

(2012) 10 AHC CK 0215

In the Allahabad High Court

Case No : First Appeal from Order No. 604 of 1993

U.P. Jal Nigam and others

APPELLANT

Vs

M/s. Shankar Construction Company and others

RESPONDENT

Date of Decision : 01-10-2012

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 20, 30, 33

Citation : (2012) 10 ADJ 557

Hon'ble Judges : Prakash Krishna, J;Arvind Kumar Tripathi, J

Bench : Division Bench

Advocate : R.C. Gupta, for the Appellant; Viresh Misra, Pramod Jain and S.P. Giri, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Prakash Krishna, J.—The present appeal is against the order dated 22.2.1993 passed by the 3rd Additional Civil Judge, Agra. It arises out of the proceedings under the Arbitration Act 1940. The respondents herein are the contractors in Department of U.P. Jal Nigam. On 6.8.1988, the parties entered into work contract. The said contract also contains, according to the parties, an arbitration clause. A dispute arose between the parties with regard to the payment due to the contractors/respondents herein. The respondents filed an application u/s 20 of the Arbitration Act for referring the matter to an arbitrator. The matter was contested by the appellants herein unsuccessfully. The contention of the appellants" that there is no arbitration clause between the parties was put to issue and was decided against them. The trial Court by its judgment and order dated 12.2.1992 accepted the application for referring the matter to an arbitrator and appointed Chief Engineer as per terms of the Arbitration Clause as Arbitrator. It was also provided that the said Arbitrator shall submit his award to the Court within two months. The said order was not challenged by the appellants and it has attained finality. By a subsequent order, Lalita Singh, retired Chief Engineer (East) was nominated as Arbitrator.

2. The Arbitrator entered into the reference and the appellants herein by their letter dated 29.4.1992 asked the respondents to supply some stamp paper worth Rs. 7/- in favour of Arbitrator so that the Arbitrator may proceed with the matter. Thereafter, the Arbitrator entered into the reference and gave the award on 10.9.1992.

3. When the notice of the award delivered by the Arbitrator was served on the appellants, an objection was filed on 9.11.1992 under Sections 30 and 33 of the Arbitration Act on the ground that Lalita Singh who had retired in the year 1991 and was not Chief Engineer in Office could not be nominated as Arbitrator, full and proper opportunity of hearing was not given to them by the Arbitrator and the Arbitrator misconducted himself.

4. In reply, the contractor contested the objection raised by the appellants and submitted that the Jal Nigam accepted the appointment of Engineer Lalita Singh as Arbitrator, full opportunity of hearing was given by the Arbitrator and the allegations that the arbitrator has misconducted himself, are wrong. It was stated that the Arbitrator has given the award well within the purview of the Arbitration Act and it is open to the Court to decide the case on merits and demerits.

5. The Court below by the order under appeal has confirmed the award dated 10.9.1992 and made it Rule of the Court subject to the condition that the respondents/contractors will pay the stamp duty and penalty on the value of the Award. It may be stated that a sum of Rs. 7,17,000/- has been found due to the contractors.

6. Shri R.C. Gupta, learned counsel for the appellants in support of the appeal submitted that the Court could not appoint the Arbitrator, there being no arbitration clause between the parties. It was also submitted that Shri Lalita Singh having been retired on the date of the appointment, could not have been appointed as an Arbitrator even under Clause 25 of the agreement which is said to be an Arbitration Clause. It was also submitted that the Arbitrator has misconducted the proceedings in as much as no opportunity of hearing was afforded to the appellants by him. These are basically two points which were urged by him during the course of the arguments.

7. In reply, Shri S.P. Giri, learned counsel for the Contractors submitted that the appellants are estopped from questioning the legality and validity either of the Arbitration Clause or of appointment of Shri Lalita Singh as Arbitrator. Elaborating the arguments, he submits that the order appointing Shri Lalita Singh as Arbitrator has attained finality and it is no longer open to the appellants to challenge the appointment of the Arbitrator at this stage of the proceedings. The appellants very much participated in the arbitration proceedings before the Arbitrator without raising any objection or demur. On the second point, the submission is that the Arbitrator had given full opportunity of hearing and the allegations to the contrary are wrong. He further submits that a total claim of Rs.

15 lacs was laid before the Arbitrator in respect of 15 items and out of them, the claim in respect of only four items has been accepted by the Arbitrator and for the rest it has been denied. Out of the four items, claims of which have been accepted, two items relate to refund of security amounting to Rs. 3,16,000/- (claim Nos. 9 and 13) and third item which has been accepted is with regard to the expenses incurred by the contractors to get the expert opinion from the experts of Roorki University with regard to drawing (claim Nos. 2 and 4). The fourth item was with respect to extra cost of foundation due to change in seismic-zone and bearing capacity from 6.50 to 3.25 MT per sq.metre. This goes to show that Arbitrator has given the award after considering the rival contentions.

8. Considered the respective submissions of the learned counsel for the parties and perused the record. Taking the first point first, it may be noted that on an application filed under Arbitration Act 1940, after inviting the objections and giving an opportunity of hearing to the appellants, the Court below had passed an order dated 12.2.1992 accepting the contractors' contention that the contract between the parties contained an arbitration clause.

9. The Court by the order without naming any person has appointed the Chief Engineer by the office as Arbitrator. A perusal of the said order would show that it was very much issue between the parties as to whether the clause No. 25 of the contract is an arbitration clause or not. The Court examined the said controversy under issue No. 2 and rejected the contention of the appellants that there was no arbitration clause between the parties. It appears that by the subsequent order, name of Shri Lalita Singh, Chief Engineer was incorporated. However, the said order could not be placed before us by the parties.

