

(1979) 05 AHC CK 0015

In the Allahabad High Court

Case No : F.A.F.O. (converted in civil revision) No. 29 of 1974

Union of India (UOI) and Another

APPELLANT

Vs

S. Mohinder Singh and Others

RESPONDENT

Date of Decision : 18-05-1979

Acts Referred:

Arbitration Act, 1940 — Section 12, 12(2), 39, 5
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1979 All 342

Hon'ble Judges : N.N. Mithal, J;H.N. Seth, J

Bench : Division Bench

Advocate : Brij Narain Sapru, for the Appellant;

Final Decision : Partly Allowed

Judgement

Mithal, J.—This is a Civil Revision converted from an appeal directed against the order of the Civil Judge, Roorkee at Saharanpur by which he allowed the application by the respondent-applicant moved under Sections 5, 8, 12 and 13 of the Indian Arbitration Act u/s 5 and has appointed one Sri Hukum Singh, retired Chief Engineer of the Punjab P.W.D. as an Arbitrator in his place. The Union of India has come up in appeal.

2. A preliminary objection was taken on behalf of the respondent applicant that an appeal does not lie against the order purporting to be u/s 5 of the Arbitration Act. Section 5 of the Arbitration Act reads as under:

"The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the court, unless a contrary intention is expressed in the arbitration agreement."

3. Section 39 of the Act provides for appeals and it reads as under:

Section 39(1). An appeal shall lie from the following orders passed under this Act (and from no others) to the court authorised by law to hear appeals from original

decrees of the Court passing the order:--

An order:--

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award;

Provided that provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court".

The order which is appealed against is one for granting leave to the respondent-applicant to revoke the authority of the appointed Arbitrator and for appointing another Arbitrator in his place. The nature of none of these orders is covered under Sub-clauses (i) to (vi) of Section 39 set out above. It is quite obvious that an order granting leave to party to revoke the authority of an appointed Arbitrator is not appealable. Even the order appointing another Arbitrator is not appealable. In our opinion, therefore, the preliminary objection is correctly taken and no appeal lies from the order under consideration.

4. At this stage the learned counsel for the appellant moved an application for permission to convert the appeal into a revision. After having heard the learned counsel for the parties at length and also taking into account the matters of importance involved in the case, we deem it proper to allow this application and permit the appellant to convert his appeal into a revision. It is needless to say that the scope in the revision would be much narrower than in the appeal and we will confine ourselves to the jurisdictional error, if any, committed by the trial court.

5. The learned counsel for the Revisionist firstly argued that the respondent-applicant had no right to revoke the authority of the appointed Arbitrator because the Arbitrator had not been appointed by the parties. On the other hand he contended the Arbitrator had been appointed by the Additional Chief Engineer C.P.W.D. as provided in Clause 25 of the Contract. The contention of the learned counsel for the petitioner is that the right u/s 5 to revoke an authority of an Arbitrator has been given only to the parties and to no one else. Since in the instant case the Arbitrator had been appointed not by the parties themselves but by the Additional Engineer C.P.W.D. as their nominee, the parties as such have

no right to revoke the authority of the Arbitrator. The learned counsel for the respondent, however, has urged before us that parties contemplated in Section 5 means the parties to the arbitration agreement. Our attention has been drawn to Section 4 of the Arbitration Act which reads as under:

"The parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment".

6. It is argued that the word "parties" used in the section contemplates only the parties to the arbitration agreement and has not been used in respect of the "person" who is authorised by them to appoint an Arbitrator on their behalf. For such a "person" the word "person" has been used in this section. On the analogy of Section 4 it has been argued that it is the parties who appoint the Arbitrator either by themselves or through the employment of some other agency agreed to by them. Nonetheless the appointment of the Arbitrator is solely done by the parties themselves. After careful consideration of the provisions of the Sections 4 and 5 of the Arbitration Act we are of the view that the contention of the learned counsel for the respondent is correct. The person who has the authority to appoint has always got the authority to withdraw or to revoke the appointment. The parties cannot be left without remedy in such a case. We are, therefore, of the view that the parties or any of them were fully competent to apply for leave of the Court u/s 5 to revoke the authority of the appointed Arbitrator.

7. It is next argued by the learned counsel for the petitioner that the trial Court was in error in appointing an Arbitrator simultaneously with the passing of an order granting leave to the applicant to revoke the authority. According to the scheme of Section 12 of the Arbitration Act it clearly contemplates distinct stages in which steps have to be taken by the parties. We have seen u/s 5 an authority of an appointed Arbitrator can indeed be revoked but only after seeking leave of the Court. This contemplates a petition to the Court for obtaining leave and only when such leave is granted by the Court then only a right to revoke the authority of appointed Arbitrator can arise. It is not possible, as vainly argued by the learned counsel for the respondent, that a party may revoke the authority of the appointed Arbitrator and then come to the Court for seeking the leave. This would neither be in accordance with the language of Section 5 or 12 of the Act nor it appears reasonable in the context of the scheme of the Act. A party who is seeking revocation of the authority has to satisfy the Court first of the grounds and reasons on which it is necessary that the authority of an appointed Arbitrator should be revoked and if the party fails to do so it would be the end of the matter. However, in case the party is able to satisfy the Court that the authority of the appointed Arbitrator should be revoked for any of the reasons given by it then the question arises whether the Court can simultaneously appoint another Arbitrator without the earlier Arbitrator even knowing that his authority has been revoked.

