

(1953) 05 CAL CK 0025

Calcutta High Court

Case No: Matter No. 3 of 1952

East India Film Studios

APPELLANT

Vs

P.K. Mukherjee and Others

RESPONDENT

Date of Decision: May 29, 1953

Acts Referred:

- Arbitration Act, 1940 - Section 12, 19, 19(1), 19(1)(g), 37(36)
- General Clauses Act, 1897 - Section 16
- Government of India Act, 1935 - Section 220

Citation: 58 CWN 152

Hon'ble Judges: Bose, J

Bench: Single Bench

Advocate: G.P. Kar, for the Appellant; A.K. Sen, for the Respondent

Final Decision: Dismissed

Judgement

Bose, J.

This is an application under Art. 226 of the Constitution for an appropriate writ directing the respondents Nos. 1 and 2 to withdraw or cancel an order of revocation of appointment of an arbitrator, dated the 24th of November, 1951, and for direction upon the said respondents to forbear from giving effect to that order. The petitioner carries on business of production and exploitation of films" and for the purpose of such business he has his buildings, studio, laboratory situated at Tollygunge in the suburbs of Calcutta. In the year 1942 the building, studio, laboratory and the garages belonging to the petitioner were requisitioned by the Government under the Defence of India Act, 1939. As no agreement could be reached" between the petitioner and the Government as to the compensation payable in respect of the requisition, a reference was made by the Collector under the provisions of section 19 of the Defence of India Act by an order made on the 20th of June, 1944, and this reference was registered as Land Acquisition Case No.

2. It appears that thereafter, arbitrators were purported to have been appointed by the Government from time to time, but none of the arbitrators entered upon the reference. By an order made on the 27th of February, 1950, one Mr. J. C. Majumdar who was an Additional District Judge of Alipore was appointed as arbitrator by the Government of West Bengal in its Department of Land Revenue. Mr. Majumdar entered upon the reference and commenced hearing of the arbitration case. The petitioner filed his statement of claim before the arbitrator and claimed a sum of about seven lakhs of rupees by way of compensation in respect of the said acquisition. Various documents and books of account were disclosed and placed before Mr. Majumdar in the course of the arbitration proceedings and evidence of witnesses was taken by the arbitrator for several days. The petitioner also called an expert witness to prove the valuation of the properties in question and this witness was examined and cross-examined for about two days and it appears that the arbitrator himself put questions to the witness. It also appears that during the arbitration proceedings, local inspection was necessary and so all the parties including the arbitrator inspected the requisitioned premises on or about the 31st of January, 1951.

3. It is alleged in the petition that since the inspection, considerable repairs and improvements and alterations have been made to the premises in question and the character of the property has been considerably altered as a result of the same. After the said inspection the hearing was further continued on the 7th of February, 1951, and 8th of February, 1951. On the last mentioned date, an objection was taken for the first time by the lawyer appearing for the Government that the reference to the arbitrator was not sufficiently comprehensive and so all the disputes relating to the question of compensation could not be entered by him.

4. On the 30th of May, 1951, Mr. Majumdar was clothed with powers for determining the question of compensation in respect of the various requisitions of the entire portions of the buildings and studios of the petitioner and the case was fixed for hearing finally on the 3rd of December, 1951, after several adjournments had been granted in the meantime.

5. On the 3rd of December, 1951, the petitioner had his main witness, brought down from Bombay and the petitioner was represented by counsel and solicitor on that day. After the petitioner had tendered his witness, one Mr. Sarogi, for completion of his examination and cross-examination, the arbitrator informed the petitioner in the presence of the parties and the lawyers that by an order, dated the 24th of November, 1951, the authority of Mr. Majumdar as appointed arbitrator had been revoked or cancelled by the Government of West Bengal and so he had become functus officio. It is alleged in the petition that Mr. Majumdar had at no time failed or refused to act nor was he or is incapable of acting as such arbitrator, but he had to give up the proceedings in view of the said order of the 24th of November, 1951.

6. On the 14th of December, 1951, the petitioner made a representation to the Secretary, Land and Land Revenue Department, who is respondent No. 2 in this application for recalling the order revoking the authority of Mr. Majumdar. But by a letter of the 22nd of December, 1951, the respondents refused to recall that order and it appears that by an order of the same date, namely, 22nd December, 1951, the respondent No. 4 was appointed as an arbitrator in respect of the matter in question in place and stead of Mr. Majumdar. Thereafter, Mr. Chakravarty, the newly appointed arbitrator, fixed 7th February, 1952, for the hearing of the arbitration case. On the 6th of February, 1952, the petitioner moved this Court and obtained the rule nisi.

