

(1969) 11 GAU CK 0003

In the Gauhati High Court

Case No : Civil Miscellaneous Petns. No's. 82, 87, 88, 92, 93 and 94 of 1968

Union of India

APPELLANT

Vs

R.D. Gupta and another

RESPONDENT

Date of Decision : 17-11-1969

Acts Referred:

Arbitration Act, 1940 — Section 20, 34, 8
Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 133, 133(1), 136
Contract Act, 1872 — Section 29

Citation : (1969) 11 GAU CK 0003

Hon'ble Judges : R.S. Bindra, J.C.

Bench : Single Bench

Advocate : H.C. Nath, Govt, for the Appellant;

Judgement

R.S. Bindra, J.C.

1. This order will dispose of Civil Misc. petitions Nos. 82, 87, 88, and 92 to 94 filed by the Union of India under Article 133 of the Constitution since the points involved for decision in all of them are exactly identical and the Civil revision petitions to which they pertain were disposed of by a common judgment dated 23rd of December, 1967, by the then Judicial Commissioner Shri Jagannadha charyulu. The dispute between the parties centred round the interpretation of an arbitration clause contained in the various contracts of construction entered into by the Union of India with the respondents. That arbitration clause provided, in four out of the six cases we are to deal with, that if and when disputes of the nature mentioned therein arose between the parties they shall be referred to the arbitration of the Chief Engineer/Additional Chief Engineer, Central P. W. D., while in the other two cases such disputes were to be referred to the arbitration of Additional Chief Engineer, Central P. W. D. The respondents herein, after the disputes arose between the parties, moved six independent applications u/s 20 of the Arbitration Act in the Court of Subordinate Judge, Tripura, praying for appointment of an arbitrator in each case of its own choice since the arbitration

clause contained in the contracts was vague in the matter of choosing the arbitrator. The vagueness pleaded qua the four contracts was that no method was provided to choose either the Chief Engineer or the Additional Chief Engineer to work as arbitrator, and respecting the other two contracts it was urged that there are large number of Additional Chief Engineers of the Central P. W. D. and so in the absence of any determining factor in the contracts it is not possible to say whom to appoint as an arbitrator. The Subordinate Judge did not accept the contention that the arbitration clause was vague in any manner and so it gave the choice to the parties either to accept the Chief Engineer of the Central P. W. D. as the arbitrator or the Additional Chief Engineer, Zone II, of the Central P. W. D. Having felt aggrieved with the order of the Subordinate Judge, the respondents filed six revision petitions in this Court, My learned predecessor Shri Jagannadha charyulu accepted the revision petitions on holding that the arbitration clause was clearly vague and so it was the function of the Court to name an arbitrator in each case. He consequently appointed Shri G. N. Dutta a (retired Chief Engineer) of Gauhati as the sole arbitrator in all the six cases. It is against that order that the Union of India has moved the instant six applications seeking certificates authorising it to file appeals in the Supreme Court.

2. Shri H.C. Nath, the learned Government Advocate, raised two points to support the contention that a good case has been made out for issuing certificate under Cl. (c) of Article 133 (1) of the Constitution. According to that clause, an aggrieved party can file an appeal in the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court in the Territory of India if the High Court certifies that the case is a fit one for appeal to the Supreme Court. In the first place, Shri H. C. Nath submitted that the view taken by Shri Jagannadha charyulu is directly opposed to the opinion expressed by Shri Timmalpad, another Judicial Commissioner of this Court, in the case of R. D. Gupta v. Union of India, AIR 1964 Tripura 27. That case, it will be noted, was also between the parties which are arrayed against each other in the present petitions. Shri H. C. Nath emphasized that in view of conflict between two judgments of this Court it is necessary that the matter should go to the Supreme Court for authoritative pronouncement to avoid embarrassment to the Subordinate Courts. He stated further that arbitration clause of the nature at anvil is incorporated in a large number of contracts made between the Union of India and the Government contractors working in this Territory and so it is necessary that the legal question involved should be decided by the highest Court in the realm.

