(1967) 09 MP CK 0003

Madhya Pradesh High Court

Case No: Civil Revision No. 314 of 1967

Union of India (UOI)		APPELLANT
	Vs	
S.V. Krishna Rao		RESPONDENT

Date of Decision: Sept. 6, 1967

Acts Referred:

- Arbitration Act, 1940 - Section 20, 20(4), 8

Citation: (1969) MPLJ 834

Hon'ble Judges: R.J. Bhave, J

Bench: Single Bench

Advocate: N.L. Mukerji, for the Appellant; Gulab Gupta, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

R.J. Bhave, J.

This revision Is by the Union of India through the General Manager, South-Eastern Railway, Calcutta (hereinafter referred to as the "Railway Administration") against the order of the lower Court, dated 20-1-1967, passed u/s 20 of the Arbitration Act appointing Shri N. S. Tayabji, Chief Engineer (Construction), Eastern Railway, Calcutta, as the arbitrator.

The facts of the case are that the non-applicant S. V. Krishna Rao (herein-after referred to as "the contractor") had entered into a contract dated 2-12-1963 with the Railway Administration for carrying out certain work at Manendra-garh Station. The contractor was also required to undertake certain additional work, the details of which are given in the application filed by the contractor u/s 20 of the Arbitration Act. It is the case of both the parties that the General Conditions of contract framed by the Railway Administration formed part of the contract dated 2-12-1963. Condition No. 62 of the General Conditions provides that all disputes or differences

of any kind arising out of or in connection with the contract, whether during the progress of the works or after their completion and whether before or after the determination of the contract, shall be referred by the Contractor to the Railway and the Railway shall within a reasonable time after their presentation make and notify decision thereon in writing. This condition further provides that the decision and the directions issued by the Railway Administration shall be final. Condition No. 63 then provides for arbitration. That condition is in the following terms:

"63-(1) If the Contractor be dissatisfied with the decision of the Railway, on any matter in question, dispute or difference, on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to or if the Railway fails to make a decision within a reasonable time, then and in any such case but except in any of the Excepted Matters referred to in Clause 63 of those conditions the Contractor may within 10 days of the receipt of the communication of such decision or after the expiry of the reasonable time as the case may be, demand in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the Railway by the Contractor and shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other shall be referred to arbitration.

(2) Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be withheld on account of such proceedings provided however it shall be open for the arbitrator or arbitrators to consider and decide whether or not such work should continue during arbitration proceedings.

(3) (a) Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to:

(i) A sole Arbitrator who shall be the General Manager or a person nominated by him in that behalf in cases where the claim in question is below Rs. 50,000/-and in cases where the issues involved are not of a complicated nature. The General Manager shall be the sole judge to decide whether or not the issues involved are of a complicated nature,

(ii) Two Arbitrators, who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid down in Clause 3(b) for all claims of Rs. 50,000/-and above, and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole judge to decide whether the issues are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions the matter under dispute will be referred to an Umpire to be appointed in the manner laid down in Clause 3(b) for his decision, fb) For the purpose of appointing two arbitrators as referred to in Sub-Clause (a)(ii) above, the Railway will send a panel of more than three names of

officers of the appropriate status of different departments of the Railway to the contractor, who will be asked to suggest a panel of three names out of the list so sent by the Railway. The General Manager will appoint one Arbitrator out of this panel as the contractor''s nominee, and then appoint a second arbitrator of equal status as the Railway''s nominee either from the panel or from outside the panel, ensuring that one of the two arbitrators so named is invariably from the Accounts Department. Before entering into reference, the two Arbitrators shall nominate an Umpire to whom the case will be referred in the event of any difference between the two Arbitrators, (c) The Arbitrator or Arbitrators or the Umpire shall have power to call for such evidence by way of affidavits or otherwise as the Arbitrator or Arbitrators or Umpire shall think proper, and it shall be the duty of the parties were (sic) to do or cause to be done all such things as may be necessary to enable the Arbitrator or Arbitrators or Umpire to make the award without any delay, (d) It will be no objection that the persons appointed as Arbitrator. Arbitrators or Umpire are Government servants, and that in the course of their duties as Government servants they have expressed views on all or any of the matters in dispute, (e) Subject as aforesaid. Arbitration Act 1940 and the Rules thereunder and any statutory modification thereof shall apply to the Arbitration proceedings under this clause."

