Modi, B.A., L.L.B., as umpire.

The respondent has been advised that the appointment of Shri Champaklal G. Modi is invalid and inoperative in law and that he is not entitled to

hold the office of umpire and proceed with the above matter.

The respondent is advised that he should not take part in the proceedings proposed to be held by Shri Champaklal G. Modi in the above matter.

The respondent, therefore, says that under the circumstances the proceedings in the above matter should be adjourned pending the valid

appointment of an umpire in accordance with the provisions of the Indian Arbitration Act, 1940.

The respondent is appearing by counsel in these proceedings under protest and will continue to so appear until the proceedings are adjourned.

15. On this the umpire recorded, (Exhibit B-8):

Mr. Rege (counsel for the Government) submits to me a statement objecting to the legality of my appointment. Mr. Rege was informed that this

point was raised by Mr. Jayakar and after the opinion of the Advocate-General about the validity of my appointment Mr. Jayakar consented to

proceed with the arbitration and he took today's date by mutual consent for the purpose. It was also brought to the notice of Mr. Jayakar that the

time for making the award was too short. A long date was given to suit the convenience of the Central Government on the understanding that the

parties-in the meantime will obtain extension of time from the proper Court for making the award.

As Mr. Jayakar has gone to Poona, the matter is adjourned to 7th October, 1952, at 5 P.M. to enable the counsel for the Government to meet

Mr. Jayakar to ascertain the above facts

16. Exhibit B-8 showed that on 7th October, 1952, Mr. Rege, counsel for the Government, still appeared under protest. Nothing, however, was

done that day and the proceedings were adjourned to 8th October, 1952. On 8th October, 1952, apparently Mr. Rege was not present but Mr.

Jayakar, Solicitor for the Government, represented the Government. The umpire's note ran:

Mr. Jayakar informs me that he has communicated with the Chief Engineer's office, Southern Command and that necessary steps will be taken to

have the time extended for making the award; till 31st January, 1953.

17. Mr. Jayakar apparently ceased to act as Solicitor for the Government by the end of January, 1953 and fresh Solicitors came on record as is

clear from the notes of the umpire, dated 30th January, 1953 and 2nd February, 1953.

18. Meanwhile, on 11th November, 1952, the Government preferred O.P. No. 33 of 1952 to the District Judge of Chingleput to extend up to

31st March, 1953, the time required to complete the award. This was apparently to implement what was represented to the umpire on 8th

October, 1952. Even the time up to 31st March, 1953, was not sufficient. On 9th March, 1953, the contractor presented O.P. No. 12 of 1953,

to the District Judge, Chingleput, to extend the time up to 31st May, 1953, for the umpire to give his award. On that application the Solicitor for

the Government of India endorsed:

I ... hereby give my consent on behalf of the respondent to the time for the umpire Sri C.G. Modi for making his award in the matter extended till

31st day of May, 1953.

19. The Court granted time till 31st July, 1953.

20. It should thus be clear that though at one stage the counsel for the Government challenged the validity of the appointment of Mr. Modi as

umpire, that objection was apparently not persisted in. Certainly no objection was put forward in the proceedings in the District Court, Chingleput,

when both parties virtually asked the District Court to extend the time to enable Mr. Modi as umpire to give his award. Time, as we have pointed

out, was granted by the District Court up to 31st July, 1953.

21. Exhibit B-8, the minutes of the proceedings before the umpire, showed that the actual enquiry commenced on 28th February, 1953 and was

concluded on 15th July, 1953. The umpire's award was given on 29th July, 1953.

22. It is against this background that we have to consider the submissions of the learned Counsel for the appellant. His first contention was that the

appointment of Mr. Modi as umpire by the arbitrators was invalid and therefore the umpire had no jurisdiction at all to proceed with the arbitration.

His next set of contentions was that the award was vitiated, because the umpire did not give his decision with reference to each head of claim and

counter-claim especially when the umpire had to decide the plea of limitation also with reference to each head of claim of the contractor.

23. The relevant dates with reference to the first of these contentions were as follows. On 14th June, 1952, Mr. Nadir Shaw relinquished his

office. On 19th June, 1952 and 26th June, 1952, respectively the contractor and the Government asked the arbitrators to appoint a fresh umpire in

the place of Mr. Nadir Shaw. Though on 1st July, 1952, itself the arbitrators appointed Mr. Modi as umpire, effect could be given to that

appointment only on 5th August, 1952, after the requisite sanction had been obtained from the Government of Bombay to permit Mr. Modi to

take up his work as umpire.

