

Union of India (Uoi) and ors. Vs. Thaly Constructions

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Court : Mumbai

Decided On : Jul-12-1990

Reported in : 1991(1)BomCR389

Judge : G.D. Kamat, J.

Acts : [Arbitration Act, 1940](#) - Sections 20 and 20(4)

Appeal No. : Appeal From Order No. 43 of 1989

Appellant : Union of India (Uoi) and ors.

Respondent : Thaly Constructions

Advocate for Def. : M.S. Usgaokar, Senior Adv. and ;S.S. Kantak, Adv.

Advocate for Pet/Ap. : H.R. Bharne, Additional Government Adv.

Disposition : Appeal dismissed

Judgement :

G.D. Kamat, J.

1. This appeal purported to be under section 39 of the [Arbitration Act, 1940](#), challenges the order of the trial Court dated 8th September, 1989, whereby that Court directed appointment of an arbitrator in consultation with the parties for which purpose a further date was fixed calling upon the parties to submit their

respective panels of arbitrators.

2. At the outset it is necessary to notice that a further order was made on 14th February, 1990, by which the trial Court appointed Mr. M.R. Ujjenkpo, a retired Chief Engineer of the State of Karnataka, to decide upon the disputes raised by the respondents. The latter order of 14th February, 1990, has not been challenged in any proceedings. It may be indeed urged that this may be a mere technicality and it may not be necessary to challenge the same for, if the impugned order dated 8th September, 1989, is quashed, automatically the subsequent order of 14th February, 1990 would become infructuous. I, however, propose not to go into this question and embark upon to decide the appeal instituted by the appellants.

3. The proceedings before the Additional District Judge at Panaji, arose under section 20 of the [Arbitration Act, 1940](#) instituted by the respondents. Tersely, the case set out is that they were awarded work of construction of O.P.D. Part B (Occupational Therapy Block) at the Goa Medical college complex at Bambolim, Goa by the appellants; that they suffered heavy losses due to hindrances caused in the execution of the work for the reasons that there was insufficient and irregular supply of cement and steel, non-availability of detailed drawings and changes made in the items, etc. The detailed losses under different heads did not find favour with Executive Engineer. It appears that a claim of rupees 14 Lakhs was made by subsequent communication dated 2nd July, 1985, and followed by reminder of 26th November, 1985. These claims were rejected by the Executive Engineer dubbing them as imaginary and exaggerated. The respondents invoked clause 25 of agreement and called upon the Chief Engineer on 30th December, 1985, by a written notice to appoint an arbitrator to adjudicate upon the disputes raised. Though at some stage it was held that the claim was not admissible at some other time better particulars of certain claims were sought for by the appellants and what is more, the appellants even made some counter claims. It is under these circumstances that the respondents approached the Court with an application under section 20 on 22nd April, 1987, for filing the arbitration agreement and for an order of reference of the disputes to the arbitrator appointed by the Court. At some stage of the proceedings, the appellants disclosed to the court that the chief Engineer has already appointed by his order dated 9th

February, 1989, an Arbitrator to go into the disputes raised by the respondents. For that matter, the appointment was of one Mr. R.L. Shrestha, a retired Chief Engineer of the State of Karnataka. No sooner Mr. Shrestha issued notice dated 22nd February, 1989 the respondents by an application dated 10th March, 1989 took a motion restraining the appellants from proceeding further in the matter. With consent of the parties, the main matter under section 20 was taken up for final hearing on merits and on the material before it the trial Court did not accept the appointment made by the chief Engineer and, on the contrary, directed the parties to suggest the names of Arbitrators so that Court itself in consultation with parties would make the appointment of the Arbitrator. Needless to say that it is this order of 8th September, 1989, now impugned in this appeal.

4. Three contentions have been raised by the learned Additional Government Advocate in seriatim as under :-

1. That as soon as the Chief Engineer made the appointment of the Arbitrator on 9th February, 1989, the proceedings under section 20 of the Arbitration Act have become infructuous;

2. Under section 20(4) of the Arbitration Act the Court could not have appointed the Arbitrator suo motu without giving an opportunity to the persona designata to make the necessary appointment; and

3. That the Central P.W.D. Manual is guidelines/instructions to the Department and the Court cannot take cognizance of those guidelines and instructions.