The case of the contractor is that during the working of the contract certain disputes arose which the Railway Administration failed to decide. It is alleged that not only the disputes were not decided but the Railway Administration took over the work from the contractor and started completion thereof departmental-ly. In these circumstances, the contractor again asked the Railway Administration to refer the dispute in terms of Condition No. 63. No heed was paid by the Railway Administration to the said request and hence the contractor served the Railway Administration with a notice u/s 80 of the CPC calling upon the Railway Administration to initiate arbitration proceedings under Condition No. 63. After waiting for a reasonable time, the contractor filed an application u/s 20 of the Arbitration Act. In the application the contractor has given details as to the poin in dispute and the various claims put forth by him. It is not necessary to reproduce them here.

In the written statement filed by the Railway Administration it has been stated that the contractor was not carrying out the work diligently and even after reminders the speed was not increased. Ultimately, the contractor abandoned the work and in those circumstances the Railway Administration was required to take it over for completing it departmentally. All the facts and circumstances alleged by the contractor were controverted. On the point of failure to act under Condition No. 63, the plea of the Railway Administration was that so long as the work was not completed, it was not possible to determine the amount of work that was left unfinished by the contractor and his claim till that stage was reached could not be properly determined. It was stated that the Railway Administration was always willing to take action under Condition No. 63 but was only waiting till the completion

of the work. It was again reiterated before the Court that till the work was finished it was not possible to refer the matter for arbitration. In other words, the plea of the Railway Administration was that the application was premature.

At this stage, the contractor made an application on 17-11-1966 stating therein that inasmuch as the Railway Administration had failed to appoint an arbitrator the Court should appoint an arbitrator out of the panel of three persons submitted by the contractor. In reply, the Railway Administration raised an objection that the panel submitted by the contractor could not be accepted, as it was contrary to Condition No. 63. The Railway Administration, therefore, submitted a panel of five persons in terms of Condition No. 63. The contractor''s plea was that all the five persons named in the panel submitted by the Railway Administration were the employees of the Railway Administration and he was not, therefore, impelled to accept that panel. On his turn, he again submitted a list of two other persons, one of whom is Shri N. S. Tayabji. The lower Court overruled the objection of the Railway Administration and appointed Shri Tayabji as the arbitrator. The present revision is directed against that order.

In the impugned order dated 20-1-1967 the learned Judge observed that in response to the notice issued u/s 80, Civil Procedure Code, by the contractor, the Railway Administration failed to satisfy his claim or take action under Condition No. 63 within two months of the receipt of the notice. The period of two months was reasonable period, and yet the Railway Administration did not take any action. The Railway Administration has, therefore, forfeited its right of challenging the application u/s 20 of the Arbitration Act. The learned Judge further observed that the contractor is not prepared to accept any of the names out of the panel submitted by the Railway Administration, as all the persons in the panel are servants of the Railway Administration, and appointment of any of them as arbitrator would be altogether improper. The learned Judge, therefore, rejected the panel submitted by the Railway Administration. As to Shri Tayabji, the learned Judge observed that he was the Chief Engineer in the service of the Eastern Railway and as such there could not be any objection to his appointment by another Railway Administration. The learned Judge, therefore, directed the appointment of Shri Tayabji as arbitrator. In doing all this, the learned Judge appears to have acted u/s 8 of the Arbitration Act.

Shri Mukerjee, learned counsel for the Railway Administration, urged that in appointing Shri Tayabji as arbitrator, the lower Court acted in excess of jurisdiction. His contention is that u/s 20 of the Arbitration Act a party to the arbitration agreement can make an application for getting the arbitration agreement filed and securing a reference through the Court in terms of the arbitration agreement. The Court, before which the application u/s 20 is filed, is not free to set at naught the arbitration agreement and make a reference to an arbitrator contrary to the arbitration agreement. He, therefore, urged that the procedure prescribed under Condition No. 63 should have been followed by the lower Court. He pointed out that

admittedly the claim in dispute is for more than Rs. 50,000/-. In such a case, the procedure prescribed under Clause (3) of Condition No. 63 ought to have been followed. This is the reason why the Railway Administration had submitted a panel of five persons for the contractor to make his choice in terms of Clause (3) of Condition No. 63. Shri Mukerjee submitted that the contractor had no right to submit his own panel: nor had the Court any authority to reject the panel submitted by the Railway Administration and to appoint a person named by the contractor.

