

Trishul Construction Co. Vs. Delhi Development Authority

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Court : Delhi

Decided On : Sep-08-1994

Reported in : 1994(2)ARBLR303(Delhi); 1994(31)DRJ37

Judge : R.C. Lahoti, J.

Acts : [Arbitration Act, 1940](#) - Sections 11

Appeal No. : Original Miscellaneous Petition No. 52 of 1994

Appellant : Trishul Construction Co.

Respondent : Delhi Development Authority

Advocate for Pet/Ap. : V.P. Singh,; Anju Bhattacharya and; M.S.M. Chopra, Advs

Judgement :

R.C. Lahoti, J.

(1) By this petition under Sections 8,11 and 12 of the [Arbitration Act, 1940](#) the plaintiff a contractor seeks removal of defendant No.3 as an arbitrator and further seeks a substituted appointment in his place by the Court.

(2) The petitioner entered into a contract with the Dda defendant No.1 for carrying out the work of construction of 312 DUs comprising of 156 category lii, 156 category li flats and 234 scooter garages at Vikas Kunj Sector B, pocket 9, etc.

Formal contract was entered into between the parties on 19.12.1984. The work could be commenced in March, 1986 and was ultimately completed on 19.10.89. Final bill was paid to the plaintiff on 20.12.91. Certain disputes arose out of the bill. In accordance with clause 25 of the contract which incorporates an Arbitration clause the plaintiff sought for appointment of an arbitrator and reference of disputes to adjudication by the arbitrator. The Engineer Member of the Dda who is authorised by the arbitration clause to name an Arbitrator, appointed S.C. Kaushal Superintendent Engineer (Arbn) as the Arbitrator.

(3) The Arbitrator entered upon the reference. He called upon the parties to file a statement of facts, points of disputes and replies. The plaintiff raised objections to the validity/propriety of appointment of Shri S.C. Kaushal as an arbitrator. He did not file his statement of facts. By communication dated 20.1.1993 the plaintiff sent a detailed letter setting out his reasons why Shri S.C. Kaushal should not act as an Arbitrator. Inasmuch as the Engineer Member defendant No.2 did not yield to the plaintiff's demand, the plaintiff has filed the present petition.

(4) It is alleged by the plaintiff that Shri S.C. Kaushal was acting as an Executive Engineer involved in negotiations and acceptance of the tender. The final bill against which the present dispute has arisen was also finalised by Shri S.C. Kaushal as Superintendent Engineer of the circle. The claims of the petitioner which were rejected were scrutinised by Shri S.C. Kaushal. It is submitted that it will not be in the interest of justice and fair play if Shri Kaushal is permitted to arbitrate over the disputes raised by the plaintiff.

(5) In the counter affidavit of Shri A. bids was Chief Engineer on behalf of the Dda, all the material averments and allegations made by the plaintiff have been denied. Though it is admitted that Shri S.C. Kaushal was the Executive Engineer, when the tenders were called, it is denied that the tender was negotiated or accepted by Shri Kaushal because the tender was accepted and awarded by Shri G.D. Nakkar, Executive Engineer. Again, though it is admitted that the work was executed for sometime under the control of Shri Kaushal but it is stated that he was promoted as Superintendent Engineer and as per record it is not correct that later on Shri Kaushal remained involved in the finalisation of the work or issuing any directions

to the plaintiff or finalising the final bill. It is also denied that the plaintiff's claims were declined under the directions of Shri Kaushal. Final bill was finalised 'by the concerned Executive Engineer at the relevant time and not by Shri Kaushal who had been promoted as Superintendent Engineer by that time. Ultimately it is submitted that in view of the very limited role of Shri Kaushal, there was no need of changing the Arbitrator.

(6) Clause 25 of the contract authorising the Engineer Member to appoint the Arbitrator goes on to state inter alias :-

'IT will be no objection to any appointment that the arbitrator so appointed is the Dda employee, that he had to deal with the matters to which the contract relates and that in the course of his duties, as Dda authority employee he had expressed views on all or any of the matters in dispute or difference.'

(7) The question for determination is whether Shri S.C. Kaushal is disqualified from acting as an Arbitrator and deserves to be removed because of his being an employee of the Dda and/or having been associated to some extent with the execution of the contract by the plaintiff. The Counsel for the plaintiff has placed strong reliance on the decision of the Supreme Court in *Nandayal Cooperative Spinning Mills v. K.V. Mohanrao*, 1993 (2) Arb LR 359 and a Single Bench decision of Ap High Court in *V. Raghunath Rao vs State of Andhra Pradesh* 1988 ALT 461. The two decisions will be referred to a little later.

