

A M/S LAXMI CONTINENTAL CONSTRUCTION CO.

v.

STATE OF U.P. & ANR.

(Civil Appeal No. 6797 of 2008)

B SEPTEMBER 20, 2021

[M. R. SHAH AND A. S. BOPANNA, JJ.]

- Arbitration – Agreement between appellant and respondent-
State – Appointment of an officer of the State department, as
C arbitrator in terms of arbitration clause in the agreement – Whether
his mandate to continue the arbitration proceedings came to an
end on his retirement – Whether continuance of arbitration
proceedings by him after retirement can be said to be a misconduct
– Held: Considering the arbitration clause in the agreement, once
a departmental officer was appointed as an arbitrator, he
D continued to be the sole arbitrator till the arbitration proceedings
were concluded unless he incurred disqualification under
provisions of the Arbitration Act, 1940; and it cannot be said that
his mandate to continue with the arbitration proceedings came to
an end on his retirement – The Civil Judge, in an arbitration suit
E filed by appellant u/s.28 of the Arbitration Act, had extended the
time to the arbitrator to complete the arbitration proceedings and
granted further period of 30 days which was after his retirement
and after specifically overruling/rejecting the objections raised by
respondents that after retirement, he cannot continue with the
arbitration proceedings – Once the Arbitrator continued with the
F arbitration proceedings and passed award (in favour of appellant-
claimant) within the extended period of time, it cannot be said that
he misconducted himself by continuing with the arbitration
proceedings – Arbitration Act, 1940 – ss.28 and 30/33.*

Allowing the appeal, the Court

- G HELD: 1.1. In the present case, the agreement contains
an arbitration Clause as per Clause 52 of the agreement. In view
of the same, the only qualification for appointment as an
arbitrator is that he should be the officer of the rank of the
Superintending Engineer or higher. Once such an officer is
H appointed as an Arbitrator, he continues to be the Sole Arbitrator

till the arbitration proceedings are concluded unless he incurs the disqualification under the provisions of the Indian Arbitration Act, 1940. Even after his retirement, the arbitration proceedings have to be continued by the same Arbitrator. Clause 52 of the agreement does not provide at all that on the retirement of such an officer, who is appointed as a Sole Arbitrator, he shall not continue as a Sole Arbitrator and/or the mandate to continue with the arbitration proceedings will come to an end. [Para 11][215-H; 216-D-F]

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1.2. The Sole Arbitrator, who at the relevant time was the Chief Engineer and was qualified to become the Sole Arbitrator was even nominated and/or appointed by the Chief Engineer as per clause 52. Therefore, considering the Clause 52 of the agreement, it cannot be said that his mandate to continue with the arbitration proceedings would come to an end on his retirement. [Para 13][217-B-C]

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2. Even the observations made by the High Court in the impugned judgment and order that the Sole Arbitrator misconducted himself by continuing with the arbitration proceedings after his retirement is also not tenable at law. In the present case, the Civil Judge (Senior Division), Roorkee extended the time to the Sole Arbitrator to complete the arbitration proceedings and granted further period of 30 days which was after his retirement and after specifically overruling/rejecting the objections raised by the respondents that after retirement, he cannot continue with the arbitration proceedings. Therefore, once the Sole Arbitrator continued with the arbitration proceedings and passed the award within the extended period of time, it cannot be said that he has misconducted himself as he continued with the arbitration proceedings. [Para 16][217-H; 218-A-C]

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3. The impugned judgment passed by the High Court quashing and setting aside the award (passed by the Sole Arbitrator) as well as the order passed by the Civil Judge making the award, Rule of the Court deserves to be quashed and set aside. [Para 17][218-C-D]

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*Himalayan Construction Co. v. Executive Engineer,
Irrigation Division, J&K and Anr., (2001) 9 SCC 359
– relied on.*

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A *Prasun Roy v. Calcutta Metropolitan Development Authority and Anr.*, (1987) 4 SCC 217 : [1987] 3 SCR 569 ; *N. Chellappan v. Secretary, Kerala State Electricity Board and Anr.*, (1975) 1 SCC 289 : [1975] 2 SCR 811 – referred to.

B	<u>Case Law Reference</u>	
	(2001) 9 SCC 359	relied on
	[1987] 3 SCR 569	referred to
	[1975] 2 SCR 811	referred to

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6797 of 2008.

From the Judgment and Order dated 19.06.2007 of the High Court of Uttarakhand at Nainital in A.O. No. 1489 of 2001.