Shri Gupta, learned counsel for the contractor, on the other hand, submitted that as soon as an application u/s 20 of the Arbitration Act was entertained, other provisions of the Arbitration Act were attracted, including Section 8 thereof, and that the Court had authority to appoint any person as an arbitrator if there was no agreement between the parties as to the selection of the arbitrator. Shri Gupta, therefore, supported the action of the lower Court. He also urged that the lower Court had appointed a really competent person as the arbitrator, who is also in Railway service, though of different division, and as such there could not be any objection to his appointment as the arbitrator. He urged that in exercise of revisional powers by this Court, in the circumstances of the case, no interference is warranted.

Had there been an objection to the desirability of appointing Shri Tayabji as the arbitrator, I would have, without hesitation, overruled the same. The objection is to the legality of that appointment and to the jurisdiction of the Court to make the said appointment. I will have, therefore, to consider the objection on merits.

In the Arbitration Act provisions have been made for three eventualities, namely, (i) arbitration without the intervention of the Court; (ii) arbitration with the intervention of the Court; and (iii) arbitration in suits. Section 20 deals with arbitration with the intervention of the Court where there is no suit pending. Section 20 reads thus:--

"20. (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be In writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

Sub-section (1) of Section 20 provides that instead of proceeding under Chapter II (which contains provisions for arbitration without the intervention of the Court) any party to an arbitration agreement, when a dispute has arisen, may apply to the Court with a prayer that the agreement be filed. Sub-section (3) then provides that on receipt of the application the Court shall issue a notice calling upon the other side to show cause why the agreement should not be filed. Sub-section (4) then provides that where no sufficient cause is shown, the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. Sub-section (5) then says that after this the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of the Act, so far as they can be made applicable. From Sub-section (5) it is quite clear that the stage of application of the other provisions of the Arbitration Act is reached when the reference for arbitration is made. It, therefore, follows that before a reference is made the Court is not entitled to rely on the provisions of Section 8 of the Arbitration Act, and the lower Court was in error in relying on Section 8. The purposes of Section 8 and Section 20 are altogether different. In those cases where the parties have agreed at the time of entering into a contract that any dispute arising out of it shall be settled by arbitration and where no arbitrators have been named and where the parties do not agree on the choice of the arbitrator, Section 8 comes into operation. It gives power to the Court to appoint an arbitrator; in other words, to make a choice for the contesting parties. Once the arbitrator is so appointed, the function of the Court comes to an end. The reference is not made by the Court but it is left to the parties to make the reference to the arbitrator nominated by the Court. On the other hand, u/s 20 what the Court has to decide is as to whether the arbitration agreement should be filed before it or not. In other words, it has first to decide whether the necessary conditions for making a reference to an arbitrator are available or not, that is to say, whether any dispute between the parties has really arisen or not. When the Court comes to the conclusion that a dispute has arisen between the parties, then the Court is required to make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise. It is thus clear that the reference is to be made to the arbitrator appointed by the parties in the agreement itself or by any other method provided in the agreement. That alone can be the meaning of "or otherwise". It is only when no arbitrators have been appointed in the agreement or no procedure has been prescribed in the agreement

for appointment of such arbitrators and when there is no agreement between the parties before the Court about the choice of the arbitrators that the Court gets an authority of nominating the arbitrators itself. The provisions of Sub-section (4) of Section 20 must be interpreted in the manner I have done for the reason that what the parties seek from the Court is the enforcement of the agreement for referring the dispute to the arbitrator through the Court. When the agreement is being enforced, it cannot be logically said that only the agreement to refer the dispute to arbitration is to be enforced and not the other part of the agreement, namely, the arbitration by the named persons or the persons to be selected by following the previously agreed procedure. The provision under Sub-section (4) empowering the Court to appoint an arbitrator of its choice can come into operation only when no arbitrators have been appointed under the agreement or no procedure has been prescribed and the parties cannot agree upon any arbitrator.