(8) Section 11 sub section (1) and (2) of the Arbitration Act provide as under: -

'11. Power to court to remove arbitrator or umpire in certain circumstances- (1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award. (2) The court may remove an arbitrator or umpire who has misconducted himself or the proceedings. (3) (4) Statutorily the law of arbitration contemplates the Court removing an Arbitrator in the following situations: (i) failure on the part of the Arbitrator or umpire to use all reasonable dispatch in entering on and proceeding with the reference and making an award. (ii) An Arbitrator or umpire misconducting himself (iii) An Arbitrator or

umpire misconducting the proceedings.

(9) Undisputedly on the averments made in the petition the case of the plaintiff does not fall in any of the situations above said. Still there is ample authority for the proposition that the court exercising its inherent powers guided by the paramount consideration of deling justice may remove an Arbitrator if a case of bias displayed or likely to be displayed is made out with certainty. Let the position of law be now examined.

(10) I straightaway proceed to read with advantage the law laid down by their Lordships of the Supreme Court in Secretary To Govt Transport Madras v. Maniswamy Mudalliar And Anr 1988 Scc 651. The arbitration clause provided for arbitration by the Superintendent Engineer who was subordinate to the Chief Engineer of the department, a party to the contract. The plaintiff apprehended bias on the part of the Superintendent Engineer if entrusted with the work of arbitration. Their Lordships held:-

'REASONABLE apprehension of bias in the mind of a reasonable man can be a ground for removal of the Arbitrator. But a named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the Court under Section 5 of the Act, unless there is allegation against the named arbitrator either against his honesty or capacity or mala fide or interested in the subject matter or reasonable apprehension of the bias'.

'Apredis position to decide for or against one party, without proper regard to the true merits of the dispute is bias. I here must be reasonable apprehension of that pre- disposition based on cogent material. The test for bias is whether a reasonable intelligent man, fully apprised of all the circumstances would feel a serious apprehension of bias. Vague suspicions of whimsical capricious and unreasonable people should not be made the standard to regulate normal human conduct'. 'An apprehension, simplicities in the mind of the contractor without any tangible ground would not be a justification for removal. There was thus no ground for removal of the arbitrator. Mere imagination of a ground cannot be an excuse for apprehending bias in the mind of the chosen arbitrator'.

(11) In the above noted case their Lordships have relied on their own earlier decision in *International Authority Of India v. K.d. Bali* : [1988]3SCR370 . wherein the law was laid down in the following terms:

'IT is well settled that there must be purity in the administration of justice as well as in administration of quasi-justice as are involved in the adjudicatory process before the Arbitrators. It is well said that once the Arbitrator enters in an arbitration the Arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result, of the proceeding, but of what effect it might possibly have produced. It is not enough to show that even if there was misconduct on his part, the award was unaffected by it, and was in reality just, arbitrator must not do anything which is not in itself fair and impartial. The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party But it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased The apprehension must be judged from a healthy, reasonable and average point of view and not on mere apprehension of any whimsical person.'

(12) In the *Registrar Coop So cities Vs Dharam Chand And Ors.* : [1962]2SCR433 , the reference to adjudication by arbitration involved fixing of liability of defalcation in a cooperative bank against the members of the managing committee. The dispute was referred to the Registrar of Coop society who had given a notice for removal of the managing committee. Bias having been alleged against the Registrar their lordships held :

'THE fact that the Registrar gave notice for the purpose of the removal of the managing committee was not reason to hold that he would be biased in the investigation of individual responsibility of various members of the managing committee in this matter. There could not be any official bias in the Registrar on this ground in connection with the present dispute and such bias did not disentitle him to act as a Judge or arbitrator under R.18'. '...even though the Registrar was the administrative head of the Department, there was nothing inherent in the

situation which showed any official bias whatsoever in him so far as adjudication of this dispute was concerned as there was no reason to support that if any of his subordinates or the auditors appointed by him were in any way found to be connected with the fraud he would not put the responsibility where it should lie. thereforee there was nothing inherent in the situation which made the Registrar a biased person who could not act as judge or an arbitrator in the case.'

