

(1996) 04 AHC CK 0109

In the Allahabad High Court

Case No : Civil Misc. Writ Petns. No's. 862 of 1991 and 33784 of 1993

U.P. Seeds and Tarai Development Corporation Ltd. and
another

APPELLANT

Vs

M/s. Mishra and Company and another

RESPONDENT

Date of Decision : 30-04-1996

Acts Referred:

Arbitration Act, 1940 — Section 11, 11(1), 11(2), 11(3), 11(4)

Citation : AIR 1997 All 206

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : V.K. Singh, V.B. Singh, S.K. Singh and P.K. Singh, for the Appellant;
H.S. Nigam, D.V. Jaiswal and Standing Counsel, for the Respondent

Final Decision : Disposed Of

Judgement

1. Aggrieved by the Order dt. 7th August, 1990 passed by the learned Civil Judge in Misc. Case No. 9/70 of 1990 arising out of an application under S. 11 read with S. 33 of the Arbitration Act, Writ Petition No. 862 of 1991 has been moved. By means of the said order, pending the disposal of the application under S. 11 of the Arbitration Act for removal of the Arbitrator, stay was granted. In the aforesaid writ petition, by Order dt. 17th January, 1991, the operation of stay order was stayed. During the pendency of the said Writ Petition no. 862 of 1991, by order dt. 3rd September 1993 the application under S. 11 of the Arbitration Act which was registered as Misc. Case No. 25/70 of 1993 was rejected while observing that the petitioner may approach the High Court for stay. Against the said order, Writ Petition No. 33784 of 1993 has been moved.

2. Learned counsel for the petitioner in Writ Petition No. 33784 of 1993 and respondent in Writ Petition No. 862 of 1991 contends that the reference having been sought to be made unilaterally by the U. P. Seeds and Tarai Development Corporation, the same is not a reference as defined in S. 2(e) of the Arbitration Act and, therefore, the Arbitrator cannot have jurisdiction to proceed with the

same. He contends further that the arbitration agreement being vague and indefinite, is void and, as such, no arbitration can be proceeded with. He further contends that because no dispute was formulated before the reference was made, therefore, the notice issued by the Arbitrator shows that the Arbitrator has misconducted himself in proceeding with the arbitration arid, therefore, he should be removed. On these grounds, he contends that the arbitration proceedings should be set aside and the arbitration agreement should be declared void. He also prays for removal of the Arbitrator so appointed. He draws my attention to his application which is Annexure "4" to writ petition No. 33784 of 1993 which is termed as an application under S. 33 read with S. 11 of the Arbitration Act and he had made out certain grounds in support of his prayer. The said application contains two prayers - one relates to the declaration that the arbitration agreement is vague and void and the other prayer is that the Arbitrator appointed should be removed.

3. It appears from the said application that the existence of the agreement for arbitration is not disputed. Whal Mr. S.K. Varma, learned counsel for the petition in Writ. Petition No. 33784 of 1993, disputes is that the said agreement is vague because of the reason that no Arbitrators such is named. On the other hand the Arbitrator is named by designation or his nominee, therefore, the said arbitration agreement is vague and unenforcable.

4. Whether the arbitration agreement is vague or not can be gone into by means of an application under S. 33 of the Arbitration Act but the same cannot from subject matter of an application under S. 11 of the Arbitration Act. The two applications cannot go together. Inasmuch as S. 11 provides that "on the application of any party to a reference" therefore, only a person who is a party to a reference may take an application for removal on the grounds mentioned in sub-sections (1), (2), (3) and (4) of S. 11. Those provisions cannot comprehend the scope of declaring the arbitration agreement as void and illegal which forms a distinct subject matter u/s 33 of the said Act. Therefore, the two cannot be put together. If he claims for removal of an Arbitrator under S. 11, in that event he has to accept the reference and as soon makes such an application, he accepts the reference. Whereas S. 33 entitles "any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award". Therefore, S. 33 can be invoked without the aid of S. 11.

5. In the present case, in paragraph 4 of the said application in Annexure "4", the petitioner in Writ Petition No. 33784 of 1993 admits that dispute and difference arose between the parties and in a routine way the opposite party Corporation claimed the arbitration clause and served a notice claiming for the alleged non-transportation on the ground that there is an established practice in the Corporation that (he goods cannot move without Movement Order. No such Movement Order is issued. In paragraph 5 of the same application, the existence of the dispute has been reiterated while in paragraph 6(a) it is stated that "the

disputes which admittedly exist between the parties are not covered by the Arbitration Clause." Therefore, there is a dispute which is an admitted position. That a reference was made under the said Arbitration Clause is also an admitted position. Whether the dispute is covered within the said agreement or not could be raised before the Arbitrator and the party raising such question has to prove by materials that the dispute is not covered within the Arbitration Agreement. The said ground cannot be a ground within the meaning of either S. 11 or S. 33 of the Arbitration Act.

6. The allegation that the agreement is vague because of the reason that the reference was agreed to be made to the Chairman of the Corporation or his nominee is very difficult to accept. Inasmuch as the arbitrator has been named by designation who is empowered to enter into the arbitration himself or may appoint a nominee. Therefore, the existence of the said clause that the arbitration is to be referred to the Chairman or his nominee cannot render the agreement vague. This situation brings the question outside the scope of S. 33.