Even if it is assumed that the Court has a right either to refer the dispute to the arbitrators nominated by the parties or to a person of its own choice, that power cannot be allowed to be exercised arbitrarily. It is the duty of the Court to satisfy itself as to why it is not just to make a reference to the arbitrators named in the agreement or to the arbitrators to be selected by following the procedure prescribed in the agreement and whether an objection to the persons named in the agreement by any party is just. This, in my view, the lower Court has not done in this case. The observation of the lower Court that it is altogether unjust to appoint a person as an arbitrator who is in service of one of the contracting parties is unwarranted. There is nothing in law to prevent a party from agreeing to arbitration by the other party to the contract or by its nominee. Such agreements are always upheld by the Court. There was, therefore, no justification for not following the procedure prescribed under Condition No. 63 of the General Conditions when the parties had agreed to abide by it. I may also observe that the lower Court did not follow the proper procedure. On the cause being shown by the defendant, the Court ought to have first record a finding as to whether the cause shown was proper or not. On recording such a finding, the Court ought to have asked the parties to nominate the arbitrators as provided under Condition No. 63. At that stage, the Court could have taken into consideration any valid objections raised by the parties to the nomination, of any of the persons from the panel. Those objections could be any other objections than the objection which found favour with the lower Court. If there was any other just and sufficient cause, then only the Court could have appointed any other person as an arbitrator and could have made a reference to him. In this view of the matter also the order of the lower Court cannot be sustained and must be set aside.

In Dhanrajamal Gobindram Vs. Shamji Kalidas and Co., , their Lordships of the Supreme Court observed:

"But the crux of the argument is that the provisions of Sub-section (4) of Section 20 read with Sub-section (1) ibid, cannot apply, and the Court, after filing the agreement, will have to do nothing more with it, and this shows that Section 20 is not applicable. This argument overlooks the fact that this is a statutory arbitration governed by its own rules, and that the powers and duties of the Court in Subsection (4) of Section 20 are of two distinct kinds. The first is the judicial function to consider whether the arbitration agreement should be filed in Court or not. That may involve dealing with objections to the existence and validity of the agreement itself. Once that is done, and the Court has decided that the agreement must be filed, the first part of its powers an$l duties is over. It is significant -that an appeal u/s 39 lies only against the decision on this part of Sub-section (4). Then follows a ministerial act of reference to arbitrator or arbitrators appointed by the parties. That also was perfectly possible in this case, if the parties appointed the arbitrator or arbitrators. If the parties do not agree, the Court may be required to make a decision as to who should be selected as an arbitrator, and that may be a function either judicial, or procedural, or even ministerial; but it is unnecessary to decide which it is. In the present case the parties by their agreement have placed the power of selecting an arbitrator or arbitrators (in which we include also the umpire) in the hands of the Chairman of the Board of Directors of the East India Cotton Association, Ltd., and the Court can certainly perform the ministerial act of sending the agreement to him to be dealt with by him. Once the agreement filed in Court is sent to the Chairman, the Bye-laws lay down the procedure for the Chairman and the appointed arbitrator or arbitrators to follow, and that procedure, if inconsistent with the Arbitration Act, prevails. In our opinion, there is no impediment to action being taken u/s 20(4) of the Arbitration Act."

These observations clearly indicate that the first part of Sub-section (4) enjoins a judicial function on the Court of deciding the dispute as to whether the agreement should be filed or not. Once that decision is taken by the Court, the latter part consists of merely a ministerial act of referring the dispute to the arbitrators named in the agreement. In that particular case, the parties, by their agreement, had placed the power of selecting an arbitrator or arbitrators in the hands of the Chairman of the Board of Directors of the East India Cotton Association Ltd Their Lordships did not find anything wrong in such an agreement and no argument was advanced before their Lordships against the validity of such an agreement. This case thus indirectly supports the view I have taken. This case was relied on by the learned counsel for the contractor in support of his contentions. I do not find anything in that case supporting his view.