7. One Mr P.K. Mukherjee, who is the Assistant Secretary, Government of West Bengal. Land and Land Revenue Department, has affirmed the affidavit-in-opposition in this case. The affidavit has been drafted in a most unsatisfactory manner. In paragraph 4 it is stated that the statements in paragraphs 2 and 8 of the position are more or less correct. This kind of statement is not a proper one which should be placed on affidavits and it is a practice which deserves strong condemnation. However, in paragraph 9 it is stated that as a result of certain inter-departmental communication from the deponent to the Collector of 24-Parganas the Government had recommended the appointment of respondent No. 4 who was then appointed as Additional District and Sessions Judge, Alipore and so the respondent No. 4, was appointed arbitrator in place of Mr. Majumdar inasmuch as the latter had been appointed a Special Judge. It is denied in the affidavit that the authority of Mr. Majumdar as arbitrator was revoked as alleged and it is pointed out that what happened was that the appointment of Mr. Majumdar was cancelled and Mr. Chakravarty was appointed inasmuch as he was appointed an Additional District and Sessions Judge in place of Mr. Majumdar.

8. The first point of Mr. Kar is that the Government had no power to revoke or cancel the appointment of Mr. Majumdar as arbitrator in the facts and circumstances stated above. It is submitted by Mr. Kar that the arbitration being a statutory arbitration, section 46 of the Indian Arbitration Act (X of 1940) applies to the case and as such, the authority of Mr. Majumdar to function or act as arbitrator could only be revoked or cancelled in the manner prescribed by section 5 of the Arbitration Act. In other words, it is only by obtaining the leave of the Court having jurisdiction upon a proper application being made to such Court that the authority of the arbitrator could be cancelled.

9. Section 46 of the Arbitration Act may be set out hereunder :

The provisions of this Act except sub-section (1) of section 6 and sections 7, 12 and 37(36), shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement, excepting so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

10. Section 5 of the Act is as follows:--

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.

11. These are the sections which are contended by Mr, Kar to be applicable to the facts and circumstances of this case and as the procedure prescribed in section 5 was not followed, it is submitted that the order of 24th November, 1951, is bad and the Government had no jurisdiction to make that order.

12. Section 19(1) of the Defence of India Act, 1939, provides in clause (g) thereof as follows:-

Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section.

13. In clause (b) of the said section it is stated that where no agreement can be reached as to the amount of compensation payable, the Central Government shall appoint as arbitrator a person qualified under sub-section (3) of section 220 of the Government of India Act for appointment as a Judge of a High Court, and there is also provision for appointment of assessors where necessary and also provision for appeal to the High Court against an award of an arbitrator in certain cases specified in that section.

14. The sub-clause (g) quoted above Suggests that arbitration proceedings Started u/s 19 are not affected by any law for the time being in force. There has been a good deal of argument on the meaning to be put upon the expression "for the time being in force". And the question that has been mooted before one is whether the Arbitration Act (X of 1940) is an Act which comes within the purview of the expression "for the time being "In force" as used in section 19(1) (g) of the Act.

15. Mr. Kar has submitted that the expression has reference only to laws which were in force at the time the Defence of India Act, 1939, was passed; in other words, only to existing laws which were current at the time. His argument is that the expression does not cover the subsequent laws such as the Arbitration Act of 1940.

16. Mr. A. K. Sen, learned counsel, appearing for the respondent, has, on the other hand, contended that this expression covers all laws whether past or future which were in force during the currency of the Defence of India Act, 1939. Certain decisions of this Court as also of the English Courts have been cited before me and it appears from these decisions that the expression may refer either to a particular point of time or to several periods of time and the interpretation that is to be adopted in any particular case must depend upon the context in which the expression occurs. This proposition is the net result of the various judicial decisions that have been made from time to time in the English Courts as also in this Court. In this connection, reference may be made to the case of Gokul Chandra Dev v.

Gopinath Dev (1) which was cited by Mr. Sen and is reported in (89 Calcutta Law Journal 162 at 176). The proposition, that I have stated above finds place in Burrows' Words and Phrases, Vol. II, P 326. The references have been made in this page to certain English cases which have attempted to explain this expression judicially.