There is no difference between the parties on the points. I may mention, that Shri Timmalpad happened to interpret an arbitration clause which is exactly identical with that which came up for interpretation before Shri Jagannadha charyulu, and that the views expressed by the two Judicial Commissioners are diametrically opposed to each other and are so wholly irreconcilable. Since, indisputably, such arbitration clause finds mention in a large number of contracts entered into between the Union of India and Government contractors it is fit and

proper that the matter should be authoritatively decided. It is in order to point out that in two cases, decided by the Punjab High Court and reported in Union of India (UOI) Vs. New India Constructors, Delhi and Others, , and Delhi and Finance Housing and Construction Ltd. Vs. Brij Mohan Shah and Another, , an identical arbitration clause was incorporated in the contracts out of which the disputes arose, and that in the first mentioned case the parties did not challenge the validity of the clause on the ground of its being vague, while in the second case the clause was declared to be vague and the arbitration agreement was held not binding on the parties, being void. In face of this conflict of authorities, I agree with Shri H. C. Nath that the present case is a fit case for going in appeal to the Supreme Court. The point in controversy is clearly of great public importance.

3. The second point urged by Shri H. C. Nath was that the previous decision by Shri Tirumalpad operates as *res judicata* between the parties. He submitted further that the present respondent had moved the Supreme Court under Article 136 of the Constitution for special leave to appeal against the judgment of Shri Tirumalpad but that prayer was rejected. Shri R. D. Gupta, the respondent herein and who argued the case personally in this Court, admitted at the bar that he had gone to the Supreme Court against the judgment of Shri Tirumalpad seeking special leave to appeal but his prayer was not allowed. Section 11 of the Civil Procedure Code, it will be noticed, contemplates the bar of *res judicata* not only respecting the suit as a whole but also concerning an issue decided in a suit, and it is well settled that an issue of law can also be barred by the principles of *res judicata*. Hence, the second point urged by Shri H. G. Nath is also quite substantial and weighty.

4. A legal question of far-reaching consequences that appears to have escaped attention so far, on all hands, is that if the arbitration agreement is vague, as contended by the respondent and as held by Shri Jagannadha charyulu, then that agreement in terms of Section 29 of the Contract Act would be void. That section provides in unambiguous language that agreements, the meaning of which is not certain, or capable of being made certain, are void.

The Punjab High Court held in the case of Delhi and Finance Housing and Construction Ltd. Vs. Brij Mohan Shah and Another, that the arbitration agreement of the nature involved in the present cases is vague because of uncertainty and as such void and not binding on the parties. It is on that finding that the High Court dismissed the application made by the defendant u/s 34 of the Arbitration Act for stay of the suit filed against it (the defendant). In support of that conclusion, the Punjab High Court placed reliance on the cases of Ganpatrai Gupta v. Moody Bros. Ltd., (1950) 85 Cal LJ 136, and Luxmi Chand Baijnath Vs. Kishanlal Sohoni, . In each of these two cases the arbitration agreement was found to be vague and uncertain and the arbitration clause in consequence was declared to be invalid. If, therefore, the arbitration agreement concluded between the parties before this Court is actually vague and uncertain

respecting the choice of the arbitrator, then nothing out of it survives to be binding on the parties. In that event, the order of this Court appointing Shri G. N. Dutta as the sole arbitrator would become unsustainable, and the respondent shall be left with no alternative but to file a regular suit for appropriate relief in the Civil Court having jurisdiction in the matter.

5. Shri R. D. Gupta raised two objections against the maintainability of the petitions filed by the Union of India. In the first instance, he urged that Shri G. N. Dutta, the sole arbitrator, having died during the pendency of the present petitions, the petitions have become anfractuous. To reinforce that contention, he relied on the authority of Union of India (UOI) Vs. Nalini Ranjan Guha, . That case is clearly distinguishable on facts. Bachawat, J., of the Calcutta High Court had by an order appointed an arbitrator between the parties in an application made u/s 8 of the Arbitration Act, and the Union of India petitioned the High Court for certificate of fitness of appeal to the Supreme Court against that order. It transpired, when that application came up for hearing, that the arbitrator appointed by Bachawat, J., had died in the meantime. A Division Bench of the High Court held that the petition for leave to appeal was not maintainable in view of clause (d) of Article 133 (1) of the Constitution which provides that no appeal shall, unless Parliament by law otherwise provides, lie to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

