

(1998) 07 DEL CK 0012

In the Delhi High Court

Case No : S.No. 638A/96 and is 11935/96

T.S. Narayanaswamy

APPELLANT

Vs

Swayam Sewa Cooperative Group Housing Society

RESPONDENT

Date of Decision : 14-07-1998

Acts Referred:

Citation : (1998) 74 DLT 687 : (1998) 46 DRJ 362

Hon'ble Judges : S.N. Kapoor, J

Bench : Single Bench

Advocate : Mr. R.K. Dhawan, for the Appellant; Mr. B.K. Dwivedi, for the Respondent

Judgement

S.N. Kapoor, J.—This judgment shall dispose of suit No. 638A/96 u/s 14 of the Arbitration Act, 1940 as well as objections vide is 11935/96.

2.1. Relevant facts are as under:

Earlier in a reference petition Suit No. 3192/92 under the directions of this court on 2nd December 1992, the Chairman and Managing Director of the Housing Urban Development Corporation appointed Shri M.N. Joglekar, respondent No.2 as an arbitrator to decide the disputes between the petitioner and respondent No.1. Shri Joglekar entered on reference and gave and published his award dated 28th February 1996. After filing of the award, requisite notices were issued.

2.2. Respondent filed is 11935/96 raising several objections including the objection relating to existence of the Arbitration Agreement. There was no privity of contract whatsoever between the claimant Prof. T.S. Narayanaswamy and Society for the first paragraph of Articles of Agreement reads as follows:

"This agreement made the 7th day of February, 1990 between SWAYAM SEWA CO-OPERATIVE HOUSING SOCIETY LTD., having its registered office at D/170, Lajpat Nagar, new Delhi of the one part

and

DEPARTMENT OF BUILDING ENGINEERING AND MANAGEMENT, School of Planning and Architecture, through the Head of Department of Building Engineering and Management, having its office at 6-Block-B, Indraprastha Estate, New Delhi-110002."

Consequently, the award filed by the arbitrator is a nullity on the face of itself.

2.3. Prof. T.S. Narainaswamy has even retired from the post of the Head of the Department of Building and Engineering and Management, School of Planning and Architecture. There was no agreement in his personal capacity. This very objection was taken before the arbitrator. Consequently, there has been a material irregularity in the erroneous assumption of the arbitrator that there existed an agreement between the claimant Prof. T.S. Narainaswamy in his individual capacity and the respondent/society. The arbitrator has just ignored the objections raised. The impugned award dealt with a dispute not contemplated by the parties and the award relates to decisions on matters beyond the scope of the submission to arbitration. The arbitrator also did not give due weight to clause 5.0.(a) of the Articles of Agreement which reads as under:

"The fees for the Project Management Services shall be 8% of the Project cost and shall be directly paid by HUDCO."

As per natural meaning of this clause, the claimant was entitled to 8% of the quantum of the work done till cancellation of agreement. The cost of total work done being Rs.35 lacs, the fee payable at the rate of 8% becomes Rs.2.80 lacs only and as per report of Mr. K.A. Patel, Chartered Engineer, the total work done till cancellation of agreement in August 1992 was to the tune of Rs.58,08,366.90P. The total percentage of the work done by the PEMC was 34.425%. Since Clause 5(a) of the Articles of Agreement clearly stipulated that the payment be released in proportion to the quantum of work executed, the fee payable comes to only Rs.2.62 lacs while the arbitrator has wrongly concluded that the claimant was entitled to get Rs.4,02,100. The respondent has already paid Rs.3,35,918.35P. The arbitrator has failed to consider the payment of Rs.10,343.93, Rs.2,500 and also Rs.1200. The excess amount paid (over and above Rs.2,72,000) is liable to be refunded to the respondent together with 18% interest with future interest w.e.f. the date when the excess amount was to be paid in part. Local Commissioner has shown total of 381 dwelling units whereas there are only 338 units existing at site and, Therefore, the percentage should have been determined accordingly. The finishing and internal services, as shown by Local Commissioner were never carried out in any of the dwelling units. The charges of the copies of the drawing which was the responsibility of the HUDCO, has wrongly been shifted to the respondent/society in contravention of the existing contractual obligations. The claimant was to claim Rs.50,000/- from the HUDCo which has been paid to the HUDCO. The respondent is not liable to pay any interest on this amount. On this basis, it is claimed that it be declared that the impugned award is illegal or the award be remitted for the purpose of eliminating the grounds for setting aside the impugned award.