17. These cases also lay down the same proposition which has been laid down in 89 Calcutta Law Journal, 162, and as the context in which that expression is used in those English cases is not quite similar to the context in which It has been used in the Defence of India Act, it will not be proper to rely on those decisions for the purpose of interpreting the meaning of the expression as it finds place in section 19(1)0:)

18. It appears to me that the words have reference only to the laws which were actually in existence at the time the Defenee of India Act came into force. The intention was to keep the arbitration under the Defence of India Act unaffected by any other law having any bearing upon the subject. In other words, the object of the framers of the Defence of India Act was to make section 19 of the Act a Self-contained code so far as arbitrations for assessment of compensation in respect of requisitioned lands were concerned.

19. I have already referred to the provisions for appeal contained in section 19 of the Act, and it may be further pointed out that reference is made in section 19 also to provisions of the Land Acquisition Act which are sought to be incorporated, as it were, in section 19 for the purpose of determination of the amount of compensation payable in respect of requisition of a particular land.

20. Reference may also be usefully made to certain rules which have been framed u/s 19 of the Act and which were published on the 30th of March, 1943, inasmuch as these rules also indicate that section 19 was-intended to be a complete code by itself.

21. Rule 2 makes provisions for the mode of appointing an arbitrator. It is stated that appointment shall be by notification in the gazette.

22. Detailed procedure for conducting the arbitration proceedings is laid down in the various rules which follow the rule for appointment. Special reference may be made to rule 6 Which provides that the arbitrator shall have the like powers and shall follow the like procedure as the Court has and follows in the exercise of its ordinary original civil jurisdiction under the "Code of Civil Procedure.

23. Rule 7 indicates that assessors may be appointed to assist the arbitrator, and rule 11 empowers the arbitrators to fix the place and time of holding meetings for arbitration, and for appearance of parties, their witnesses and lawyers.

24. Rule 13 empowers the arbitrator to administer oaths and affirmation in relation to the matters in difference; and the arbitrator has power to call for production of such documents as may be necessary.

25. Rule 14 enjoins that the arbitrator shall keep a record of the proceedings, though it need not be a verbatim record.

26. The question of costs of the arbitration is in the discretion of the arbitrator.

27. Rule 19 provides for the time within which an appeal can be preferred from the award of an arbitrator, and rule 20 shows that the award of the arbitrator is enforceable in the same manner as a decree of a civil court and the arbitrator shall be deemed to be a Court.

28. It is clear from these various rules that the arbitrator set up u/s 19 is nothing but a Court or a special tribunal set up within the ambit of his jurisdiction defined by the various rules made u/s 19 of the Defence of India Act.

29. Rule 3 is as follows :

if the arbitrator neglects or refuses to act or is incapable of acting or dies, the Provincial Government, shall appoint some other person in his place.

30. So this section provides for substitution of another arbitrator in place Of the appointed arbitrator only in. certain circumstances as specified in that rule.

31. Rule 21(1) of the rules is as follows :

The provincial Government may, on receipt of an application by any of the parties to the reference, remove an arbitrator who fails to use reasonable despatch in entering on and proceeding with the reference and making an award.

(2) The provincial Government shall remove an arbitrator who has misconducted himself or the proceedings, the reasons for the removal being recorded in writing and communicated to the parties to the reference.

(3) Where an arbitrator is removed under sub-rule (1) or sub-rule (2), the provincial Government shall appoint another arbitrator in his place, and the arbitrator so removed shall not be entitled to receive, any remuneration in respect of his services.

32. It is clear from these rules that when an application is made by any of the parties to the reference, the provincial Government may take steps to remove the arbitrator, if the Government is satisfied that the arbitrator has failed to use reasonable despatch in entering on the reference or proceeding with the reference; and sub-rule (2) of Rule 21 makes it incumbent upon the Government to remove an arbitrator who is guilty of misconduct as stated in that rule.

33. It is, therefore, clear that the rules, by their exhaustive treatment of the possible situations with regard to an arbitration, have tried to make section 19 as complete a code as possible. It appears to me to be quite clear from what is stated above that section 19(1) (g) of the Defence of India Act was intended to keep all arbitrations unaffected by any other law which had any bearing on" the subject and which were :n force at the time of the passing of the Defence) of India Act.

