

Secretary To The Government, Transport ... vs Munuswamy Mudaliar & Ors on 29 August, 1988

Equivalent citations: 1988 AIR 2232, 1988 SCR SUPL. (2) 673, AIR 1988 SUPREME COURT 2232, 1988 SCC (SUPP) 651, (1988) 4 JT 730 (SC), (1989) 1 KER LT 18

Author: Sabyasachi Mukharji

Bench: Sabyasachi Mukharji

PETITIONER:

SECRETARY TO THE GOVERNMENT, TRANSPORT DEPTT. MADRAS

Vs.

RESPONDENT:

MUNUSWAMY MUDALIAR & ORS.

DATE OF JUDGMENT 29/08/1988

BENCH:

MUKHARJI, SABYASACHI (J)

BENCH:

MUKHARJI, SABYASACHI (J)

RANGNATHAN, S.

CITATION:

1988 AIR 2232 1988 SCR Supl. (2) 673

1988 SCC Supl. 651 JT 1988 (4) 730

1988 SCALE (2) 1070

ACT:

Arbitration Act, 1940 : S. 5-Chosen Arbitrator-Removal of-Apprehension of bias-To be based on cogent materials.

HEADNOTE:

The dispute as to the refund of earnest money deposit to the respondent-contractor was referred to an arbitrator named in the arbitration clause of the agreement. The respondent filed claim before him. During the pendency of the claim before the said arbitrator, there was succession to that office by another incumbent. The succeeding Officer wanted to continue the arbitration proceedings but before that the respondent made an application under s. 5 of the Arbitration Act for removal of the arbitrator on the ground

that he being an employee of the State the petitioner apprehended bias. The Judge, City Civil Court found that the Chief Engineer of the Circle concerned was in favour of the cancellation of the contract in question and when it came to be terminated the construction was sought to be entrusted at the risk and cost of the petitioner on the advice or the proposal of the Chief Engineer. Being of the view that the arbitrator, the Superintending Engineer, being subordinate to the said Chief Engineer, would necessarily have a leaning to accept the attitude expressed by latter, he concluded that there could legitimately be a bias in the mind of the arbitrator. The High Court dismissed the appeal in limine.

Allowing the appeal by special leave,

HELD: A named and agreed arbitrator cannot and should not be removed in exercise of a discretion vested in the court under s. 5 of the Act unless there is allegation either against his honesty or capacity or mala fide or interest in the subject matter or reasonable apprehensions of the bias. [677E-F]

A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition based on cogent materials. Mere imagination

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of a ground cannot be an excuse for apprehending bias. [677F-G; 678C]

International Authority India v.K.D. Bali & Anr.,J.T. 1988 2 S.C.1. and Commercial Arbitration, by Mustill & Boyd., [1982] Edn. p.214, Hulsbury's Laws of England, 4th Edn. Vol. 2, para 551, p. 282 referred to.

In the instant case, when the parties entered into the contract they knew the terms of the contract including arbitration clause providing that the Superintending Engineer of a particular Circle shall be the arbitrator. They also knew the scheme and the fact that the said Superintending Engineer was subordinate to the Chief Engineer of the Circle. In spite of that the parties agreed and entered into arbitration and indeed submitted to the jurisdiction of the arbitrator at that time to begin with, who however, could not complete the arbitration because he was transferred and succeeded by a successor. In these circumstances no bias could reasonably be apprehended and made a ground for removal of a named contractor. In numerous contracts with the Government, clauses requiring the Superintending Engineer or some official of the Government to be the arbitrator are there. It cannot be said that the Superintending Engineer as such cannot be entrusted with the work or arbitration and that apprehension simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal. [677C-F]

The case is remanded back to the Judge, City Civil Court, Madras to appoint the Superintending Engineer, Trichy

to be the arbitrator in accordance with the arbitration agreement. [678C-D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3251 of 1988.

From the Judgment" and Order dated 21.9.1984 of the Madras High Court in C.R.P. No.3482 of 1984. A.V.Rangam for the Appellant P. Krishna Rao and K.R.Nagaraja for the Respondents. The Judgment of the Court was delivered by SBYASACHI MUKHARJI, J. Leave granted and the appeal is disposed of by the following judgment.

PG NO 675 This appeal arises out of an order of the High Court of Madras, dated 21st September, 1984. The appellant is the Secretary to the Government, Transport Deptt. , Madras, and the respondent No. 1 is the managing partner of M/s. National Company, which was the successful tenderer of the work of construction of a bridge across the river Coovum at Koyambedu within the corporation limit of the city of Madras and accordingly the necessary contract was executed between the respondent No. 2-the Superintending Engineer (Highways) World Bank Project Circle, Madras, and the said Company on 28th April, 1979.

According to the conditions of the contract between the parties, the work should have been completed on or before 5th November, 1980. The said National Company, however, according to the appellant, did not even commence the work till 21.9.1981. and despite extension of time until 31.10.1981 the said firm failed and neglected even to commence the job. Consequently, the contract in favour of the said firm was determined absolutely at their risk and cost, according to the appellant. The respondent herein, in his individual capacity as managing partner of the said Company filed a suit in the City Civil Court, Madras, being O.S. No. 3996/82 claiming damages alleged to have been caused as a result of the said determination of the said contract and for refund of earnest money deposit etc. In view of the Arbitration Clause under the agreement between the parties, the appellant filed a petition for referring the dispute to the arbitrator for further proceedings and the City Civil Court? Madras, accepting the appellant's prayer, passed orders directing both the parties to refer the disputes to the arbitrator, and stayed the suit. As per the order of the City Civil Court, Madras, the respondent filed claim petition before the arbitrator, namely, Superintending Engineer (Highways & Rural Works) Rural Roads Circle, Tiruchirapalli, being the second respondent herein.