5. To appreciate these three contentions it is necessary to view a few facts and the common ground between the parties. The respondents have executed a contract in standard form which contains clause 25 empowering the chief Engineer to make the appointment of an Arbitrator in the matter of disputes. Since it is not disputed that Chief Engineer is a persona designata to make the appointment of arbitrator, it is not necessary to extract clause 25 of the agreement. The Central Public Works Department (C.P.W.D. for short) Manual contains guidelines and instructions in relation to various matters and Chapter III under the heading 'Contracts' speaks of contract forms, award of works, preparation of tender

documents, etc., etc. Section 36 in this chapter refers to arbitration, litigation cases and speaks of guidelines and instructions. Clear instructions are given as to how Executive Engineer and a Superintending Engineer should process claims, what are the defences open to the department and instruction to the chief Engineer to appoint Arbitrators within at least 30 days from the receipt of the requests in that behalf from the Contractors.

6. Mr. Bharne, the learned Counsel for the appellants on the first contention says that as soon as the Chief Engineer made the appointment of Mr.. Shresta the proceedings under section 20 of the Act became infructuous. This appears to be a wild proposition. If Mr. Bharne is to contend that the moment the Chief Engineer made the appointment of Arbitrator the court was bound to accept the same and thereafter there was no question of Court making appointment of arbitrator, such a contention would stand differently and merit some consideration. Mr. Bharne does not dispute that the proceedings taken by the respondents are under section 20 of the Arbitration Act. Had it been proceedings under section 8 of the Arbitration Act, perhaps such a proposition is acceptable, but inasmuch as the proceedings were instituted under section 20 Chapter III even after the appointment of the Arbitrator it is open to the court to give directions to the Arbitrator from time to time and even subsequently it is required of the Arbitrator to file the award in the Court and the parties are entitled to make the award a rule of the Court or get the same set aside for one or the other reasons. Therefore, in any event, the proceedings under section 20 even after the appointment of an arbitrator do not come to an end and therefore, they can never become infructuous.

7. I will now take it that what Mr. Bharne says is that once the appointment of the arbitrator is made by the Chief Engineer the issue in relation to the appointment becomes infructuous and not the entire proceedings. This aspect of the matter in my view, can be conveniently considered together with the second proposition canvassed by Mr. Bharne that the Court under section 20(4) could not have appointed the Arbitrator suo motu without giving an opportunity or calling upon the Chief Engineer, the person designated to make the appointment.

8. The whole thrust of Mr. Bharne in this connection is that the parties are bound by the contractual terms and clause 25 of the agreement clearly stipulates that designated person (Chief Engineer) to make the appointment of the arbitrator. He now says that when there has been no appointment made and party is driven to a court in an application under section 20 and if during its pendency the designated person makes the appointment there could not have been any further order made by the Court in preferring its own Arbitrator. It is equally sought to be canvassed that when a Court under sub section (4) of section 20 comes to the conclusion that disputes are liable to be referred to arbitration in the absence of sufficient cause to the contrary the court has to only direct the designated person to make the appointment of the Arbitrator and cannot proceed to make appointment on its own.

He has relied upon the following decision : Civil Revision Application No. 158-84 M/s. Laxmikant D. Naik Karmali v. The Union of India & ors., decided by the learned Single Judge of these Court (Paunikar, J.) dated 22nd February, 1985, the decision in Appeal from Order No. 32/87 Ramakant Yeshwant Kharangate v. Union of India & ors., dated 22nd April, 1988 decided by me and another decision in K. Hussainar v. Union of India & 3 ors. 1989(2) G.L.T. 100.