3. These objections are being contested by the claimant inter alias on the ground that the contesting respondent could not take the plea of lack of arbitration agreement for the disputes had already been referred to Mr. M.N. Joglekar under the directions of this court and the disputes mentioned in clause A to I excepting the dispute E to the arbitrator. And, the respondent/society was also directed to deposit FDR of Rs.5 lacs despite the fact that similar objection was taken earlier but ultimately the respondent society also agreed to the arbitration. The contention that there was no privity of contract between the claimant and the respondent/society is being disputed by the claimant. It is also denied that the arbitrator has erroneously concluded that there was an agreement between T.S. Narayanaswamy, the claimant and the respondent/society. The learned arbitrator while passing the award on issue (c) considered clause 5(a) taken with project cost with reference to clause 4.4 and accordingly determine the professional fee due to the claimant and rightly awarded the amount. This court, not being an appellate court, is not supposed to examine quantum of amount and merits and conclusions drawn by the learned arbitrator. There was no correction in the award Annexure 11, though mentioned in the objection petition, has not been filed. It is denied that the arbitrator has not considered payment of Rs.10,343, Rs.2,500 and Rs.1200 or ignored material documents. The award is well reasoned. It is stated that the HUDCO has not signed the arbitration agreement. It is denied that it was the duty of the claimant to take Rs.50,000/- from HUDCO.

4. From the respective contentions of the parties, following points arise for consideration:

a) Whether the respondent could question privity of arbitration agreement and validity of the reference at this stage after the reference was made under the directions of this court?

b) Whether the arbitrator has misconducted or acted beyond the scope of the agreement which has prejudicially affected the respondent in respect of any of the claims of the claimant?

c) Whether Prof. T.S. Narayanswamy is entitled to file the petition u/s 14 of the Arbitration Act, 1940?

d) Relief.

5. I have heard the parties counsel at length and gone through the record.

POINT (A)

In so far as the question of invalidity of the reference is concerned, learned counsel for the claimant submitted that at the initial stage this plea was also taken before the directions were issued by the court for referring the matter to arbitrator. But ultimately, this plea was not pressed before Hon"ble Mr. Justice Dalveer Bhandari on 2nd December 1992. It is submitted that the principles of res judicata as well as estoppel by conduct apply for there was letter dated 5th August 1992 written by the Secretary of the respondent Society Shri P.R. Meena;

the issues were framed; the respondent deposited Rs.5,00,000 in court; specific issues were referred to the already appointed arbitrator Shri M.N. Joglekar; the objector participated in arbitration proceedings.

6.1. On the other hand, it is contended that Section 30 provides that the award may be set aside if the award is otherwise invalid, on the authority of The Union of India (UOI) Vs. Shri Om Prakash, . The Supreme Court did not follow the distinction between the cases where the reference was made in a suit and where the reference was not made under an order of the court. Supreme Court observed in para 5 as under:

"The words "or is otherwise invalid" in clause (c) of Section 30 are wide enough to cover all forms of invalidity including invalidity of the reference. We do not find any reason why the general and unqualified language of clause (c) should not include an award on an invalid reference which is a nullity. The cases cited at the Bar show that all the High Courts with only one or two exceptions have taken this view. We hold Therefore that the awards challenged in these appeals are nullities and have been rightly set aside by the High Court. In the view we have taken it is not necessary to consider the other question, whether Brig. Bhandari who made the awards was the officer answering the description of Director of Farms, General Headquarters, Simla, to whom the court had referred the disputes. In the result the appeals fail and are dismissed with costs."

6.2. It would be desirable to know the background of this case. In that case, reference was made beyond its jurisdiction by the court on an application u/s 8 of the Arbitration Act. It was contended that the learned Civil Judge did not have any jurisdiction for he was functions officio after passing an order u/s 8(2) and as such, could not make an order of reference. The named arbitrator Col. Ranbir Singh returned the papers. Thereafter, Judge, Small Cause Court appointed Director of Farms, General Headquarters, Shimla to act as an Arbitrator. The papers were sent to Brig. H.L. Bhandari who was said to be the officer concerned. Brig. Bhandari was not the Director of Farms for the post had been abolished. Review application was filed and that was also dismissed. The respondent did not appear before the Arbitrator. The awards were given; decree was passed and appeal preferred. The High Court set aside the award holding that when the court below made the orders of reference, there was no post of Director of Farms, General Headquarters, Shimla in existence, and as such, Brig. Bhandari was not competent to act as an Arbitrator on the basis of order dated February 13, 1951. The Union of India questioned the correctness of the High Court decision in these appeals. By the above noted observations, the apex Court dismissed the appeal.

