

(1961) 12 P&H CK 0024
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 280-D of 1959

Union of India and Another

APPELLANT

Vs

A.K. Gilkam and Co.

RESPONDENT

Date of Decision : 06-12-1961

Acts Referred:

Arbitration Act, 1940 — Section 11, 12, 2
Contract Act, 1872 — Section 65
Government of India Act, 1935 — Section 175, 175(3)

Citation : AIR 1962 P&H 423

Hon'ble Judges : J.S. Bedi, J

Bench : Single Bench

Judgement

(1) This revision arises against the order of Shri Diali Ram, Commercial Sub-Judge 1st Class, Delhi, dated the 18th March 1959 by which he ordered the removal of the General Officer commanding-in-chief, Western Command, as an arbitrator and appointed Shri Permanand Trehan as such with the direction that the arbitrator should make his award within four months or such extended time as the court may allow and that the arbitrator would get Rs. 1000/- as his fees.

(2) The facts which gave rise to this petition under Secs. 11 and 12 of the Arbitration Act are as under : Messrs. A. K. Gilkan and Co., Now respondents, entered into two arguments with the Union of India, New Delhi, for managing and running a cinema for the troops stationed at some place in Jammu and also for the management of the Officers' club. It was also agreed between the parties that in case of any disputes arising out of these contracts, reference would be made to the General Officer Commanding-in-chief, Western Command whose decision was to be final. It was, however, alleged that the Union of India through the General Officer Commanding, XV Corps, unlawfully terminated the contracts and forcibly took possession of the cinema machinery, accessories, equipment and furniture installed, for running the cinema and for managing the officers' club. This dispute between the parties led to a reference to the General Officer Commanding-in-chief, Western Command, regarding the claim of the present

respondents in respect of non-payment of certain bills and compensation for breach of contract. The amount allowed by the award against the Union of India was Rs. 20,000/-.

As regards the machinery and other cinema equipment, the Union of India directed the present respondents to take delivery of the same from the Garrison Cinema, Jammu, who accordingly went there to take the delivery but found considerable part of it missing. The inventory in respect of the articles found missing was prepared at the spot. The present respondents then made a requisition for replacement of the missing parts of the machinery or in the alternative for compensation, but without success. Then on the 16th August 1956 they made a reference to the arbitrator and also prayed for an opportunity of making a personal submission about the facts of the case. The request for interview was declined. Even thereafter some requests were made by them to the arbitrator to proceed with the arbitration but with no results. Consequently the present respondents made an application u/s 11 of the Arbitration Act for the removal of the arbitrator, i.e., the General Officer Commanding-in-Chief, Western Command, and for appointment of another arbitrator u/s 2 of the Act. The present petitioners resisted that application and a number of pleas were taken which will be evident from the following issues framed by the trial court:

1. Whether this application is not maintainable?
2. Whether the argument dated the 16th May 1949, was cancelled by a subsequent agreement between the parties and what is its effect?
3. If issue No. 2 is found in the negative, whether the arbitrator, indicated in the arbitration agreement, was required to enter on the reference according to law?
4. Whether the arbitrator has failed to execute the reference for arbitration and what is its effect?
5. Has the arbitrator misconducted the proceedings?
6. Relief.

The trial Judge found almost all the issues in favour of the present respondents and passed the order mentioned above.

(3) This revision was heard at considerable length. Amongst other arguments the main argument of the petitioners' counsel was that the agreement dated the 16th May 1949 was between the General Officer Commanding, 21 (J. and K.) L of C. Area and Messrs. A. K. Gilkan and Co. Neither the Union of India nor the Governor-General in Council was a party to the said agreement and it, therefore, infringed the mandatory provisions of Section 175(3) of the Government of India Act, 1935. Section 175 of the aforesaid Act deals with power to acquire property and to make contracts etc., on behalf of the Governments. Its clause (3) runs as under:

"(3) Subject to the provisions of this with respect to the Federal Railway

Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise".

He submitted that in the present case the suit was brought against the Union of India and the General Officer commanding-in-chief, Western Command, Headquarter Simla, who were not parties to the agreement, and, therefore, on that ground alone the suit was liable to be dismissed, as there was no valid contract between the parties. In support of his plea he cited *The State of Bihar and Another Vs. Charanjitlal Chadha and Another*, , *S.K. Sen Vs. Provincial P.W.D., State of Bihar and Another*, , and an unreported ruling of the Supreme Court in *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*,

(4) This respondents' counsel, on the other hand submitted that the provisions of Section 175(3) of the Government of India Act, 1935, are only directory and not mandatory.

(5) This point was discussed in the above mentioned ruling of the Supreme Court in the unreported case, and after considering all the pros and cons it was held that

"the fact that certain other provisions in the Constitution are regarded as merely directory and not mandatory, is no ground for holding that the provisions relating to the form of contracts are not mandatory. It may be said that the view that the provisions in the Constitution relating to the form of contracts on behalf of the Government are mandatory may involve hardships to the unwary. But a person who seeks to contract with the Government must be deemed to be fully aware of statutory requirements as to the form in which the contract is to be made. In any event inadvertence of an officer of the State executing a contract in manner violative of the express statutory provision, the other contracting party acquiescing in such violation out of ignorance or negligence will not justify the Court in not giving effect to the intention of the Legislature, the provision having been made in the interest of the public. It must therefore be held that as the contract was not in the form required by the Government of India Act, 1935, it could not be enforced at the instance of the appellant and therefore the Dominion of India could not be sued by the appellant for compensation for breach of contracts."

(6) The above observations are fully applicable to the facts of this case. It is admitted that the agreement in question was signed by the Officer Commanding 21 (J. and K.) L of C Area, but it nowhere states that he was entering into the same on behalf of the Union of India.

(7) The respondents' counsel then urged that this point cannot be taken now for the first time as it was not taken anywhere earlier during these proceedings. In

this connection he relied on AIR 1960 Pat 139, and some other authorities. The learned counsel for the petitioners, on the other hand, relied on Kesar Singh v. Indar Singh AIR 924 Lah 543 and Sohan Singh v. Santa Singh AIR 1923 Lah 491, and submitted that a plea or law on proved facts can be newly raised, and that provided the determination of a question of law which is raised for the first time does not depend upon a decision as to facts which are in dispute, the Court is not only competent but should in the interest of justice entertain the plea. Although the written statement does not show that this point was clearly taken yet it is apparent on the fact of the record. This point was, however, taken in the grounds of revision.

(8) The respondents' counsel also drew my attention to Section 65 of the Indian Contract Act which lays down that "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it." These provisions, however, do not help the respondents to any considerable extent and may be relevant only when the contract is in proper form and between the parties to the suit.

(9) For the reasons given above, I am of the view that there was neither any valid contract between the parties to this suit nor the same was in proper form. This revision petition is, therefore, accepted and the order of the Court below is set aside. Taking into consideration the peculiar circumstances of the case, I leave the party to bear their own costs.

Revision allowed.