9. Before going to the other decisions cited I may pause to examine these three authorities. In the case of M/s. Laxmikant D. Naik Karmali, when proceedings under section 20 of the Arbitration Act were resorted to before the District Court on behalf of the appellants, it was disclosed by the department that in terms of clause 25 an arbitrator has already been appointed by the designated person. The trial Court held that since the arbitrator has already been appointed there was no further question of going into the merits of the application, but however, directed that the proceedings be kept under suspension to enable the appointed arbitrator to file the award at a later date. This order was however sought to be challenged in the revision and the learned Single Judge held that there was no merit in the revision. But what cannot be forgotten and brushed aside is that the Counsel appearing for the revision applicant conceded before the Court that he has no objection to the appointment of the arbitrator which was done by the designated person in terms of clause 25 of the agreement. An observation was made that if the revision applicant had any grievance against the impugned order his proper

remedy was to challenge the order appointing the arbitrator and the letter of reference before the appropriate forum. In my view therefore, this decision is no authority for the proposition that if during the pendency of the proceedings under section 20 the designated person makes an appointment such appointment is binding on the Court. Coming to the decision in Appeal From Order No. 32/87 Ramakant Yeshwant Kharangate's case, it is indeed true that order was made that the disputes contained in the letter of 2nd May, 1986, are referred to the arbitrator to be appointed by the Chief Engineer. But then, this order was confined to the prayer made in the application under section 20 itself, for, it prayed that reference be made to the arbitrator in terms of clause 25 of the agreement. In K. Hassainar's case (supra) again this Court directed, on making reference of the disputes to the arbitrator to be appointed by the Chief Engineer. Relying upon the observation in the judgment rendered by the Supreme Court in Union of India v. Prafulla Kumar Sanyal, : (1979)3SCC631 , the question was whether in the facts and circumstances of the case the Court should make the appointment of the arbitrator straight away or whether the choice be left to the chief Engineer and however the final direction was made to the chief Engineer to make the appointment.

Nothing can be curled out from these two authorities that any definite proposition of law has been laid down that Court is incapacitated from making any appointment once the power is given by virtue of clause 25 of the designated person or that the Court is bound by the appointment made by the person designated.

10. Mr. Bharne now says that the decision in Union of India v. Prafulla Kumar Sanyal supports his view and what is more the Full Bench of the Delhi High court in the decision of Ved Prakash Mithal v. The Union of India & ors., : AIR1984 Delhi325 based on that decision of the Supreme Court called upon the Chief Engineer to appoint the arbitrator in accordance with clause 25 of the agreement. In the Delhi case once the disputes had not been referred to the arbitrator, proceedings were taken on behalf on Ved Prakash under sections 8 and 20. The Chief Engineer was the designated authority to make the appointment of the arbitrator and despite no appointment had been made by the Chief Engineer following the observation in Prafulla Kumar Sanyal's case the Chief Engineer was

directed to make the necessary appointment within two months from the date of the order failing which the retired Registrar of the Delhi High Court was appointed as the arbitrator. This Full Bench authority in my view does not help matters because the question of reference of the disputes by the department was examined in the context of a decision earlier rendered by a Division Bench saying that if the President of India fails to make appointment that is the end of the proceedings insofar as the claimant is concerned and the Court cannot make appointment at all.

11. Mr. Bharne has heavily relied upon : (1979)3SCC631 because according to him this decision has been misread by the trial Court and he now says that this authority of the Supreme Court has been examined by a Divisional Bench of this Court in one of the latest decisions in Union of India v. M/s. Ajit Mehta & Associates & ors., : AIR1990 Bom45 . The matters in this decision were five appeals filed by the Union of India against the respondents who preferred different claims in five different contracts. Having obtained payments on the final bills and certifying no-further claims except in one case, some new claims were pressed against the Union of India and when those claims were rejected or refused on the ground that there was full and final satisfaction by invoking section 8 of the Act, assistance of the Court of Civil Judge, Senior Division, Pune, was sought for appointment of the arbitrator. The Senior Division Court obliged the respondents and appointment, were made of three different arbitrators, finally culminating in some awards. Union of India at no stage participated in the proceedings before the arbitrators and finally adopted proceedings for setting aside the awards made. The orders and awards made were challenged in the High Court. The Division Bench for variety of reasons held that there could not have been any appointment of arbitrators by the Court under section 8; that there had been satisfaction and final settlement of all bills and claims and there could not have arisen any further claims. Therefore, the proceedings right from the beginning were held void and without jurisdiction; that even on merits the awards could not be sustained as respondents had not made out a case on merits and it is on these grounds that the appeals of the Union of India were allowed. A large number of authorities were viewed in this decision including the decision of the Supreme Court in Prafulla Kumar Sanyal's case, para 23 of the report. It must be pointed out at this stage

that a reference to facts had been made and to the operative part of the order where both the parties expressed a desire that the President be asked to appoint the arbitrator according to the relevant clause of the agreement and the Supreme Court expressed no objection to that suggestion and accordingly asked the President to make the appointment as contemplated under the arbitration clause.