D Mukesh Kumar Sharma, Chatanya Siddhanta, Advs. for the Appellants.

Ravindra Raizada, Sr. Adv., Rajeev Kumar Dubey, Ashwan Mishra, Anurag Tiwari, Ms. Vaidhruti Mishra, Kamlendra Mishra, Advs. for the Respondents.

E The Judgment of the Court was delivered by

M. R. SHAH, J.

1. Being aggrieved and dissatisfied with the impugned judgment and order dated 19.06.2007 passed by the High Court of Uttarakhand at Nainital passed in A.O. No. 1489 of 2001 by which the High Court

F has allowed the said appeal and has set aside the award dated 08.01.1998 made by the learned Arbitrator and the order dated 20.04.2001 passed by the learned Civil Judge (Senior Division), Roorkee making the said award Rule of the Court, original claimant, M/s. Laxmi Continental Construction has preferred the present appeal.

G 2. The facts leading to the present appeal in nutshell are as under:-

2.1 A contract was entered into between the appellant and the respondents regarding the earthwork including lining of V.U.G.C. from KM 10 to KM 11 vide agreement dated 06.02.1988. During the contract

H work, various disputes and differences arose between the parties. All

disputes and differences between the parties were required to be A
resolved through arbitration in pursuance of clause 52 of the agreement.
Clause 52 of the agreement reads as under:-

“52. ARBITRATION:

All disputes or differences in respect of which the decision is B
not final and conclusive, shall be referred for arbitration to a sole
arbitrator appointed as follows:

Within thirty days of receipt of notice from the contractor of his C
intention to refer the dispute to arbitration the Chief Engineer shall
send to the contractor a list of three officers of the rank of
Superintending Engineer or higher, who have not been connected
with the work under this contract. The contractor shall within D
fifteen days of receipt of this list select and communicate to the
Chief Engineer the name of one officer from the list who shall
then be appointed as the sole arbitrator. If contractor fails to
communicate his selection of name, within the stipulated period,
the Chief Engineer shall without delay select one officer from E
the list and appoint him as the sole arbitrator. If the Chief
Engineer fails to send such a list within thirty days, as stipulated,
the contractor shall send a similar list to the Chief Engineer within F
fifteen days. The Chief Engineer shall then select an officer from
the list and appoint him as the sole arbitrator within fifteen days.
If the Chief Engineer fails to do so the contractor shall G
communicate to the Chief Engineer the name of one officer from
the list, who shall then be the sole arbitrator.

The arbitration shall be conducted in accordance with the H
provisions of the Indian Arbitration Act, 1940 or any statutory
modification thereof. The decision of the sole arbitrator shall be
final and binding on the parties thereto. The arbitrator shall
determine the amount of costs of arbitration to be awarded to
either parties.

Performance under the contract shall continue during arbitration I
proceedings and payments due to the contractor by the owner
shall not be withheld, unless they are the subject matter of the
arbitration proceedings.

All awards shall be in writing and in case of awards amount to
Rs. 1.00 Lakh and above, such awards shall state reasons for the
amounts awarded.

- A Neither party is entitled to bring a claim to arbitration if arbitrator has not been appointed before the expiration of thirty days after defect liability period.”
- 2.2 Arbitrator was required to be appointed as provided under clause 52 of the agreement. The Chief Engineer appointed one Shri S.S. Manocha, who at the relevant time was also a Chief Engineer, as an Arbitrator vide order dated 31.10.1992. The Sole Arbitrator entered into the Reference on 19.11.1992 and issued notice to the parties directing them to submit the relevant papers and documents etc. The claimant filed its claim giving all details. The respondents also filed their objections to the said claim of the claimant. The respondents, thus, participated in the proceedings before the Sole Arbitrator. On various dates, the arbitration proceedings were adjourned at the instance of the respondents. During the period, the learned Arbitrator Shri S.S. Manocha superannuated on completion of superannuation age on 30.11.1995. During the hearing, the time for making and publishing the award was extended from time to time by the respondents. That the Superintending Engineer vide its letter dated 09.08.1996 refused to extend the period of arbitration particularly when the arbitration was about to close and the same could not be completed due to lapses, default and seeking adjournments on the part of the respondents.
- E 2.3 The appellant thereafter filed Arbitration Suit No.116 of 1996 before the Civil Judge (Senior Division), Roorkee under Section 28 of the Arbitration Act, 1940 praying for extension of time for making the award and for hearing and conducting the arbitration. The respondents took their objections that the arbitrator has got retired and, therefore, the arbitration proceedings should not be proceeded further by the Sole Arbitrator, who has retired. Even the respondents also filed Misc. Suit No. 122 of 1997 with a prayer for declaring Reference sent to the Sole Arbitrator as inoperative and illegal.
- G 2.4 Both the suits were heard together by the learned Civil Judge (Senior Division), Roorkee. By common order dated 11.12.1997, the learned Civil Judge (Senior Division) extended the period of arbitration for 30 days and directed the Sole Arbitrator, Shri S.S. Manocha to decide the same within the extended period of time. That thereafter, the learned Sole Arbitrator, Shri S.S. Manocha declared the award on 08.01.1998 and ordered the respondents to pay a total sum of Rs.10,97,024.00 with interest on the said sum from 01.10.1990 to 07.01.1998. The respondents

