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Court : Delhi

Decided On : Nov-23-1981

Reported in : ILR1982Delhi269

Judge : A.B. Rohatgi, J.

Acts : [Arbitration Act, 1940](#) - Sections 5

Appeal No. : Leave Application No. 3185 of 1981 and Suit No. 174A of 1980

Appellant : Anand Builoers and Anr.

Respondent : Driplex Water Engineerin'g (P) Ltd.

Advocate for Pet/Ap. : N.S. Sistani and; R.P. Kapur, Advs

Judgement :

Avadh Behari Rohatgi, J.

(1) This is an application under sections 5 and li of the [Arbitration Act, 1940](#) (the Act) for the removal of the sole arbitrator Shri S. N. Mukherjee.

(2) On an application under section 20 of the Act filed by the contractor Mjs. Anand Builders I appointed on 6th April. 1981 Mr.S. N. Mukherjee as the sole arbitrator. Mr. Mukherjee is an advocate. He appears before the arbitrators in disputes arising out of building contracts. Both the employer Mrs. Driplex Water

Engineering (P) Ltd. and the contractor Anand Builders agreed on the name of Mr. Mukherjee. I, therefore, appointed him.

(3) On 15th April, 1981 my order was communicated to Mr. Mukherjee. On 30th August, 1981 he wrote to the parties. In that letter he said that he had received on that very day a letter dated 21st April, 1981 from the contractor through his advocate, Mr. N. S. Sistani, asking him to enter upon the reference. On 24th September, 1981 the present application was filed by the employer, M/s. Driplex Water Engineering (P.) Limited', for the removal of the arbitrator.

(4) There are disputes between the contractor and the employer. Construction work was awarded to the contractor by the employer. Disputes arose between the parties. Those disputes were referred to the sole arbitration of Mr. S. N. Mukherjee by agreement of the parties. Now the employer seeks removal, of the arbitrator. Mr. Kapur has urged three grounds in support of the application. In the first place he says that the arbitration clause provides for a reference to two arbitrators, one to be nominated by such party. But with a desire to settle the disputes expeditiously he agreed to the appointment of Mr. S. N. Mukherjee. Mr. Mukherjee was appointed by agreement of the parties as the Sole arbitrator. therefore the employer Willingly gave up his right to the appointment of an arbitrator by him in terms of the clause. That the clause entitles each party to nominate his arbitrator is of no avail in view of the agreement that was reached before me on the sole arbitrator, Mr. S. N. Mukherjee, Advocate.

(5) Secondly counsel raised & more serious objection. He said that after the appointment of Mr. Mukherjee by this court on 6th April, 1981 the employer has come to know that Mr. Mukherjee has accepted an engagement in another case of the contractor. He argued that once Mr. Mukherjee has accepted. the office of an arbitrator he should not have agreed to appear on behalf of the contractor in an arbitration case, even though it is a different case. This acceptance of engagement, counsel says, has shaken his confidence in the arbitrator and this, according to him, is the chief ground for his removal. I do not agree with this broad submission.

(6) In Paragraph li of the application the employer said that he 'has been informed that the said Shri S. N. Mukherjee, Advocate Is now acting as alegal consultant to the plaintiff in a dispute between the plaintiff and one M/s. Kothari & Associates, Architects'. This fact was not known to the petitioner at the time Shri Mukherjee was appointed as sole arbitrator.' This is the chief complaint. In his reply, the contractor has said :

'SHRIS. N. Mukherjee has been looking after the affairs and has been advising both the parties at one occasion or the other and this fact was in the complete knowledge of both the parties at the time when his name was proposed. Shri S. N. Mukherjee had been consulted by both the parties in some of their other cases and on account of that reas'on both the parties had the confidence that he would discharge his duties impartially and judiciously and keeping that fact in view, the parties agreed in proposing his name as a sole arbitrator.' In the rejoinder this is' the reply of the employer to the allegation of the contractor : 'The applicant submits that Shri S. N. Mukherjee can be enquired as to whether he has acted as counsel for the plaintiff before Shri J. R. Bhalla, Arbitrator, in the dispute between the plaintiffs and M/s. Kothari and Associates' or not. The rest of the contents of the para 11 are Wrong and are denied.'