12. Mr. Bhagne asserts that Division Bench has clearly laid down that in any proceedings under section 20(4) it is only the designated person who can make the appointment and the Court has no power whatsoever to name the arbitrator. I have already made reference to the decision in Prafulla Kumar Sanyal's, case : (1979)3SCC631 and the discussion in paragraph 3 cannot be lightly brushed aside, which may be usefully extracted:-

'Thus if an arbitrator had been appointed whether in the agreement or otherwise, the court shall make an order of reference to him. In this case, clause 29 of the agreement provides that every dispute shall be referred to the sole arbitration of the person appointed by the President of India or if he is unwilling to act to the person appointed by the arbitrator. An arbitrator, in fact, has not been appointed by the President though the provision has been made for such appointment. Construing strictly the words of sub-section (4) the Court is not bound to make an order of reference to the person that is to be appointed by the President of India or in the event of his not being willing to a person to be appointed by the administration, for the arbitrator has not been appointed as contemplated in the sub-section. Therefore, it will not be obligatory on the part of the Court to make an order of reference to the arbitrator that may be appointed by the President. If an arbitrator had not been appointed as required in the sub-section, the Court is to find whether the parties could agree upon an arbitrator. If the parties agree, the court has to appoint the person agreed to as an arbitrator. If there is no such agreement, the Court will have to appoint an arbitrator of its choice.'

13. Mr. Usgaonkar now says that what is mentioned in para 5 of this report asking the President to make a reference is solely based on concession and the Supreme court has clearly construed sub-section (4) of section 20 and has held that the Court is not bound to make an order of reference to the person that is to be

appointed by the President of India or in the event of his not being willing, to a person to be appointed by the authority as an arbitrator has not been appointed as contemplated in the sub-section.

14. Mr. Bhagne however, strongly places reliance on paragraph 25 of the Division Bench judgment-which reads thus:-

'The conspectus of the decisions cited above, therefore, lays down a proposition that if under a clause of arbitration such as ours where the arbitrator is to be appointed by a named authority and not by consent of the parties, the provisions of section 8 cannot be invoked for appointment of an arbitrator. It is only the provision of section 20(4) that can be availed of in such circumstances, and even in that case the only direction that the Court can give, in the first instance, is to the appointing authority to name the arbitrator. The second proposition which emerges from this decision is that when there is an express term in the contract that the dispute will be arbitrated only by an arbitrator appointed by the named authority and when an arbitrator is appointed under section 8 to arbitrate such a dispute, the very appointment of the arbitrator is void being without jurisdiction, the arbitrator so appointed lacks jurisdiction, inherently and hence the award made by such arbitrator is non-est. The third proposition is that when the award suffers from such inherent defect it can be set aside or ignored at any stage of the proceedings.'

Mr. Usgaonkar now again asserts that this being the construction of sub-section (4) his case that the Court has still power to make the appointment of the arbitrator is fortified when para 5 is observed, which reads as under :-

'.....

as an arbitrator has not been appointed by the parties and as the parties are not agreed upon an arbitrator the Court may proceed to appoint an arbitrator, but in so doing it is desirable that the Court should consider the feasibility of appointing an arbitrator according to the terms of the contract.'

He now says that desirability is not a mandate. Although he would not dispute that an observation of this nature coming from the apex Court in the sense it is obiter

dicta is still required to be followed, but then it will depend on case to case on facts. He now says that the decision rendered in *Union of India v. M/s. Ajit Mehta & Associates* (supra) does not make reference to paragraph 3 of the decision in *Prafulla Kumar Sanyal's* case as the reference is solely restricted to para 5. Therefore, it cannot be construed that a Division Bench has interpreted the law laid down by the Supreme Court in *Prafulla Kumar Sanyal's* case.

