

(1974) 06 GAU CK 0005
In the Gauhati High Court
Case No : Misc. Appeal (First) No. 25 of 1970

Union of India and others

APPELLANT

Vs

R.C. Malpani and another

RESPONDENT

Date of Decision : 07-06-1974

Acts Referred:

Arbitration Act, 1940 — Section 2, 20, 41, 5

Citation : AIR 1974 Guw 56

Hon'ble Judges : R.S. Bindra, J;D. Pathak, J

Bench : Division Bench

Advocate : G.K. Talukdar, Govt, for the Appellant; A.R. Barthakur, P. Prasad and M.K. Sharma, for the Respondent

Final Decision : Allowed

Judgement

R.S. Bindra, J.—A contract for extension and strengthening of taxi-tracts and provision of crash barriers and taxi-tracks at Chabua Air-field was concluded between the President of India and Sri R. C. Malpani sometime in the year 1962-63 and on conclusion of the contractual work some disputes cropped up between the parties. Those disputes were referred on 19-1-66 to the arbitration of Brig. N. S. Bhagat. This arbitrator entered upon the reference and gave his award on 20th February, 1967. Subsequently, it appears, some more disputes cropped up between the parties and the Director-General of Works, Army Headquarters, Engineering Branch, New Delhi, appointed Brig. M. P. Joseph for decision thereof. The contractor objected to that appointment, and since Brig. M. P. Joseph exhibited disinclination to do the arbitration, the Director-General appointed Brig. Narulla as the arbitrator. The contractor having felt aggrieved, moved an application under Sections 5 and 20 read with Section 41 of the Indian Arbitration Act, 1940, hereinafter called the Act, contending that the Director-General having once appointed Brig. N. S. Bhagat as the sole arbitrator by his letter dated 19-1-66 for decision of the existing as also the future disputes, he (the Director-General) lacked jurisdiction to appoint another arbitrator. The

precise contention raised was that after an arbitrator has been appointed, his appointment can be annulled in terms of Section 5 of the Act only through the Court or in terms of the agreement entered into between the parties, and that since the agreement between the parties does not authorise the revocation of the authority of an appointed arbitrator, the only alternative left to the Director-General, or for that matter to the Union of India, was to seek the approval of the Court for revoking the authority of Brig. N. S. Bhagat.

2. On the authority of the letter Ex. 2 dated 19th January, 1966, addressed by the Director-General of Works to the contractor R. C. Malpani and the Chief Engineer, Eastern Command, Calcutta, by which he (the Director-General) appointed Brig. N. S. Bhagat as the sole arbitrator, the trial Court held that Brig. Bhagat had been appointed arbitrator not only in respect of disputes qua which a reference was made to him on 19th January, 1966, but also in respect of future disputes that may crop up between the parties under the contract concluded between them. This finding was rested by the trial Court on para 2 of that letter. That para reads: "Any disputes which may subsequently arise in respect of this contract shall also be referred to Brigadier N. S. Bhagat for adjudication." Having reached the conclusion that it was Brig. Bhagat who was to arbitrate in respect of all the disputes that may arise between the parties out of the contract in question, the trial Court made absolute its temporary injunction restraining Brig. M. P. Joseph and Brig. Narulla to proceed with the arbitration as desired by the Union of India.

3. We think that the learned trial Court went wholly wrong in deciding the fate of the dispute between the parties on the footing of para 2 of the letter Ex. 2. It is elementary that the right of a party to a dispute to claim arbitration is rooted in the arbitration agreement, or, as is popularly called, arbitration clause in a contract. The expression "arbitration agreement" is defined in clause (a) of Section 2 of the Act, to mean a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. The contention of the contractor that the letter Ex. 2 gives him authority to claim that it is Brig. Bhagat who is to decide all the disputes, present and future, that may crop up between the parties would therefore look to be entirely spurious, Ex. 2 being not an agreement between the parties. The contract concluded between the parties is marked Ex. A, and according to its terms, vide page 29 of the contract, the parties had agreed "to refer all disputes as required by Condition 70 to the sole arbitration of an Engineering Officer to be appointed by the Director-General of Works, Army Headquarter, New Delhi, whose decision shall be final, conclusive and binding." It is this agreement which alone can determine the right of one party or the other to the appointment of an arbitrator, and not what is mentioned in para 2 of Ex. 2. The letter Ex. 2, practically speaking, is the reference made by the parties to the arbitrator Brig. N. S. Bhagat through the Director-General of Works to whom power had been given by the parties to the contract to appoint some Engineering Officer as an arbitrator. It follows that the rights of the parties shall be governed by Ex. A and not by what is mentioned in