8. It will be profitable here to have the provisions of Section 12 also before us. Clause (1) of Section 12 provides only the filling of the vacancy of an umpire or an Arbitrator on an application being moved by any of the parties of the Arbitration Agreement. Sub-clause (2) of Section 12 specifically provides for the contingency arising when the authority of appointed Arbitrator is revoked by Court. Leaving the irrelevant portions apart this sub-clause would read as under:

Where the authority of an Arbitratoris revoked by leave of the Court

.....the Court may, on the application of any party to the arbitration agreement, either -

- (a) appoint a person to act as sole arbitrator in place of the persons displaced, or
- (b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

9. It will appear that after leave to revoke the authority of an Arbitrator has been granted a party seeking to have another person appointed as Arbitrator has to make an application before the Court. Naturally before he moves the application u/s 12(2) he has to intimate the original Arbitrator whose authority has been revoked. The manner of intimating the revocation of the authority of the appointed Arbitrator is nowhere provided for in the Act, and can be done in any manner desired by the party but it must in some way or the other convey to the arbitrator that leave has been granted by the Court and that his authority to act as an arbitrator has been revoked by the parties and his services as an Arbitrator are no longer required. After this stage has been reached the parties have to make an application as contemplated u/s 12(2) of the Act. In the instant case what we find is that the respondent-applicant made an application u/s 5 along with Sections 8, 12 and 13. It is clear that Section 8 does not apply in this case. Section 12, as we have said above, contemplates revocation of authority of the Arbitrator before an application for appointment of a new Arbitrator can be made.

In this case there is nothing on the record to show that after the leave of the Court had been granted any step had been taken by the respondent-applicant to intimate the appointed Arbitrator about the revocation of his authority after leave of the Court has been obtained. In fact from the way in which the application had been moved jointly under Sections 8 and 12 of the Act and the way in which simultaneous orders for leave to revoke the authority of the appointed arbitrator and the one appointing a new arbitrator has been passed clearly go to show that the respondent never intimated the appointed Arbitrator about the revocation of his authority after he had applied for leave u/s 5 of the Act. In our opinion, this was not a correct procedure and the Court also exceeded its authority in making the appointment of a new Arbitrator. In fact this application u/s 5 could not have been combined with the application u/s 12 of the Act.

10. The learned counsel for the respondent-applicant then vainly tried to argue that the above ground now being raised by the petitioner was never taken by

him in his objections in the trial Court nor in his grounds of appeal. We have gone through the objections filed by the petitioner in the trial Court and we find that in para 15 thereof it has very specifically questioned the authority of the Court to appoint another Arbitrator as per Clause (25) of the arbitration agreement. In any case even if no such specific ground has been taken the point raised is purely a question of law and it goes to strike at the very root of the jurisdiction of the Court and such an objection cannot be refused even at this stage. In view of what has been stated above we are of the opinion that the trial Court was in error in exercising jurisdiction u/s 12 at the stage of proceedings u/s 5 which could be done only when the concerned party to the arbitration agreement had actually revoked the authority of the appointed Arbitrator and thereafter by means of a separate application had sought appointment of arbitrator by the Court and after such revocation had been intimated to the appointed arbitrator.

11. The learned counsel for the petitioner lastly argued that in view of Clause (25) a new arbitrator has to be appointed by the Addl. Chief Engineer, P.W.D., and cannot be appointed by the Court. However, the respondent's learned counsel had referred to a ruling reported in AIR 1971 J&K 130 in which the same agreement between the same parties was the subject-matter of consideration. On the basis of the decision of their Lordships of Jammu & Kashmir High Court it was argued that the appointment of an Arbitrator u/s 12(2) has to be made by the Court irrespective of the terms of Clause (25) of the agreement. We have had the advantage of going through the said ruling and we are in respectful disagreement with the same. We are not prepared to go to the extent to which the learned Judges of the J.&K. High Court have gone. In our view a plain reading of Section 12(2) shows that this section does not contemplate that an arbitration agreement like Clause (25) of the agreement in the instant case would be abrogated in any manner once the authority of appointed arbitrator has been allowed to be revoked u/s 5 of the Arbitration Act, which will depend on the terms of the arbitration agreement. We, however, do not propose to express any opinion in this regard in the present appeal.

12. In view of all the above discussions the result should be that the order passed by the Court below merely amounts to an order permitting the parties to revoke the authority of the arbitrator. The party may, either acting on the basis of the permission granted by the Court revoke the authority of the arbitrator or it may in changed context decide not to revoke such authority. If it revokes the authority of the arbitrator a vacancy will come into existence and the situation may be dealt with in one of the following two ways:

(1) The vacancy be filled up in the manner contemplated by Clause (25) of the agreement, or

(2) On an application being moved u/s 12 of the Act in this behalf, the Court may in its discretion either appoint a person to act as an arbitrator in place of the person displaced or to order that the arbitration agreement shall cease to have

effect.

However, while adopting second of the aforementioned two courses and in exercising its discretion, the Court will always keep in mind the real nature of the agreement and that type of person by whom the parties intended to get their dispute decided. It may in a suitable case refuse to appoint an arbitrator and order that the arbitration agreement itself will be in operation. We are certain that if and when an application u/s 12 is moved the Court will decide the same in accordance with law.

13. In this view of the matter the revision succeeds and merits to be allowed in part.

14. The revision is accordingly allowed in part and the order of the trial Court making a reference of the dispute to arbitration is set aside. The parties are directed to bear their own costs.