15. I have noticed two more paragraphs in the decision of the Division Bench of this Court, namely paras 21 and 22. On making distinction between the scope of section 8 and section 20 in para 21, the Division Bench made observations in para 22 to the effect that regard being had to the proceedings filed under section 8 and clause 70 involved therein where Engineer-in-Chief is the appointor of the arbitrator and arbitrator had to be Engineer Officer.

16. I need not go into this contention of Mr. Bharne as I find that this appeal can be decided on the first submission made on behalf of the respondents by Mr. Usgaonkar. In his foremost submission he mentions that regard being had to the conduct of the appellant before the commencement of the proceedings under section 20 and thereafter and further, regard being had to their conduct of waiver and acquiescence, namely participation before the arbitrator appointed by the Court, no interference is called for in this appeal. He has given a long list of dates which according to him are sufficient to throw light to make his submission good and on the contrary hold that the action of the department is highly condemnable.

He has equally urged that the agreement existing between the parties is a contract of adhesion as the respondents were merely required to subscribe its signature on the standard form in which clause 25 is stipulated in the matter of making reference of the dispute to the arbitrator to be appointed by the chief Engineer. He says, in the absence of freedom of contract, the rule of contra preferent as directly applicable and on its compliance it must be held that if the chief Engineer failed to make the appointment when called upon to do so the Court is no longer bound to give him opportunity after opportunity to make such appointment, not for that matter it can be held that the court has no power to make the appointment. He says that this opportunity aspect of the matter is required to be viewed in the

background of speed by which the arbitration is envisaged. Argument appears to be that the usual ordinary remedy of a Civil Court is given up, for forum of arbitration is chosen, the whole emphasis being speed. According to him, there is no other consideration except speed which is reason detre why the government has introduced the clause for reference of the dispute to arbitration so that the disputes are not locked up in Court and piled up on its shelves. In the matter of invocation rule of contra preferentem he has relied upon the decisions of Sahebzada Mohammad Kamgarh Shah v. Jagdish Chandra Deo Bhabal Deb & ors., : [1960]3SCR604 , Delhi Development Authority v. Durga Chand Kaushish, : [1974]1SCR535 and Central Inland Water Transport Corporation Ltd., & anr. v. Braojo Nath Ganguly & anr., : (1986)11LLJ171SC . He equally relied upon a passage of page 25 of the Law of Contract by Avtar Singh (III Edition), as to how the strict construction is required where the clause is widely expressed so as to make it unreasonable and further that whenever any doubt as to meaning and scope of term arises or when a contract limits the powers, doubt or ambiguity is to be resolved in favour of the party who is called upon to subscribe signature on the printed contract or standard form of contracts.

17. The respondents preferred claims as early as June, 1985, with reminders on 2nd July, 1985 and 26th November, 1985. Once Executive Engineer having rejected the same, a letter-cum-notice was addressed dated 30th December, 1985 to the chief Engineer to refer the disputes to the arbitration of the arbitrator to be appointed by the chief Engineer. For a period of nearly one and half years no arbitrator was appointed with the result that the respondents were perforced to file application under section 20 on 22nd April, 1987.

Before going any further in the matter, I may have to notice a few things in relation to this appeal itself, for they may have a great bearing on the point sought to be agitated by Mr. Usgaonkar that the conduct of the appellant is far from happy. This appeal was lodged in the registry on 15th December, 1989, challenging the impugned order of 8th September, 1989. The registry found that the appeal was instituted three days beyond the period of limitation and therefore, without registering placed the appeal under objection. A notice was directed to the appellants to regularise the appeal on 22nd December, 1980. Needless to say that