So was the view taken by their Lordships in *lives & Barker V. Willans* (1894) 1 Ch.D. 478 and *Jackson V. Berry Rly Co* (1893) 1 Ch. D. 238. It was held:

'It was essential feature in the contract between the plaintiff and the railway company that a dispute such as that which has arisen between the plaintiff and the company's engineer should be finally decided not by a stranger or a wholly unbiased person but by the company's engineer himself. Technically, the controversy is one between the plaintiff and the railway company; but, virtually, the engineer, on such an occasion, must be the judge, so to speak, in his own quarrel. Employers find it necessary in their own interests, it seems to impose such terms on the contractors whose tenders they accept and the contractors are willing in order that their tenders should be accepted to be bound by such terms. It is no part of our duty to approach such curiously coloured contracts with a desire to upset them or to emancipate the contractor from the burden of a stipulation which however onerous, it was worth his while to agree to bear.

(13) A few out of many decisions from other High Courts may be noticed.

(14) A decision of Patna High Court is a recent one. In *M/f. Ruby; Construction Vs State Of Bihar And Ors*, : AIR1993 Pat14 it has been held:

'...THAT in all arbitration cases where one of the parties is the State or its agency, the arbitrator should always be an independent person, would be contrary to the basic concept of arbitration under the Act. There is nothing in law to prevent a party from agreeing to arbitration by the other party to the contract or by its nominee.'

(15) The High Court of Orissa in *Srustidhar Mohanti vs. Steel Authority of India Ltd.*, : AIR1989 Ori251 has held that merely because an officer of the Corporate body, one party to the arbitration, was acting as an Arbitrator, allegation of bias could not be sustained. No presumption could be drawn that he would be unfair.

(16) So is the view taken by a Division Bench of the High Court of Madhya Pradesh in *Shiv Lal Prasad V. Union of India* : AIR 1975 MP40 . It was held that a railway officer acting as an arbitrator in a matter to which railway was a party, could not be said to have unduly favored the railway department simply because of his being a railway employee in the absence of anything to show that the officers were favorably inclined towards the department or prejudicially disposed towards the contractor.

(17) Russell states in *Law of Arbitration (1952 Edn at p.144)* :- It the parties to a dispute, with full knowledge of the facts, select an arbitrator who is not an impartial person, or who has to perform other duties which will not permit of his being an impartial person, the court will not in general release them from the bargain upon which they have agreed; and if a party to a contract submit to the jurisdiction of a tribunal which has an interest of its own in the decision, the Court will not in general on that account release him from the bargain (however improvident it may be) so long as the court is satisfied that he is aware or ought to have been aware of the terms of the bargain he has entered into. To disqualify an arbitrator so appointed, it is insufficient to show that he might be suspected of partiality: it must be shown, if not that he actually is biased, at least that there is a strong probability that he will be biased, and to such an extent as to be incapable of fairly and honestly giving a decision.'

(18) It is, therefore, clear from the law laid down in the above noted cases and several others that a mere apprehension of bias would not confer the court with jurisdiction to remove an Arbitrator. Arbitration is a voluntarily chosen forum by the parties for adjudication of their disputes. Having entered into a contract for the benefit of securing a work, a contractor must be held bound by the arbitration clause subscribed to by him. He must be attributed with the knowledge that having conferred the authority to nominate an arbitrator on the Engineer Member of the Dda, the authority could very well nominate an employee of the Dda as an

arbitrator and the officer or employee nominated as an arbitrator would not be disqualified from acting as such merely on account of his having been associated with the contract work or even on account of his having expressed his view on all or any matters under reference.

(19) In the case at hand the plaintiff has not brought any material on record enabling forming of a positive opinion as to the truth of the several averments made by him most of which, and the material ones certainly, have all been denied in the affidavit filed by the Chief Engineer..

(20) V. Raghunath Rao's case (supra), a single bench decision of Ap High Court relied on by the counsel for the plaintiff goes on to the extent of holding that the State was not free to impose such arbitrary or unjust clauses in a public contract and if imposed they must be held to be arbitrary, unfair and offending Art 21 of the Constitution and hence invalid. With respect to the High Court of Andhra Pradesh it is difficult to subscribe to the view so held in view of the weight of authorities to the contrary.

(21) The Supreme Court decision in Nandayal Coop case (supra) is a case peculiar on its own facts. The courts below had recorded a concurrent finding that the Arbitrator had bias against the defendant as he had acted on earlier occasions as an Arbitrator of the appellant. Their Lordships did not agree with the contention of the appellant that bias could always be waived. However, there is no such generalised proposition of law laid down by their lordships which may embolden the contention of the plaintiff in the present case.

(22) For the foregoing reasons the petition is held liable to be dismissed and is dismissed accordingly.