The other case, relied on by the learned counsel for the contractors, is Union of India(UOI) Vs. D.P. Singh, . In that case, the power to appoint a sole arbitrator was given to one of the parties. That party made a default. The other party made an application u/s 8(1)(a) of the Arbitration Act for appointment of an arbitrator. The objection raised was that the application was not tenable. The argument was that

Clause (a) of Section 8(1) comes into operation where one or more arbitrators are to be appointed by consent of parties and they do not agree in such appointment. Where the arbitrator was to be appointed by one party alone, the provision of Clause (a) was not attracted. That contention was repelled by the learned Single Judge by observing that in such cases it is inherent in the arbitration agreement itself that the nomination of the arbitrator by the party, who is given the power to appoint him, shall be deemed to have been made by the consent of both the parties and hence it was not necessary to make any express provision that the appointment should be made by the consent of the parties. It was further observed in that case that under Clause (2) of Section 8 the Court had discretion to make its own appointment and no duty was cast on the Court to consult the defaulting party and give him an opportunity to make an appointment even where the defaulting party has the sole power under the arbitration clause to appoint the sole arbitrator. Shri Gupta cannot derive much assistance from this case for the simple reason that the proceedings, in that case, were not initiated u/s 20 of the Arbitration Act. I have already pointed out that Section 8 and Section 20 operate under different circumstances and cannot be mixed up together. Apart from this, with due respect, I am not prepared to accept that a party in default loses its right of being consulted by the Court when an application u/s 8 is made for appointment of an arbitrator. It may be that even after consulting the party the Court may not accept the person nominated by the party for valid reasons; but the discretion of the Court cannot go to the extent of denying the right to the other party of making its submissions as to the choice of an arbitrator.

In Union of India (UOI) Vs. Gorakh Mohan Das and Another, , it was held that where the contract between the Railway and the Contractor provided for the appointment of two arbitrators, one to be selected by the Railway as the contractor''s nominee out of a panel of three names to be suggested by the Contractor, and the other to be appointed by the Railway, in which appointment the Contractor had no voice at all, it cannot be said that the arbitrators are to be appointed by consent of parties so as to attract the applicability of Section 8. In that case, it was also pointed out:

"The province of Section 8 and Section 20 is quite distinct. The former confers power upon the Court to appoint an arbitrator on an application u/s 8 where the parties do not concur in the appointment of an arbitrator and the latter entitles party to apply for filing the arbitration agreement in Court and empowers the Court to make an order of reference to the arbitrator appointed by the parties and, in the absence of such appointment, to the arbitrator appointed by it."

This decision clearly indicates the scope of Section 20, namely, that under that section the Court has power to refer the matter to arbitration of persons appointed by the parties and only where such appointment is not made that the Court makes its own choice. I respectfully concur with this decision. I may also refer to the decision of the Calcutta High Court in Union of India (UOI) Vs. Himco (India) Private

Ltd., , wherein Bachawat J., delivering the judgment of the Court, observed:

"The arbitration agreement contains adequate and exhaustive machinery for appointment of arbitrators including substitutional appointments in case the appointed arbitrator refuses to act etc. The fact that the appointed arbitrator has not yet signified his willingness to act as arbitrator does not debar the Court from making an order of reference of the dispute to him. If he subsequently refuses to act as the arbitrator the procedure laid down in the arbitration agreement will prevail and will have to be followed: see the observation in paragraph 26 read with paragraphs 6, 7 and 23 in the judgment of the Supreme Court in Dhanrajamal Gobindram Vs. Shamji Kalidas and Co., ".

This decision also emphasises the fact that the procedure prescribed under the agreement, which is directed to be filed in an application u/s 20 of the Arbitration Act, is required to be followed in selecting or appointing the arbitrators to whom the reference is to be made. This decision also indicates that the decision of the Supreme Court was interpreted by the Calcutta High Court in the same manner in which I have interpreted it.

For the abovesaid reasons, I am of the view that the lower Court was in error in appointing Shri Tayabji as the arbitrator in derogation of the procedure prescribed under Condition No. 63 for appointment of arbitrators. The revision is, therefore, allowed, the order of the lower Court is set aside and the Court is directed to refer the dispute to the arbitrators selected after following the procedure prescribed under Condition No. 63. The applicant shall get the costs of this petition. Hearing fee Rs. 200/-.