nothing was done in the matter for over a period of six months. It is as if suddenly the appellants were awakened that on 28th June, 1990 an application for condonation of delay was instituted and alongwith that an application for injunction seeking to restrain the respondents from proceeding in any manner whatsoever with the arbitration proceedings. The reason why this happened was that the arbitration proceedings are round the corner, fixed by Mr. Ujjenkop on 13th to 15th July, 1990. Unless the application for condonation of delay was dealt with no application for injunction could have been considered. An urgent circulation of the matter was sought on 28th June, 1990 and the matter was taken on 29th June, 1990. There respondent not having raised any objection for condonation of delay, the delay was condoned. The appeal came up for admission before this Court on 7th July, 1990 as also application for interim relief which was vehemently opposed. By the consent of the parties instead of deciding the motion pending hearing and final disposal of the appeal, I decided to take up the appeal itself on its merits and that is how this appeal was placed for hearing in fact, out of turn. I have made abundant reference as to how in between 8th September, 1989 and 14th February, 1990, the trial Court made the appointment of arbitrator Mr. Ujjenkop. A few more facts are required to be noticed after that order of 14th February, 1990 which facts are factually undeniable. Mr. Ujjenkop issued noticed on 15th March, 1990, directing the respondents to file their statement of claim within 15 days from the date of receipt of the notice. The appellants were thereafter directed to file their counter statement within the next 15 days and rejoinder, if any, by the respondent within 7 days from the receipt of the counter statement of the appellants. The respondents submitted statement of claim on 4th April. The appellants filed their counter claims on 22nd May, 1990 and rejoinder was filed by the respondent on 31st May, 1990. A preliminary hearing before the Arbitrator took place on 20th June, 1990 and that is how the further hearing are now being fixed on July 13th, 14th, and 15th. It is therefore, not understood as to how an appeal instituted in December 1989 was allowed to be kept under objection for a period of over six months and absolutely unattended. This is despite the fact that even as early as 14th February, 1990 the trial Court named the arbitrator as the earlier order merely directed the parties to submit their panels. In the ordinary course on this Bench without any effort an appeal of this nature comes for admission or hearing within

less than four weeks. I have already mentioned that the notice of the appeal being barred by limitation by three days was served upon the appellants as early as last week of December, 1989. This is however not all and it is necessary to have a look at the proceedings before the trial Court which will clearly amplify as to how the whole matter is looked upon by the department. After the impugned order was made directing the parties to submit the names of arbitrators to be appointed in consultation thereof the next date fixed was 19th September, 1989. On this date admittedly the respondent submitted three names of arbitrators including that of Mr. M.R. Ujjenkop. The appellants did not submit any names. Despite this, the trial court did not proceed to make the appointment of the arbitrator because it appears that a statement was made that the impugned order would be challenged in the High court and subsequently that an appeal has been filed. After 19th September, 1989 dates intervened are 28th September, 1989, 26th October, 1989, 17th November, 1989, 4th December, 1989, 21st December, 1989, 29th January, 1990 with the result that the trial Court was finally perforced to make the appointment of the arbitrator on 14th February, 1990. How long the appellants wanted the trial Court to wait In this context it is relevant to note that the application for certified copy of the impugned order was itself filed as late as 9th November, 1989, and despite the appeal was lodged on 15th December, 1989, as mentioned earlier. The same was not prosecuted at all. The learned Judge in the order made on 14th February, 1990, has observed that as represented to him be bona fidely waited affording opportunity after opportunity to the appellants to bring some order from the High Court. It is really beyond comprehension as to how this appeal was just thrown in the registry in December, 1989 and nothing was done until 28th June, 1990. If the department was really interested in not accepting the impugned order nor for that matter the appointment made, all that was expected of the department was to put the appeal in motion and here I may make an observation that at this Bench matters can be got circulated for the next day, and what is more it is needless to mention that in the meantime the appointed arbitrator had even issued notices to the parties. There is another way of looking at the matter from the angle of waiver and acquiescence by the appellants. I have already mentioned as to how Mr. Ujjenkop had directed notices to the parties calling upon them to file their pleadings. Without any protest or prejudice the appellants not only filed counter to