6.3. Before proceeding further, it would be desirable to appreciate the factual position in the case in hand. The agreement dated 7th February 1990 was executed between Shyam Sewa Co-operative Housing Society Ltd., Delhi, having its Regd. office at D/170 Lajpat Nagar, New Delhi, of the one part and Department of Building Engineering and Management, School of Planning and

Architecture, through its office at 6 Block-B, Indraprastha Estate, New Delhi-110 002. It has been signed by Secretary of the Shyam Sewa Co-operative Housing Society Ltd. on behalf of the Society and it was signed by Head of the Department on behalf of Department of Building Engineering and Management, School of Planning and Architecture. Para 2.1.2 reads as under:

2.1.2 "The PMC and Society will appoint a Working Committee consisting of the following members:

1. Secretary of the Society
2. Two representatives of SEWA
3. Two representatives from beneficiaries
4. HUDCO representative
5. Representative of Architect Consultant
6. Two representatives from PMC

The quorum of this meeting shall be formed by four members. The meeting shall be presided by President or Secretary of Society. All matters like procurement of materials, its quality, rates, mode of execution of work etc. have to be got approved from the above committee. The bills of materials and labour employed or of petty contractors shall be certified by the PMC.

Para 3.5 provides as under:

3.5 Even if any dispute, difference or question arises out of or concerning this agreement and whether the same has been referred to Arbitration or not, the PMC shall continue to perform his duties under this agreement with due diligence. "Unless the PMC is instructed in writing by the Society not to continue with the work".

6.4. The fees for the project management devices was directly payable to HUDCO in terms of clause 5A.

The arbitration clause 3.4 reads as under:

3.4 "Same as otherwise provided herein in the event of any dispute, difference or question arising out or touching upon or concerning the agreement for the execution of the work herein specified, the same shall be referred to the HUDCO as an Arbitrator. The decision of the Arbitrator thus appointed, shall be final and binding on both the parties and shall be made a Rule of Court."

6.5. The objection of the respondent is that the claimant was never a party and there was no privity of contract between the parties.

6.6. The instant case is slightly different from the case of Union of India Vs. Om Prakash (supra). Waverly Jute Mills Co. Ltd. Vs. Raymon and Co. (India) Private Ltd., may not be very helpful for in that case, reference was not made through

court and naturally in those cases, the application of Order 2 Rule 2 of res judicata would not have applied but in the present case, a petition u/s 20 was filed. The plea was raised by the respondent which was an issue but not pressed ultimately. Consequently, the reference was made. The question is whether this court should now consider the question of invalidity of reference for want of any valid arbitration between the claimant and the respondent.

6.7. The contention of the learned counsel for applicant is that this agreement itself indicates that though Prof. T.S. Narayanaswamy was Head of the Department of Building, Engineering and Management, School of Planning of Architecture, he had signed the same only in official capacity on behalf of the Department and not in his own personal capacity. There is no finding in regard to this aspect of the matter either way in the order of this court dated 2nd December 1992 for the respondent informed that at the request of the petitioner, the disputes between the parties had already been referred to Mr. M.N. Joglekar, Executive Director, Design and Development, Housing and Urban Development, HUDCO house, Lodhi Road, New Delhi. Thus, it indicates that the respondent did not press about the maintainability of the petition for the reference was to be made in any case on account of the dispute between the Department of Building, Engineering and Management and the respondent and the petitioner just happened to be the Head of the Department of Building, Engineering and Management. Later on, he retired on 31st July 1994. At that stage, the petitioner being Head of the Department as well as Project Management Consultant, the respondent it appears, did not press the plea. But when the petition u/s 14 was filed, the petition was not filed by Head of the Department; it was filed by Prof. T.S. Narayanaswamy in his personal capacity. Now the question is whether the arbitration agreement though not signed by Prof. Narayanaswamy in his personal capacity would ensure to the benefit of claimant in his personal capacity just being a member of working committee under clause 2.1.2. It may be mentioned that Ex. P/7 related to the question of cancellation of agreement under which services of Prof. Narayanaswamy were deemed as cancelled with immediate effect. It was an issue which was referred to the arbitrator for arbitration.

6.8. Now coming back of clause 3.4. Whether this court could cover and bundle the dispute relating to the individual agreements with members of Project Management Committee with the disputes referable under the main agreement.