24. The learned Counsel for the appellant urged that 5th August, 1952, should be taken as the date on which Mr. Modi was appointed umpire,

and that such an appointment was in contravention of Section 8(2) of the Arbitration Act, 1940, and was in excess of the powers of the

arbitrators. The learned District Judge referred to the petitions filed in his Court for extension of time to complete the arbitration proceedings and

observed that these petitions indicated that the parties accepted the umpire and were willing to abide by his award. The learned Judge concluded:

I do not consider that in these circumstances it could be said that the umpire acted without jurisdiction or without his being an umpire legally

appointed under the Arbitration Act.

25. The relevant portion of Section 8(1)(c) of the Arbitration Act runs:

Where the arbitrators are required to appoint an umpire and do not appoint him; any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy

Section 8(2) runs:

If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave

the notice and after giving the other parties an - opportunity of being heard appoint an umpire who shall have like power to act in the reference and

to make an award as if he. had been appointed by consent of all parties.

26. We are unable to discover any real basis in these statutory provisions for the contention of the learned Counsel that in the circumstances of this

case the two arbitrators were divested of their powers to appoint an umpire on the expiry of the fifteenth day from the date on which the parties to

the reference, the contractor and the Government, wrote to them asking for the appointment of an umpire. In this case the obligation of the

arbitrators to appoint an umpire arose when Mr. Nadir Shaw informed them and the parties on 14th June, 1952, of his inability to function any

longer as an umpire On 23rd June, 1952, Mr. Patil wrote Exhibit A-4 to the other arbitrator, Brigadier Halloway, suggesting certain names. Exhibit

A-5 was the reply of Brigadier Halloway, dated 25th June, 1952, accepting the suggestion to appoint Mr. Modi. On 1st July, 1952 both of them

addressed Mr. Modi to accept the appointment, Exhibit B-i. Thus it was not a case of neglect or refusal of the arbitrators to appoint an umpire.

They did appoint the umpire. They selected Mr. Modi for appointment even before 1st July, 1952, though the formal appointment had to be

deferred till 5th August, 1952, to obtain the sanction of the Government of Bombay to enable Mr. Modi to accept the offer of appointment. The

parties, the contractor and the Government, were kept informed all through. It should be clear that it was not a case, where the arbitrators, who

were required to appoint an umpire, did not appoint one within the meaning of Section 8(i)(c) of the Arbitration Act. That Sub-section postulates

at least a factual failure on the part of the arbitrators to appoint an umpire

before either of the parties could serve the notice on the arbitrators. The notice, for which Section 8(i)(c) provides, is a notice by the party to the arbitrators, who had already failed to appoint an umpire, to concur in the appointment of an umpire or to concur in supplying the vacancy in the office of the umpire. Even factually the letters written by the contractor and the Government to the arbitrators on 19th June, 1952 and 26th June, 1952, respectively were not the notices for which Section 8(1)(c) provided. Section 8(2) comes into play only after the service of the said notice, the notice issued by the party u/s 8(1)(c). There was no such notice. There was no occasion for any such notice.

27. Even assuming that the letters, dated 19th June, 1952 and 26th June, 1952, could be viewed as notices u/s 8(1)(c) of the Act, Section 8(2) is

only an enabling Section. The party whose notice was ignored is enabled by Section 8(2) to apply to the Court for the appointment of an umpire.

The scheme underlying Section 8 is that the default of a party to the reference or even the default of an arbitrator should not normally result in the

arbitration agreement itself becoming abortive. Consent, of course, is of the very essence of arbitration. Reading Section 8(1)(c) and Section 8(2)

together, it seems to us that, even where the arbitrators were requested by the parties to appoint an umpire, if the request was complied with and

an umpire was appointed, and that appointment was accepted by the parties, the validity of the appointment cannot be challenged on the ground

that that appointment was made more than fifteen days after the parties had asked the arbitrators to appoint an umpire. If the requirements of

Section 8(2) are satisfied, and an application is made to the Court to appoint an umpire, thereafter, of course, when the Court is seized of the

matter, the arbitrators could not be permitted to appoint an umpire. None of these factors came into play in the present case. Once again we have

to point out that the arbitrators acted promptly on the receipt of the letters from the parties to the reference to arbitration, and the delay in giving

effect to that appointment was one which was specifically brought to the notice of both the contractor and the Government and they accepted that

delay as inevitable.

28. The contention of the learned Counsel for the appellant, that the appointment of Mr. Modi as umpire was invalid even at its inception, therefore

fails.