(7) In my opinion the .denial of the employer is Vague and evasive. There is a positive allegation by the contractor that Mr.S. N. Mukherjee was 'being consulted by both parties in one case or the other, on one occasion or the other and on account of that fact both parties knew him arid had confidence in him. It appears to me that the employer is not prepared to affirm, that they did not know Mr. Mukherjee when they agreed to his appointment. It is Mr. Mukherjee's professional duty to appear for one party or the other in cases arising out of building contracts. In fulfilling hig professional responsibilities, a lawyer assumes various roles that require the performance of many difficult tasks. But fundamental ethical principles are always present to guide him. . He has always to observe the highest professional standards. I do not think Mr. Mukherjee was disqualified from taking cases either of the contractor or the employer.

(8) Thirdly, Mr. Kapur says that though the letter of Mr. N. S. Sistani which was sent to the arbitrator on behalf of the contractor is dated 21st April, 1981 it is surprising that it reached the arbitrator after more than 4 months. For this' he relies on arbitrator's letter dated 30th August, 1981 where the arbitrator says that he received the letter dated 21st April, 1981 on 30th August, 1981. He suggests that this is a disingenuous attempt to extend the time and to prolong the arbitration. In my opinion this is not a ground to remove the arbitrator. It is sufficiently explained by the contractor that on account of his preoccupation with other work outside Delhi it was' not possible for him to take the letter of Shri N. S. Sistani earlier than 30th August, 1981 to the arbitrator. I have no reason to doubt the arbitrator when he says that he received Mr. Sistani's letter on 30th August, 1981. The fact that the contractor's letter is dated 21st April, 1981 and the arbitrator received it, on 30th August, 1981 is not a. ground for the arbitrator's removal.

(9) Before the court exercise its discretion to give leave to revoke an arbitrator's authority, it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. In considering the exercise by the court of the power of revocation it must not be forgotten that arbitration is a particular, method for the settlement of disputes. Parties not wishing the law's delays know, or ought to know. that in referring a dispute to arbitration they take arbitrator for better or worse, and that his' decision is final both as to fact and law. In many cases the parties prefer arbitration for these reasons. In exercising its discretion cautiously and sparingly, the court has no doubt these circumstances in view, and considers that the parties should not be relieved from a tribunal they have chosen because they fear that the arbitrator's decision may go against them. (M/s. Amarchand Lalitkumar v. Shree Ambica Jute Mills. Ltd., : [1963]2SCR953

(10) In my opinion there is' No professional misconduct in appearing for a party in a different case, if the arbitrator is an advocate and it is known to both parties that he appears for clients in arbitration cases. Nor is the arbitrator in my opinion disqualified from accepting a brief of the contractor. He is not disqualified to accept an employment from a client merely because the parties have agreed to appoint him as arbitrator.

(11) To disqualify an arbitrator so appointed, it is not sufficient to show that he might be suspected of partiality. If the parties to a dispute with full knowledge of the facts, select an arbitrator who has to perform other duties also, the court will not in general release them from the bargain upon which they have agreed. Every person must use his own discretion in the choice of his judges; and being at liberty to choose whom he likes best, cannot afterwards object the want of honesty or understanding to them, or that they have not done him justice. (Russell on Arbitration ((19th ed. p. 153, 154). On the facts of this case I have come to the conclusion that Mr. Mukherjee has not rendered himself incapable of fairly and honestly giving a decision. Russell at p. 154 says :

'EVENso, it may be presumed that the court will not lightly interfere with an appointment deliberately agreed upon by, the parties. Thus the provision common in building, contracts, by which certain possible disputes between building contractor and building owner are determined by the architect or engineer, will still be enforceable.'

(12) The Supreme Court has warned that discretion in such cases has to be exercised 'cautiously- and sparingly'. I am satisfied that the employer was aware or ought to have been aware of the terms of the bargain he has entered into. The employer's apprehension that justice will not be done to him is unfounded. Mr. Mukherjee, I have no doubt, will act as an impartial arbitrator. He will not act as an advocate for one party in the case before him. He is not unfitted to decide the dispute with complete honesty, impartiality and disinterest. He cannot be suspected of partiality simply because; he has appeared for one of the parties in another case. If there are any fears in the employer's mind those fears are liars. For these reasons the application 'is dismissed with costs. Counsel's fee Rs. 2001.