7.1. From clause 2.1.2, it is apparent that the Project Management Consultants were the Department of Building, Engineering and Management and not Prof. T.S. Narayanaswamy in his personal capacity. The moment we spread and split the two capacities of the claimant, when he filed the petition u/s 20 and when he filed the petition u/s 14, the present petition appears to be incompetent for the following reasons:

i) Clause 3.4 covered only the dispute between the PMC and the respondent/society. It did not cover any dispute relating to appointment or termination of any of the representatives from PMC in the working committee. The two, PMC

and the Prof. Narayanaswamy in his individual capacity could not be equated in any manner, specially after his retirement.

ii) The dispute between the representative of the PMC and the Society were not supposed to be referred for arbitration under clauses 3.1 to 3.5.

iii) The principles of res judicata and estoppel might have been applicable in this case also if Prof. T.S. Narayanaswamy had filed the present application on behalf of the Department of Building Engineering and Management but not when he is filing the case for his individual capacity.

iv) The claimant did not rely on any agreement other than Annex. P/2 dated 7th February 1990. The fee for the Project Management Services was payable to HUDCO in terms of clause 5.0.(a).

v) That the PMC fee shall include salary including funds of PMC staff associated with the project. This clause 5(a) and (g) would be covered in clause 5 (a) and clauses (b), (c), (d), (f), (g), (h) and (i) are just an elaboration of the different heads under which payment was to be made to HUDCO.

7.2. Considering these aspects, one is led to an irresistible conclusion that there was no agreement between the respondent and the claimant in his personal capacity.

7.3. For the foregoing reasons, and in the light of judgment of Union of India Vs. Om Prakash (supra), it is apparent that the respondent/objector could certainly challenge the validity of the reference, in so far as privity of arbitration agreement between the present petitioner and the respondent is concerned, in the petition u/s 14.

7.4. But this by itself may not be sufficient to say that the reference under consideration is invalid. In view of the dual capacity of the petitioner at that stage and for all practical purposes, the present petitioner was representing PMC, i.e. Department of Building, Engineering and Management. Accordingly, it has to be held that the reference was valid. It is altogether different thing whether the present petition is maintainable or not.

POINT (B)

8.1. However, since the award has been filed under the Directions of the court, this court is supposed to consider the objections of the respondent/society on merits. These are dealt with as under:

8.2. The dispute relates to award on issue No. (c) "To what amount the petitioner/claimant is entitled to the professional fee in accordance with the agreement"?

8.3. In so far as the question of cost of project construction is concerned, according to the respondent a sum of Rs.58,72,000/- was the cost of project of constriction, as per the loan sanctioned record of HUDCO. The learned Arbitrator

was justified in ignoring the project cost in HUDCO's loan application estimates for those estimates were well before 1st July 1988 while the agreement was signed on 7th February 1990. The arbitrator was absolutely correct when he observed "Therefore, the loan application estimate needs enhancement by two years escalation". In terms of clause 4.4 of the agreement, "the fee for the Project Management Consultants for the project shall be based on the estimated cost as arrived at the time of this agreement and shall be based on the market rates." Therefore, there is no reason to differ with the learned Arbitrator up to this stage. It is apparent from the record that the cost was not worked out at the market rate on 7.2.90 but none of the parties referred to such a cost. As per letter dated 1.5.90, the cost was conveyed for 341 dwelling units at Rs.27,000/- each and that comes to Rs.92,07,000/- according to the estimate and that is the nearest estimate. There is no reason to differ with that estimate.

8.4. However, there is another aspect. According to the submissions of the counsel for respondent clause 5A of the agreement stipulated that the payment shall be released in quantum of the work executed. Since only 34.425% work was performed, the fee payable becomes only Rs.2,72,000/- in terms of the report of the Local Commissioner (Annex.6). Clause 5(3) and (f) provide that the apart from the payment under clauses 5(a) to (d), the balance shall be released once every month in proportion to the quantum of work executed in that month, subject to a minimum of 5% of the total fees payable.

8.5. Consequently, the arbitrator was supposed to consider that clause 5(a) read with clause (e) and (f) clearly stipulated that the payment was to be released in proportion to the quantum of the work executed. According to the report of the Chartered Engineer, appointed by the court only 34.425% work was done. The learned arbitrator has not taken into consideration this aspect at all. But he had just calculated at the rate of minimum of 36.828 per month for 14 months irrespective of the construction work done. Moreover, it does not appear that the learned arbitrator has considered all the amounts paid. He just adjusted only 80,780/- without discussing as to why no adjustment was given for imprest money Rs.10,343.90 consultancy fee, Rs.2,500 plus Rs.1200 and Rs.2,71,875 deducted from loan released account. It has also been pointed out that Local Commissioner had shown 381 dwelling units whereas there are only 338 units existing at site. The finishing and internal services as shown were never carried out in any of the dwelling units. The charges and copies of drawing, which was the responsibility of HUDCO has wrongly been shifted to the respondent/society in contravention of the existing contractual obligations.