29. In the view we have taken of the validity of the appointment of the umpire, it may not really be necessary to uphold his jurisdiction on the

ground that the Government, by its conduct, was estopped from questioning the validity of the appointment in subsequent proceedings. The learned

Counsel for the appellant urged that the participation of the Government in the proceedings before the umpire subsequent to 30th September,

1952, on which date the counsel for the Government lodged Exhibit A-15 with the umpire, did not really bar the Government from attacking the

validity of the proceedings before that umpire. The learned Counsel relied on *Chetandas v. Radhakisson* AIR 1927 Bom. 553 , and *Rambaksh v.*

Bombay Cotton Co. AIR 1931 Bom. 81. What would have been the position had the umpire, after the protest by the Government on 30th

September, 1952, completed the arbitration proceedings within the time allowed by law and gave his award, we are not called upon to discuss or

decide in this case. Whether in such a case, the subsequent participation in the proceedings before the umpire after the initial protest would amount

to a waiver of the Government's right to challenge the jurisdiction of the umpire does not arise for consideration in the circumstances of this case.

The umpire could not complete the arbitration proceedings within the time allowed by law. The requisite sanction of the Court had to be obtained

to extend the time within which the umpire could give his award. That sanction was sought first on the initiative of the Government itself when it filed

O.P. No. 33 of 1952, and next on the initiative of the contractor when he filed O.P. No. 12 of 1953. Who presented the petition may not be

material in the circumstances of this case, as both parties to the reference had agreed before the umpire to obtain the sanction of the Court to

extend the time for the umpire to give his award. O.P. No. 12 of 1953, it should be remembered, contained an express consent given by the

Solicitor for the Government to extend the time. If the Government wanted to challenge the validity of the appointment of Mr. Modi as umpire, the

proper stage was when an application was made to the District Court, Chingleput, to extend the time, and the appropriate forum to decide such an

issue was that Court. The conduct of the Government in accepting the validity of the proceedings before the umpire, on the basis of which alone

the Government could have asked for extension of time or acquiesced in the subsequent request for extension of time, should be sufficient to deny

them the right at this stage to impeach the validity of the appointment of Mr. Modi as umpire.

30. This was the conduct of the Government after the formal protest to the umpire's jurisdiction by filing Exhibit A-15 on 30th September, 1952.

But this apart, we have narrated the manner in which the Government concurred in the appointment of the umpire and the steps they took before

him requesting him to proceed with the reference, Exhibit B-12. Learned Counsel urged that this might not amount to waiver or acquiescence

because it was not proved that Government were aware of the precise legal point regarding invalidity when they took these steps. It is unnecessary

to pronounce on the sustainability of this explanation because in the present case the Government specifically gave up this objection later on after

they were aware of the supposed invalidity in the appointment of the umpire. In saying this we are thinking of the proceedings before the umpire,

dated 4th September, 1952, which we have already set out. On the latter date, they expressly abandoned their objections to the validity of the

umpire's appointment accepting the opinion of the Advocate-General in the matter. Learned Counsel for the appellant faintly suggested that the

Advocate-General whose opinion was sought was counsel for the contractor but if as was admitted this fact was known to the representative of

the Government when the latter agreed to abide by his opinion, it did not affect its binding character. Indeed even after an opinion adverse to

Government's contention was given by the Advocate-General it was in terms accepted by the Solicitor who represented the Government before

the umpire and it was on this basis that the umpire adjourned the proceedings to 30th September, 1952. This conduct of the Government might, in

our opinion, sustain a plea that the Government had precluded themselves from lodging any protest to the jurisdiction of the umpire on 30th

September, 1952, when they filed Exhibit A-15 before him.

31. But as we have already recorded earlier, it may not be necessary to rest our decision on these features of the case because independent of

these we have found that the appointment of Mr. Modi as umpire was valid.

32. There was even less basis for the second set of contentions of the learned

Counsel for the appellant. It is true that the umpire did not give any reasons in the award. But, then that by itself cannot vitiate the award. Exhibit B-8 was a fairly full record of the proceedings before the umpire, which showed that each head of claim and counter claim was separately considered by the arbitrator. It was not as if the question of limitation was not considered by the arbitrator. Exhibit A-16 showed that 28 hours and 45 minutes were spent in all by the umpire in listening to arguments on the question of limitation. Exhibit A-16 also showed that each of the claims and counter-claims was considered, and the time spent by the umpire on each of these claims was also recorded. We have referred to this only to show that every aspect of the case with reference to each head of claim was fully considered by the umpire before he gave his award. We are not now concerned with the question whether the ultimate decisions of the umpire which might very well have been based in part on his construction of the correspondence as acknowledgment of liability on the part of the Government was right or not; all that we need say is that the apparent failure to record specific findings on the issue of limitation with reference to each head of claim did not vitiate the umpire's award. Nor can the validity of the award be impugned on the ground that each item of claim or counterclaim was not specifically dealt with and the umpire's decision thereon recorded. An award of a lump sum is not invalid and the sum awarded must on the facts of the present case be taken to reflect the net result of the claims upheld or disallowed.

33. The appeals fail and are dismissed with costs in one, C.M.A. 76 of 1956.