Das Gupta, J., one of the Judges constituting the Division Bench, observed in addition that as a result of the death of the arbitrator the parties are relegated to the same position which prevailed when the application u/s 8 of the Arbitration Act was made and that the order appointing the arbitrator had consequently become anfractuous. Obviously, there the dispute did not relate, to the exact scope of the arbitration agreement but the difference between the parties centered round the point as to who should be appointed an arbitrator. As against that, the dispute that arises for determination in the cases in hand is more deeper It is whether one of the officers mentioned in the arbitration clause is to work as an arbitrator, or that clause is void because of vagueness and some arbitrator other than those officers has to be named by the Court, Therefore, with the death of Shri G. N. Dutta the parties are not relegated to their original position. Unlike the Calcutta case, the dispute between the parties is not about naming the arbitrator but the manner in which he should be named, apart from two other serious contentions which require determination, namely (1) whether the dispute is barred by res judicata, and (2) whether the arbitration agreement would survive if it is really vague as contended by the respondent in each of the six cases. Consequently, I reject the first objection raised by Shri R. D. Gupta.

6. The second point urged by Shri R. D. Gupta was that the order dated 23rd of December, 1967, of this Court is neither a judgment nor a decree nor a final order within the meaning of Article 133 (1) of the Constitution, and as such the certificate claimed by the Union of India cannot be issued. He cited the cases of Union of India (UOI) Vs. Nalini Ranjan Guha, and Mohd. Mohmood Hasan Khan

Vs. Government of Uttar Pradesh, , to support that contention. The Allahabad High Court outlined the conditions which must be satisfied before an order can be described as a final order within the meaning of Article 133 (1). Those conditions are, (1) that the order should not be an interlocutory order, (2) that even though it is an order which disposes of the proceeding before a Court finally, it should not be an order which leaves the original proceeding in the Court below alive, and (3) that there should be a final determination of the rights of the parties or the order must of its own force dispose of the rights of the parties. I think all these three conditions are satisfied in the present case. Without doubt, the impugned order is not an interlocutory order. Further, that order finally disposes of the case filed before the Subordinate Judge. And lastly, the rights of the parties which were debated firstly before the trial Court and then before this Court were finally determined. Shri R. D. Gupta argued that since only the question of appointment of an arbitrator has been decided between the parties and not the main dispute arising from the execution of the contract which the arbitrator is yet to determine, it cannot be urged by the Union of India that the disputes between the parties have been finally determined.

I regret I cannot accept that contention as valid. The final order contemplated by Article 133 (1) is an order which finally determines the dispute thrown up by the civil proceeding filed in the Court and not the dispute which will arise out of a civil proceeding which may be filed in the Court in future. In the applications moved by the respondent in the Court of the Subordinate Judge at Agartala, the only matter in controversy was whether the arbitrator had to be appointed in terms of the arbitration clause or whether that clause was vague in the matter of selection of the arbitrator and so it was for the Court to name as arbitrator. That dispute between the parties was finally determined by this Court by its order dated 23rd of December, 1967. Therefore, that order, in my opinion, is a final order within the meaning of Article 133 (1).

7. The Calcutta authority is also of no help to Shri R. D. Gupta. There it was held, in a case filed u/s 8 of the Arbitration Act that an order appointing an arbitrator decides no question of right between the parties and as such it is not a final order appeal able under Article 133. As stated earlier, the dispute had arisen between the parties in that case because they could not agree on an individual to work as an arbitrator and so the Court had been approached u/s 8 of the Act to appoint an arbitrator. However, in our case the dispute is of an altogether different nature. It relates to the exact scope of arbitration agreement entered into between the parties. The respondent, I may appropriately mention, had moved the applications u/s 20 of the Arbitration Act.. Such an application had to be and was registered as a suit, and that suit, it is obvious, has been finally disposed of by this Court's order. A final order, in the sense that expression is used in Article 133 (1), is an order which finally determines the points in dispute in the civil proceeding and brings it to an end. This test is fully satisfied respecting the order in dispute. Hence, I repel the second submission made by Shri R. D. Gupta as well.

8. The last point urged by Shri R. D. Gupta, though in a luke-warm manner, was that the dispute between the parties is not respecting a civil proceeding. The expression "civil proceeding" used in Article 133 (1) is wide enough to cover any proceeding of a civil nature decided by the High Court, whether in its original, appellate or revision jurisdiction. Further, if the proceeding involves the assertion or enforcement of a civil right, it is a civil proceeding. Judged by those tests, I feel no difficulty in holding that the impugned order was made in a civil proceeding.

9. As a result, I accept all the six petitions and direct that a certificate do issue in each one of them under clause (c) of Article 133 (1) of the Constitution. However, I make no order as to costs of these petitions.