8.6. In the absence of clarity on the above-mentioned point, one may infer that either the learned arbitrator failed to consider the material evidence on record and/or failed to apply the provisions of the agreement.

8.7. Accordingly, it is held that the arbitrator misconducted the proceedings and acted beyond the scope of the agreement which has prejudicially affected the respondent in respect of the concerned claims. The point is decided accordingly.

POINT (C)

9.1. Accepting that the reference was valid, the question whether the present petition is maintainable or not is to be seen at this stage and in the light of discussion on Point (a), in case competence of Prof. T.S. Narayanaswamy is considered, he is not competent to file the present petition u/s 14 for making the award rule of the court. It may also be mentioned that the Arbitrator at p.11 observed as under:

"However, considering that all the earlier payments of professional fees were made to the School of Planning and Architecture, this payment should also be made in the same manner. Since this payment relates to the period when Shri T.S. Narayanswamy, the claimant was the Head of the Department of Building Engineering and Management, he is directed to claim his share from the School of Planning and Architecture, New Delhi, in the same manner as earlier."

9.2. This indicates that even the Arbitrator had not considered his claim in his individual capacity but only as a representative of the Project Management Consultant i.e. the Department of Building, Engineering and Architecture.

9.3. In view of the observations of the Supreme Court that the term "otherwise invalid" would cover the cases of reference made through the court also appears to be wide enough to cover the case, at the reference petition stage u/s 20 of the Arbitration Act, 1940 as well as at the stage of filing of the award and the stage u/s 14 to make the award the rule of the court. Consequently, it may be difficult to accept the proposition that such a plea could not be taken, especially when the petition is no more clothed with the representative capacity.

9.4. Prof. T.S. Narayanswamy in his individual capacity was not a party to the arbitration agreement. He was just a third party who could not by any stretch of imagination take advantage of the said arbitration clause and get it enforced and that the settled law is that only those persons can enforce arbitration clause or award who are parties to the agreement (See General Insurance Company Ltd. Vs. Narain Prasad, AIR 1984 Pat 190. Prof. T.S. Narayanswamy cannot claim to be person claiming under the Department of Building, Engineering, Management and Architecture. Since he is not a party to the arbitration agreement, nor any person claiming under him, he could not apply under Sections 14 or 30 or 33 of the Arbitration Act, Prof. T.S. Narayanaswamy cannot file any objection in his individual capacity.

9.5. The question of jurisdiction of the court depends on numerous factors including the competence of the petitioner. If the petitioner has no cause of action in his personal capacity, this court may not have any jurisdiction to entertain the petition for a petition u/s 14 shall be governed by Order 1 Rule 1 just like a civil suit and Therefore the claimant having no cause of action in his personal capacity, could not file this petition u/s 14.

9.6. The Arbitrator u/s 14(2) could file award or signed copy of it "at the request

of any party to the arbitration agreement or any person claiming under such party". It means that in application u/s 14 by a person who is not a party to the arbitration agreement or who does not claim under such a party, should not be entertained.

9.7. As such, neither the application nor the objections filed by Prof. T.S. Narayanswamy are maintainable.

POINT (D)

10. For the foregoing reasons, it appears desirable that the matter should be remitted for ascertaining the actual work done by the Department of Building, Engineering and Management to decide the fee of the department on that basis. The arbitrator should also clarify the basis of arbitrarily taking 2.12.92 as the date of termination of the agreement for it should relate back to the date of notice for the observations of Hon'ble Mr. Justice Dalveer Bhandari especially when the observation was to the effect that respondent No.1 and respondent NO.2 in any event did not want the petitioner to continue any longer because of past experience with him. In these circumstances, the condition could not be imposed on the petitioner to complete the project.

11. Accordingly, I set aside the award and remit the matter to Mr. M.N. Joglekar, the Arbitrator to clarify all the points mentioned in paras No 8.4 to 8.7 and 10, within four months. The respondents and the interested parties may appear before the Arbitrator on 3rd August 1998. The department of Building, Engineering and Management shall be represented by the present Head of the Department or his successor in office during the pendency of the arbitration proceedings.

12. The suit is disposed of accordingly.

13. A copy of this order may be sent to the Arbitrator for information and compliance.