During the pendency of the claim before the said arbitrator, the respondent filed another application seeking to change the arbitrator on the ground that the arbitrator being an employee of the State Government, an Engineer from any sector other than the sector of Tamil Nadu or a retired Engineer of the State Government might be appointed arbitrator.

The contract between the parties, inter alia, contained the following Arbitration Clause:

PG NO 676 "(3) The arbitrator for fulfilling the duties set forth in the arbitration clause of the Standard Preliminary Specification shall be Superintending Engineer (H) Rural Roads Tiruchira Palli Circle."

Pursuant to this the Superintending Engineer of that Circle, at the relevant time, was previously appointed as arbitrator. There was succession to that office by 'another incumbent and the succeeding Superintending Engineer wanted to continue the arbitration proceedings but before that an application was made under Section 5 of the Arbitration Act, 1940 (hereinafter called 'the Act') for removal of the arbitrator, before the learned Judge of the City Civil Court, Madras.

The learned Judge by his order sought to revoke the authority of the named arbitrator. The learned Judge in his order dated 6th March, 1984, inter alia, observed as follows:

"The apprehension of bias on the part of the Arbitrator is made to rest on the ground that the first respondent in the counter filed before the Arbitrator to the claim made by the petitioner referred to G.O. Ms. 409/Transport Dated 7.4.83 which in turn made a reference to a letter No.114879/D2/81. Dated 30. 10.82 of the Chief Engineer, H & RW."

In the order of the learned Judge, City Civil Court, he stated that the Chief Engineer of the Circle concerned was in favour of the cancellation of the contract in question and the contract entrusted to the petitioner came to be terminated and the construction was sought to be entrusted at the risk and cost of the petitioner on the advice or the proposal of the Chief Engineer. The Superintending Engineer is sub-ordinate to the Chief Engineer, therefore, the learned Judge, City Civil Court was of the view, as he says in the judgment, "It is not unreasonable to say that the successive Superintending Engineer of this particular department who will be subordinate to the Chief Engineer will necessarily have a leaning to accept the attitude expressed by the Chief Engineer." The learned Judge came to the conclusion that there could legitimately be a bias in the mind of the arbitrator who was the Superintending Engineer against the appellant. The High Court also did not examine this aspect and dismissed the appeal in limine. Hence, this appeal.

Apprehension of bias in the mind of the arbitrator is a good ground for removal of the arbitrator under section 5 of PG NO 677 the Act. The learned Judge, City Civil Court, had directed the parties to submit a list of three engineers willing to be appointed as arbitrator and if the parties express consensus one of the three from the list of the petitioner or from the list of the respondent would be chosen and appointed as arbitrator and in case there is no consensus between the parties then from among six engineers to be mentioned by both the parties three each in a separate list one of them will be selected by draw of lots and appointed as arbitrator. The parties were directed to submit a list of three engineers of their choice who would be willing to be appointed as arbitrator in the matter within a stipulated period.

This is a case of removal of a named arbitrator under Section 5 of the Act which gives jurisdiction to the Court to revoke the authority of the arbitrator. When the parties entered into the contract, the parties knew the terms of the contract including arbitration clause. The parties knew the scheme

and the fact that the Chief Engineer is superior and the Superintending Engineer is subordinate to the Chief Engineer of the particular Circle. In spite of that the parties agreed and entered into arbitration and indeed submitted to the jurisdiction of the Superintending Engineer at that time to begin with, who, however, could not complete the arbitration because he was transferred and succeeded by a successor. In those circumstances on the facts stated no bias can reasonably be apprehended and made a ground for removal of a named arbitrator. In our opinion this cannot be, at all, a good or valid legal ground. Unless there is allegation against the named arbitrator either against his honesty or capacity or mala fide or interest in the subject matter or reasonable apprehension of the bias, 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.

Reasonable apprehension of bias in the mind of a reasonable man can be a ground for removal of the arbitrator. A predisposition to decide for or against one party, without proper regard to the true merits of the dispute is bias. There must be reasonable apprehension of that predisposition. The reasonable apprehension must be based on cogent materials. See the observations of Mustill and Boyd, *Commercial Arbitration*, 1982 Edition, page 214. Halsbury's *Laws of England*, Fourth Edition, Volume 2, para 551, page 282 describe that the test for bias is whether a reasonable intelligent man, fully appraised of all the circumstances, would feel a serious apprehension of bias. This Court in *International Authority of India v. K.D. Bali and Anr.*, J.T. 1998 2 S.C. 1 held that there must be PG NO 678 reasonable evidence to satisfy that there was a real likelihood of bias. Vague suspicions of whimsical, capricious and unreasonable people should not be made the standard to regulate normal human conduct. In this country in numerous contracts with the Government, clauses requiring the Superintending Engineer or some official of the Govt. to be the arbitrator are there. It cannot be said that the Superintending Engineer, as such cannot be entrusted with the work of arbitration and that an apprehension, simpliciter in the mind of the contractor without any tangible ground, would be a justification for removal. No other ground for the alleged apprehension was indicated in the pleadings before the learned Judge or the decision of the learned Judge. There was, in our opinion, 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.

In that view of the matter, the order made by the learned Judge, City Civil Court, and the decision of the High Court cannot be sustained and they are set aside. The appeal is allowed. We remand the case back to the learned Judge, City Civil Court, to ask the Government to appoint the Superintending Engineer, Trichy, to be an arbitrator in accordance with the arbitration agreement. The arbitrator will proceed according to the evidence of the parties and after considering all the relevant facts according to the agreement and make an award in accordance with law. There will be no order as to costs.

P.S.S.

Appeal allowed.