7. Now the question that the ground for removal of the Arbitrator appointed, as contended by Mr. Verma, was that the power to nominate can be exercised only once and by appointing one Mr. Harish Chandra Mahajan, the said power has been exhausted and upon transfer of Mr. Mahajan the second nomination of Smt. Anita Jain Bhalnagar is without authority and beyond the arbitration agreement. Mr. S. R. Singh, learned counsel for the respondents, on the other hand, contends that because of the specific agreement that arbitration would be entered into by the Chairman or his nominee, it does not necessarily mean that such power to appoint nominee can only be exercised once. There may be circumstances which may necessitate replacing the Arbitrator already appointed by another nominee or the Chairman may have entered into the arbitration himself. If he may enter into arbitration himself, he could very well nominate his nominee once again.

8. The U.P. Amendment of S. 4 by U.P. Act No. 57 of 1976 which came into force on 1st Jan. 1977 provides as follows :

"4. Agreement that arbitrators be appointed by the third party.-- (1) 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.

(2) In every such case where any appointed arbitrator neglects or refuses to act, or becomes incapable of acting, or dies, the vacancy shall be supplied by the person designated as foresaid.

(3) In case the person designated as aforesaid fails, to make the appointment under sub-section (1) or to supply the vacancy under sub-section (2), within one month after the service of notice on him by either party to the arbitration agreement, the parties may jointly appoint an arbitrator or supply the vacancy,

as the case may be."

9. Section 4 clearly indicates that reference may be made to an Arbitrator named by designation for the time being in office. Therefore, the agreement cannot be said to be vague and in such cases, in the contingencies provided in sub-sec. (2) or sub-sec. (3), of the U. P. Amendment, in case of any occurrence of vacancy, the same can be supplied by the person designated or by the parties as the case may be. Mr. Verma contends that in this case the contingency contained in sub-sec. (3) has not been fulfilled. Thereafter, the appointment of Mrs. Anita Bhatnagar Jain is wholly unwarranted.

10. A plain reading of sub-sec. (3) indicates that if a person fails to make the appointment under sub-sec. (1) or to supply the vacancy under sub-sec. (2) within one month of the service of notice on him by either party to the arbitration agreement, the parties may appoint an Arbitrator or supply the vacancy. But in this case no such agreement has been reached between the parties. Therefore, sub-sec. (3) is not attracted. On the other hand, the vacancy has been supplied under sub-sec. (2) by the person designated in the Arbitration Agreement. Mr. Verma's contention that the transfer of nominee does not make him handicapped and does not result in the vacancy. Sub-sec. (2) contains two parts -- one if the Arbitrator neglects or refuses to act and the second if he becomes incapable of acting or dies. So far as the first part, we are not concerned in the present case. So far as the second part, whether transfer of an officer makes him incapable of acting is a question which is to be decided here. Now an arbitration is to be decided within a specified time and it is expected that an Arbitrator who is in the area and spot would be capable of doing justice. The nominated Arbitrator who has been transferred elsewhere and may or may not afford to find time, to hold the arbitration or he may express his unwillingness to hold the arbitration whatever might be the reason. The designated Arbitrator is the best judge to assess the situation and in such case if he so feels, he can fill the vacancy which occurs because of the transfer of Sri Mahajan. This fact can very well be presumed to render Sri Mahajan incapable of acting on his transfer and to nominate another Arbitrator in his place by reason of sub-sec. (2) of S. 4. The expression "becomes incapable of acting" comprehends the hitter situation. It can also comprehend situation where the officer is transferred elsewhere. There cannot be compartmentalisation while deciding that a person becomes incapable of acting. It is the satisfaction of the designated arbitrator entitled to nominate. Therefore, I do not find any infirmity in the said order of nomination.

11. The ground that reference has been made unilaterally or the dispute has not been formulated cannot be accepted at this stage) once the intention to refer is involved and a reference is made and after the parties filed their pleadings. The dispute can be formulated and issues can be framed. That will not be an irregularity which goes to the root of the jurisdiction of the Arbitrator. The mode of reference does not also specify that before making the reference the scope and ambit of the reference is to be formulated. This is a dispute which is to be

referred and the dispute can be crystalised through pleadings and whether the same come within the purview of the agreement or not can very well be gone into by the Arbitrator, if raised. The question of existence of agreement can even be challenged while challenging the award itself. At this stage, such an application cannot be put through because of the averments made in the said application contained in Annexure "4" which does not make out any such ground.

12. In that view of the matter. Writ Petition No. 862 of 1991 is disposed of by setting aside the order dt. 7th Aug. 1990 in view of the observations made above.

13. At this stage, Mr. V. K. Singh, learned counsel for the petitioner in Writ Petition No. 862 of 1991 submits that the arbitration proceeding is complete and the Award is ready but because of the interim order it has not been signed. It is also contended that Mr. Verma's client had participated in the proceedings. Since in the mean time a long time has lapsed no useful purpose would be served by keeping the matter pending in view of the observations made above. The Writ Petition No. 33784 of 1993 shall be deemed to have been disposed of by reason of the observations made hereinbefore. The Arbitrator shall be free to sign the Award and publish the same. Mr. Verma's client shall have all opportunity to challenge the said award under S. 33 of the Arbitration Act and all points and grounds available under S. 33 would be open to him. The finding given hereby as to the validity of the arbitration agreement is tentative for the purpose of deciding the present case and shall not be operative as resjudicata.

14. With these observations, these two writ petitions are disposed of.

15. Order accordingly.