Ex. 2, which was, in another way, notice to the contractor and the Chief Engineer of Works about the appointment of Brig. N. S. Bhagat as an arbitrator by an authority competent to appoint him in terms of the contract Ex. A. Another fact of vital importance which appears to have missed notice in the Court below is that an arbitrator gets jurisdiction only if a reference is made to him and not otherwise. The expression "reference" is defined in clause (e) of Section 2 of the Act. It means a reference to arbitration. The reference can be made to an arbitrator either by the parties jointly or by one of them after giving a notice to the other, or on seeking help of the Court, the Court acting on behalf of the party reluctant to make the reference in the manner the Court acts while executing a transfer deed in a suit for specific performance of the contract on behalf of the party who had gone back on his commitment. Therefore, without reference the arbitrator lacks jurisdiction to undertake the job of arbitration. It is in the light of these basic principles that we now proceed to examine the factual data to determine whether Brig. Bhagat had jurisdiction to decide the disputes still pending between the parties, or, put in other words, whether any reference had been made to him in the eye of law respecting those disputes.

4. As stated above, the disputes which had arisen between the parties until the letter Ex. 2 had been addressed by the Director-General on 19th January, 1966, to the contractor and the Chief Engineer, were referred to the arbitration of Brig. N. S. Bhagat who admittedly was an Engineering Officer. Brig. Bhagat made his award on 20th. February, 1967. It appears that on 6th July, 1968, the contractor wrote a letter, copy Ex. 4, to Brig. Bhagat requesting that in terms of para 2 of Ex. 2 he should proceed with arbitration of certain other disputes which had arisen between the parties since after the first reference. Brig. Bhagat, it looks, had retired by then and so he claimed fees in his capacity as a non-official arbitrator. Though the contractor was out to pay him the fees, but probably the Union of India was reluctant. Brig. Bhagat was also not clear in his mind if he had the jurisdiction to undertake the arbitration respecting the fresh disputes that had been reported to him by the contractor. Therefore, he wrote a letter on 11th July, 1968, to the Engineer-in-Chief enquiring whether the Engineer-in-Chief desired him to act as an arbitrator respecting disputes mentioned in the contractor's letter dated 6th July, 1968, and if the reply be in the affirmative then, Brig. Bhagat stated, he would charge fees at the rate of Rs. 300.00 per day, vide enclosure to the letter Ex. 10, they both, letter and the enclosure, constituting Annexure J filed by the contractor.

5. The Engineer-in-Chief, it is not in dispute, did not agree to Brig. Bhagat's working as an arbitrator for the decision of the new disputes. It was obviously for the reason that in terms of the arbitration clause of the contract, the Director-General could have appointed only some Engineering Officer as arbitrator and Brig. Bhagat having retired, he could not answer the description of an Engineering Officer. These facts leave no room for doubt on the points that when the contractor sought Brig. Bhagat's arbitration by his letter Ex. 4, dated 6th July, 1968, Brig. Bhagat had become functus officio, having given his award on

20th February, 1967, and he not being then an Engineering Officer, he could not be appointed as an arbitrator in terms of the arbitration clause. Consequently, it is not possible to endorse the actual finding given by the trial court or the reasoning applied by it in reaching that finding.

6. We are tempted to have another look at para 2 of Ex. 2. It says that any dispute which may subsequently arise between the parties "shall also be referred to Brig. N. S. Bhagat for adjudication". Obviously, the para contemplates a fresh reference to Brig. Bhagat which manifestly negatives contractor's contention that on the basis of reference once made to him Brig. Bhagat can assume jurisdiction for decision of another set of disputes. Nay more. Power was given by the parties per Ex. A to the Director-General to appoint an arbitrator and not to make a reference to the arbitrator. Reference power was not given to him and the reason for it is clear. To make reference is the sole privilege of the parties including of course their agents or that of the Court. It is not the stand of the contractor that the Director General was agent of Union of India, or his own, or of both. Therefore, what was mentioned by Director General in Ex. 2 has no binding value on the Union of India, and so it has been rightly submitted on its behalf that Brig. Bhagat has no authority to arbitrate on fresh crop of disputes between the parties.