10. It was admitted to the learned counsel for the appellants that the orders holding that there is an arbitration clause between the parties and appointment of Shri Lalita Singh as arbitrator were not challenged any further by them. The said order admittedly, attained the finality. After the appointment of Shri Lalita Singh as arbitrator, the appellants wrote a letter dated 29.4.1992 paper No. 16 ga/7 on the lower Court record addressed to the Contractor asking him to furnish stamp paper of worth Rs. 7/- in favour of the arbitrator, duly executed by both the parties, so that the proceedings before the arbitrator may commence. In the light of the above letter, even if there was any illegality or irregularity with regard to appointment of Shri Lalita Singh as arbitrator to settle the dispute between the parties, comes to an end, as the appointment was accepted.

11. In this connection, the subsequent conduct of the appellants is also very relevant. The appellants admittedly filed their objections alongwith the material in support thereof before the arbitrator, without raising any dispute with regard to his appointment as arbitrator. In this factual situation, there is sufficient force in the argument of the learned counsel for the contractors that the appellants is now estopped to question the legality and validity of appointment of Shri Lalita Singh as Arbitrator.

12. In *Chowdhary Murtaza Hossein v. Mt. Bibi Bechunnissa*, (1876) 3 Ind App 209 (P.C.), Privy council has said that "On the whole, therefore, their Lordships think that the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the Arbitration proceedings to make the award, did submit to the Arbitration going on, that he allowed the Arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself, and that it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award.

13. In the case of *N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another*, , it has been held as follows:

If the parties to the reference either agree before hand to the method of appointment, or afterward acquiesce in the appointment made with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceeding with full knowledge of the relevant fact will amount to such acquiescence.

14. The same view has been taken in the *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another*, . The same view has been adopted by the Apex Court in its later decisions also.

15. For the same reason, we also reject the argument of the learned counsel for the appellants that since Shri Lalita Singh had retired, he could not have been appointed as an arbitrator. The date of superannuation of Lalita Singh is said to be 3.1.1991 by the appellants. We therefore, do not find any substance in the argument on the first point of the appellants' counsel.

16. Now, we take up point No. 2 with regard to alleged misconduct of the arbitrator. It was vehemently argued by the learned counsel for the appellants that the award has been passed without giving any opportunity of hearing to the appellants. We scanned the original record with the help of the counsel for the parties. It was argued by the learned counsel for the appellants that they were not permitted to file their version. The learned counsel for the appellants submitted that 28.8.1992 was the date fixed for hearing before the arbitrator who delivered the award, subsequently on 10.9.1992 without actually hearing the matter either on 28.8.1992 or on 10.9.1992. Before proceeding further, it is apt to notice the pleading of the appellant in this regard. A copy of the objections to the award filed by the appellants would show that what has been argued before us has not been set out therein in so many words. The learned counsel for the appellants in this regard invited our attention to paragraph 5 of the objections which is reproduced below for the sake of convenience.

That the Arbitrator has made the award in a hurry without giving full and proper opportunity to the objector and without considering the evidence of the objector on record. The entire case has been decided within a short span of 15 days. The

proceedings were stated on 28.8.1992 and award has been made on 10.9.1992. This clearly proves the bias of the Arbitrator against the objector and the misconduct of Arbitrator.

17. The contents of the paragraph reproduced above would show the exact nature of grievance which was put forward by the appellants before the Court below. Only this much was urged that the award has been passed, in a hurry without giving full and proper opportunity to the objector without considering the evidence of the objector on record.

18. A perusal of record it no where shows that opportunity of hearing was not given by the arbitrator to the appellants. Copy of the order sheet of the proceedings before the arbitrator would show that on 28.8.1992, three officials on behalf of the appellants and contractor were present before the Arbitrator. There designations are as follows:

- (1) S.E Project Circle, Agra
- (2) EE Vishwa Bank Unit, Agra
- (3) EE Project, Mathura

19. There appearances have been recorded in the order sheet and all of them have signed. It further shows that 15.9.1992 was the date fixed for the award. It has been signed by the officials of the appellants. The record further shows that 28.8.1992 was the date fixed for hearing vide letter dated 18.8.1992 of the contractor addressed to Superintending of Engineer, Agra on the instructions of the Arbitrator. On the record, there is a letter by the arbitrator addressed to the Superintending Engineer, Project Circle, U.P. Jal Nigam, Agra as also to the contractors informing that 28.8.1992 at 10.00 a.m. has been fixed for "personal hearing". These documents unequivocally prove that the matter was heard by the arbitrator on 28.8.1992 and both had the opportunity to put their versions. Logically it follows that the contention of the appellants that no hearing took place on 28.8.1992 is incorrect and the said argument is misconceived. That appears to be the reason that no such grievances, in so many words was raised in their objections. Only this much was raised that the award was given in hurry. The said objection is also not correct for the reasons that the arbitration proceeding commences when the arbitrator enters into a reference and not when the matter is heard by the arbitrator.

20. The contention of the learned counsel for the appellants that the proceedings were concluded in hurry has been rightly negated by the Court below. The record further reveals that before hearing the matter finally the arbitrator required certain information through his letter dated 15.5.1992 and the information was furnished by the appellants through their letter dated 7.7.1992 with the request that the matter may be heard if possible at Agra itself.

21. The record further shows that there is a document at serial number 30. It is a letter addressed to the contractors by the Civil Engineering Department,

University of Roorki dated 7.10.1989. A copy of the said letter as per endorsement of the arbitrator was given on 29.8.1992 at the time of final hearing by the Contractors. This also belies the case of the appellants.

22. In view of above, we do not find any substance in the second point raised by the learned counsel for the appellants.

23. The learned counsel for the appellants did not challenge the award on any other count. In view of above discussions, we do not find any merit in the appeal. The appeal is dismissed with costs.