

Ajay Traders Vs. Birla Jute Industries Ltd. and anr.

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Court : Madhya Pradesh

Decided On : Nov-27-2003

Reported in : 2004(1)ARBLR453(MP); 2004(1)MPHT187; 2004(1)MPLJ280

Judge : S.P. Khare, J.

Acts : [Arbitration and Conciliation Act, 1996](#) - Sections 11(6) and 11(8)

Appeal No. : Misc. Civil Case No. 445/98

Appellant : Ajay Traders

Respondent : Birla Jute Industries Ltd. and anr.

Advocate for Def. : Prem Francis, Adv.

Advocate for Pet/Ap. : Manoj Sharma, Adv.

Disposition : M.C.C. allowed

Judgement :

ORDER

S.P. Khare, J.

1. This is an application under Section 11(6) of the [Arbitration and Conciliation Act, 1996](#) (hereinafter to be referred to as 'the Act') for appointment of Arbitrator.

2. It is not in dispute that there was an agreement dated 24-3-1997 between the applicant and non-applicants. A photocopy of that agreement is annexed to the application. Clause (7) of that agreement provides as under:--

'(7) That, in the event of any dispute or difference arising between parties touching or relating either to the said work or to any other matter or thing arising out of this agreement, the same shall be referred to the President of Satna Cement Works, who alone shall determine and decide the matter and his decision in the matter shall be binding and conclusive upon both the parties.'

3. Disputes arose between the parties. The applicant called upon the non-applicants by notice dated 26-3-1998 to refer the dispute to arbitration. A copy of this notice has also been annexed to the application. Para 4 of this notice is as under:--

'4. Ordinarily, therefore, the President, Satna Cement Works has to act as an Arbitrator in such eventuality. However, it may be appreciated that the President had throughout been involved in the matter and has already taken a decision that it is M/s. Ajay Traders who is in breach. The meetings from time to time were arranged with the President, It shall, therefore, not be in fitness of things that the President, Satna Cement Works acts as an Arbitrator. In all fairness a third person wholly independent and not interested in the parties should act as an Arbitrator. It may further be appreciated that it shall be against the spirit of Section 12(2) of [Arbitration and Conciliation Act, 1996](#) if the President were to act as an Arbitrator.'

4. Section 11(8) of the Act is as under:--

'(8) The Chief Justice or the person or institution designated by him, in appointing an Arbitrator, shall have due regard to--

(a) any qualifications required of the Arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial Arbitrator.'

5. It is clear from Section 11(8) of the Act that the designate of the Chief Justice shall have due regard to the considerations 'as are likely to secure the appointment of an independent and impartial Arbitrator'. It means that the Arbitrator named in the agreement should not be a person who is actually biased or there is a reasonable apprehension of bias on his part. In the present case during the execution of the contract Satna Cement Works, who is a contracting party, was represented by its President and there are allegations and counter allegations about the breach of the contract by the other party. The President of Satna Cement Works was himself a party to negotiations which took place during the implementation of the agreement. It is not disputed on behalf of the non-applicants that the President of Satna Cement Works participated in the meetings which were held from time to time regarding the execution of the agreement. According to the applicant, the President was throughout involved in the matter and has already taken a decision in his capacity as the President of Satna Cement Works that the applicant has committed breach of the contract. Therefore, the applicant has reasonable apprehension of bias on the part of the President of Satna Cement Works in acting as an Arbitrator. It is, therefore, prayed on behalf of the applicant that an independent and impartial person be appointed as Arbitrator in this case. On the other hand it is argued that the applicant entered into the agreement with the eyes open that the President of Satna Cement Works is to be appointed as Arbitrator for resolving the dispute and, therefore, the applicant can not be permitted to resile from that agreement.

6. It is the duty of the designate of the Chief Justice as per Section 11(8) of the Act to see that the person who is appointed as Arbitrator is 'independent and impartial' and, therefore, it would not be proper in the present case to appoint the President, Satna Cement Works as an Arbitrator.

7. Recently the Supreme Court in Bihar State Mineral Development Corporation v. Encon Builders (I) (P) Ltd., (2003) 7 SCC 418 : 2003 Arb.W.LJ. 733 (SC), has considered the point which is involved in the present case though that case actually arose under the Arbitration Act, 1940. Paras 17 and 18 of this decision of the Supreme Court are very instructive. These are as under:--

'17. There can not be any doubt whatsoever that an arbitration agreement must contain the broad consensus between the parties that the disputes and differences should be referred to a domestic Tribunal. The said domestic Tribunal must be an impartial one. It is a well settled principle of law that a person can not be a judge of his own cause. It is further well settled that justice should not only be done but manifestly seen to be done.

18. Actual bias would lead to an automatic disqualification where the decision-maker is shown to have an interest in the outcome of the case. Actual bias denotes an Arbitrator who allows a decision to be influenced by partiality or prejudice and thereby deprives the litigant of the fundamental right to a fair trial by an impartial Tribunal.'

8. Again in Para 32 it has been observed :

'It will bear repetition to state that the action of the second appellant itself was in question and, thus, indisputably, he could not have adjudicated thereupon in terms of the principle that nobody can be a judge of his own cause.'

9. The principle of law laid down in the decision of the Supreme Court referred above is fully applicable to the present case for interpreting the words 'independent and impartial Arbitrator' used in Section 11(8)(b) of the Act.

10. The application is allowed. Hon'ble Shri Justice B.C. Verma, a retired Chief Justice of Punjab and Haryana High Court and who was a Judge of this Court also and who is residing at Jabalpur (M.P.) is appointed as Arbitrator in this case. A copy of this order and a letter of request be sent to him by the Additional Registrar (Judicial).