7. Sri A. R. Barthakur, the learned counsel representing the contractor, brought to our notice this Court's unreported decisions in Civil Revns. Nos. 36 of 1962, 59 of 1968 and 70 of 1965 (Assam) to support his contention that the authority of an arbitrator once appointed cannot be revoked without the intervention of the Court unless such revocation can be spelled out of the terms of the agreement concluded between the parties. However, in our considered opinion the present is not a case of revocation because Brig. Bhagat had given his award respecting the reference which was made to him on 19th January, 1966. The contractor wanted "Brig. Bhagat to take cognizance and exercise jurisdiction over another dispute that had arisen between the parties after the first reference dated 8-1-66 had been made to him and that reference (had been awarded. Brig. Bhagat could enter upon the new reference only if it was made by the parties jointly, or by the Court to whom one of those parties may have approached for the purpose. This, however, is not the case here. Therefore, we hold without demur that the letter dated 6th July, 1968, of the contractor does not constitute a reference to the arbitrator, and the corollary that follows is that no violation of Section 5 of the Act is involved in the present case, Brig. Bhagat having not been appointed as an arbitrator for decision of the disputes outlined in contractor's letter dated 6th July, 1968, lacks jurisdiction to take seisin of the same and so no question of cancellation or revocation of his authority as an arbitrator arises.

8. Though the parties' Counsel were unable to cite any authority (except the three unreported decisions brought to our notice by Sri A. R. Barthakur) in support of their rival contentions, but Russel had discussed the question at anvil on page 77 of his Treatise on Arbitration, Eighteenth Edition. The learned

commentator states under the heading "Matters accruing before and after date of submission" that a reference of all matters in difference gives an arbitrator power over all matters down to the period of the submission, but does not, except under very special circumstances, enable him to award on future and contingent claims, or to give damages in respect of money demands becoming due after the date of the submission. He states further that even if the submission be of all differences and "of anything in anywise relating thereto," these latter words do not extend the power of the arbitrators to matters which, though relating to the existing differences, arise after the date of the submission. These propositions enunciated by Russel are founded on reported judgments of the English Courts. We are of the opinion that both the propositions apply without qualification to the law of arbitration prevalent in India, and so we are in respectful agreement with the same.

9. A reference to para 25 of the application made by the contractor to the Court would show that the reliefs claimed by him were as under:

- (a) That the respondents to the application be directed to file in Court the contract concluded between the parties;
- (b) That Brig. N. S. Bhagat be directed to proceed with the reference and decide the disputes outlined in the application; and
- (c) That Brig. M. P. Joseph be restrained from entering upon the reference made to him per letter dated 5th February, 1969, "till this application is disposed of by this learned Court.

10. It is at once clear that no prayer was made by the contractor for a decision by the Court on the point whether or not the appointment of Brig. Joseph is valid if Brig. Bhagat is held not entitled to decide the new reference which the contractor had made to him by his letter dated 6th July, 1968. However, the learned trial Court went to the length of restraining by permanent injunction Brig. Joseph and Brig. Narulla from entering upon the reference. We have concluded above that Brig. Bhagat had no jurisdiction to decide the fresh disputes that had arisen between the parties either on the authority of para 2 of the letter Ex. 2 or on the footing of the contractor's letter Ex. 4, he having become functus officio after giving his award on 20th February, 1967, and he having ceased to be an Engineering Officer since the middle of 1967 on his retirement from service. That finding settles the fate of the application moved by the contractor in the trial Court. That Court lacked jurisdiction to determine further whether or not the appointment of Brig. Joseph or of Brig. Narulla is valid in law. The only prayer made by the contractor in his original application was that Brig. Joseph be restrained from proceeding with the reference until the application made by him is disposed of. Temporary injunction on those lines was issued but clearly that injunction could not survive the decision of the application by the Court, nor could the Court grant any permanent injunction, such being not the prayer. We hold as a consequence that nothing said by the trial Court will

have the effect of determining the validity or otherwise of the appointment of Brig. Joseph or of Brig. Narula as an arbitrator for decision of fresh disputes between the parties. That matter is left open. If the contractor wants to challenge the appointment of the new arbitrator, he shall be entitled to do so in the manner provided by law.

11. In the result we allow this appeal, quash the order of the trial Court and dismiss the contractor's application. Taking all the factors into consideration we leave the parties to bear their own costs in the two courts.

D. Pathak, J.

12. I agree.