34. But the effect of section 46 of the Arbitration Act has been to extend the operation of the various provisions of the Act of 1940 to statutory arbitrations excepting certain sections which are mentioned in section 46 itself. The wording of section 46 is, as I have quoted before, that "the provisions of this Act shall apply to every arbitration under any other enactment for the time being in force". Now giving the expression "for the time being in force" the same meaning which I have given to section 19(1)(g) of the Defence of India Act. it is clear that the Arbitration Act of 1940 has also application to the statutory arbitration as contemplated by section 19 of the Defence of India Act, because the Defence of India Act was an enactment which was in force at the time the Arbitration Act, 1940, came into operation, and therefore, the Defence of India Act falls within the purview of the expression "for the time being in force"; Thus, the wordings of section 46 extend the provisions of the Indian Arbitration Act, 1940, to arbitrations initiated u/s 19 of the Defence of India Act. and as there is no provision for revocation of the authority of an Arbitrator in section 19 of the Defence of India Act or the rules made there under, under the circumstances as exist in the present case it must be held that section 5 of the Arbitration Act is applicable in cases of revocation of authority of an appointed arbitrator u/s 19 of the Defence of India Act. Consequently the order which was made on November 24, 1951, and which in effect revoked or cancelled the authority of Mr. Majumdar, was made without jurisdiction.

35. Moreover, the various rules made u/s 19 of the Defence of India Act, which I have quoted above, clearly show that an arbitrator appointed under that section is really in the nature of a tribunal or functions as a court. It is therefore in the fitness of things that recourse should be had to section 5 of the Act when an attempt is made to revoke the authority of an appointed arbitrator who is ready and willing to act and is capable of functioning as such u/s 19 of the Defence of India Act.

36. It was further contended by Mr. Kar, that assuming that the provisions of the Arbitration Act, 1940. do not apply to arbitrations commenced u/s 19 of the Defence of India Act. inasmuch as the rules framed u/s 19 of the Act make section 19 a self-contained and complete Code, the power of revoking the authority of an appointed arbitrator or for substituting another arbitrator in place of the appointed arbitrator, must be sought for in the rules themselves; and inasmuch as the rules make provision for substitution of another arbitrator in place of the appointed arbitrator and also for removal of the appointed arbitrator, the Government has power to make an order of substitution or removal only in exercise of the powers conferred by the rules. Mr. Kar submits that the facts and circumstances of this case make it quite clear that the conditions precedent to the exercise of the power vested in the Government under Rule 3 and rule 21 of the rules made under the Defence of India Act do not exist in the present case.

37. It is clear from the rules that the primary intention was that a person appointed arbitrator would normally see the proceedings through until an award is made. But

in special circumstances there may be substitution of another person in place of the original appointee. It appears to me that it was not the intention of the framers of the rules that the Government would go on changing the personnel of the arbitrator as often as it pleases and according to its whims. For the sake of convenience and on grounds of policy and expediency, the same person should, in the absence of any special circumstances, continue the proceedings and bring the same to a close by making and publishing an award. In the present case the arbitrator was appointed as special judge. and this is put forward as the ground for revoking or cancelling his authority and putting a new person in his place. But the fact remains that this Mr. Mazumdar is still functioning as the Additional District Judge of Alipore, although no doubt in his capacity as a special Judge, and he is readily available.

38. Mr. Sen has drawn my attention to section 16 of the General Clauses Act, which is as follows :

Where by any Central Act or Regulation a power to make any appointment is conferred, then, unless a different intention appears, the authority having (for the time being) power to make the appointment shall also have power to suspend or dismiss any persons appointed in exercise of that power.

39. He contends that this provision of the General Clauses Act should be treated as incorporated in section 19 of the Defence of India Act and the rules framed thereunder, and by virtue of this provision the Government had power to make the order which is impugned in the present case.

40. It is, however, clear that this section cannot apply to the facts and circumstances of the present case. This section 16 has reference to the relation of master and servant, and the present case is not a case of suspension or dismissal, but it is really a case of revocation or cancellation of the authority of the appointed arbitrator. Further, as I have pointed out before, an arbitrator is not really in the position of an employee or servant of the Government but he occupies the position of a tribunal or a court. Further when special rules are framed for substituting another person in place of the old appointee and this substitution can take place only under certain conditions, it must be held that the operation of the provisions of section 16 of the General Clauses Act is excluded by the special provisions contained in the rules. Section 16 is only attracted unless a different intention appears in the enactment or regulation to which section 16 is sought to be applied. In the present case the rules framed u/s 19 must be construed as expressing a different intention as contemplated by section 16 itself and thus eliminating the possibility of application of the provisions contained in section 16 of the General Clauses Act.

41. In my view the order of November 24, 1951, and December 22, 1951, must be held to have been without jurisdiction.

42. In the result the petition succeeds. The rule is made absolute, and the respondents Nos. 1 and 2 are directed to forbear from giving effect to the orders,

dated November 24, 1951, and December 22, 1951. The petitioner is entitled to the costs of the present proceedings.