the statement filed by the respondents, but even participated in the preliminary hearing held on 25th June, 1990. Mere pendency of the appeal which was otherwise not prosecuted for over a period of six months, by itself cannot permit the appellants today to contend that they had challenged that impugned order and in such a circumstance the appearance made before the arbitrator cannot be held against the department. I am unable to subscribe to this view as at no stage of the proceedings the department protested. Mr. Usgaonkar therefore, is right in pointing out that when the appellants have participated in the proceeding before the arbitrator without any demur the proceedings should not be allowed to be scuttled at this stage. Here again a reference may be made to the decision in 'Union of India v. M/s. Ajit Mehta & Associates' where right from the beginning the Union of India took the stand before the civil Court, Senior Division, Pune that there is no question of reference of disputes to the arbitrator and what is more they did not participate before the arbitrators at any time. The proceedings were allowed to go ex-parte the Union of India and it is only when the awards were made that they challenged the same. On these facts therefore, it clearly transpires that though on one hand an attempt was sought to be made as if to challenge the impugned order, by merely dumping an appeal in the registry of this Court there is complete waiver and acquiescence on the part of the appellants in the appointment of the arbitrator by the trial Court. On an overall conduct which I have already highlighted, it is just not possible therefore, to allow these proceedings to be scuttled at this state.

18. It is indeed true as Mr. Bharne says that even Mr. Sharesta, the learned arbitrator appointed by the Chief Engineer had issued notices. Factually this position is undeniable but what is important to notice is that no sooner Mr. Shresta issued notices, the respondent took out a motion and put a restraint to the further proceedings. What is worse for the appellants is that when notices were issued by Mr. Ujjenkop without any protest or without prejudice to their case they filed pleadings and thereafter appeared before him, despite this appeal was pending in this Court no attempt whatsoever was made either to take it up or make a motion for appropriate order. It is in this context that a doubt arises whether the lodging of the appeal was just an eyewash to get over the embarrassment at some stage or the other from the criticism that the department never tried to challenge the

impugned order. I, however, leave the matter at this.

19. I have also examined the aspect from another angle. I asked Mr. Bharne learned Counsel appearing for the appellants whether Mr. Ujjenkop has got any bias for the department, or the department has anything against him. It has been fairly conceded before me that there is no such thing. Had it been otherwise, perhaps a different consideration could have crept in. The other aspect of the matter is that the Chief Engineer had made the appointment of Mr. Shrestha who is a retired Chief Engineer of Karnataka State. Mr. Ujjenkop is equally a retired Chief Engineer of the State of Karnataka and even on this score in my view, this appointment can hardly be faulted with for he is equal to the task. In addition, the learned Judge has mentioned in the order dated 14th February, 1990, that out of three persons indicated Mr. Ujjenkop is to be preferred because he has a permanent residence at belgaum, which is close to Goa and the trial Court has even directed the arbitrator to hold his sitting at Panjim. Mr. Shrestha is a resident of Bangalore and as per the notices issued by him he called upon the parties to appear before him at Bangalore, the third being from Bombay.

20. It is indeed contended by Mr. Bharne that if the trial Court had no power to make the appointment the participation under protest or without prejudice had no meaning. This submission will have to be viewed in the context of the background of the case and the power of the court under section 20 of the Arbitration Act. It may be noticed that it is not the case that the court cannot make the appointment at all, but all that is sought to be urged is if and when the Chief Engineer makes the appointment then the Court has no power to make the appointment. The broad question is if the chief Engineer does not make the appointment, it can never be contended that the court has no power to make the appointment of an arbitrator under section 20 of the Act. On the conduct highlighted above, it is as if the appellants accepted the appointment made by the court and submitted to the jurisdiction of the arbitrator and as if the appointment made by the Chief Engineer was given up. It is undeniable that the proceedings commenced by the respondents were under section 20 and not under section 8 as in 'Union of India v. Ajit Mehta & associates' (supra), nor was there any clause requiring the Chief Engineer to appoint an arbitrator from any class or category of arbitrators. In this

view of the matter therefore, in my view, no interference is called for in the impugned order.

21. Before however, I conclude, I may refer to the third contention of Mr. Bharne, that the C.P.W.D. Manual are guidelines and instructions and the Court cannot take cognizance of the same or allow the parties to enforce them against P.W.D. in a Court of law. Prima facie this contention is not without force, but, however, I need not go in that question in the view I have taken in this appeal.

22. Appeal is therefore, dismissed. Parties are however left to bear their own costs.

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