filed their objections under Section 30/33 of the Arbitration Act, 1940 A
vide Misc. Case No. 3 of 1998, challenging the said award and made
prayer therein for setting aside the award dated 08.01.1998 before the
learned Civil Judge (Senior Division), Roorkee.

2.5 Having found that arbitration clause 52 of the agreement does B
not provide for terminating the mandate of the Arbitrator on his
retirement, the learned Civil Judge (Senior Division), Roorkee overruled
the objections raised by the respondents herein and made the award
dated 08.01.1998 Rule of the Court.

2.6 Feeling aggrieved, dissatisfied with the judgment and order C
dated 20.04.2001 passed by the learned Civil Judge (Senior Division),
Roorkee, overruling/rejecting the objections of the respondents and
making the award dated 08.01.1998 Rule of the Court, the respondents
preferred appeal before the High Court and by impugned judgment and D
order the High Court has allowed the said appeal and has quashed and
set aside the award dated 08.01.1998 made by Shri S.S. Manocha, the
then Chief Engineer and the Sole Arbitrator and the order dated
20.04.2001 passed by the learned Civil Judge (Senior Division), Roorkee
making the award Rule of the Court, solely and mainly on the ground
that after the retirement of the Sole Arbitrator, Shri S.S. Manocha as E
Chief Engineer, he has misconducted himself by proceeding further with
the arbitration proceedings.

2.7 Feeling aggrieved and dissatisfied by the impugned judgment F
and order passed by the High Court, the original claimant has preferred
the present appeal.

3. Shri Mukesh Kumar Sharma, learned Advocate has appeared G
on behalf of the appellant and Shri Ravindra Raizada, learned Senior
Advocate has appeared on behalf of the respondents – State of U.P.

4. Shri Mukesh Kumar Sharma, learned Advocate appearing on H
behalf of the appellant has vehemently submitted that in the facts and
circumstances of the case, the High Court has materially erred in
quashing and setting aside the award declared by the Sole Arbitrator
as well as the order passed by the learned Civil Judge (Senior Division),
Roorkee making the award Rule of the Court.

5. It is submitted that both the parties are bound by the arbitration I
clause contained in the agreement, in particularly, contained in clause
52 of the agreement. It is submitted that clause 52 of the agreement

- A provides for nomination of the arbitrator by the Chief Engineer out of the three officers of the rank of Superintending Engineer or higher, who have not been connected with the work under the contract. It is submitted that clause 52 does not provide that the arbitrator nominated and/or appointed shall have a mandate to continue the arbitration proceedings till he remains in service, and, thereafter, on his retirement
- B his mandate is terminated. It is submitted that in absence of such a provision in the clause 52, once an Arbitrator is appointed considering the qualification mentioned in clause 52, thereafter, he continues as an Arbitrator till the arbitration proceedings are concluded unless clause 52 provides other way round. It is further submitted by learned
- C Advocate appearing on behalf of the appellant that even otherwise the High Court ought to have appreciated that throughout the respondents participated in the arbitration proceedings even after the Sole Arbitrator, Shri S.S. Manocha attained the age of superannuation. It is submitted that High Court has also not appreciated that even thereafter by order dated 11.12.1997, the learned Civil Judge (Senior Division), Roorkee extended the time to complete the arbitration proceedings after overruling the objections raised by the respondents and that after the retirement, Shri S.S. Manocha, the learned Sole Arbitrator cannot continue with the arbitration proceedings. It is submitted that the order dated 11.12.1997 passed by the learned Civil Judge (Senior Division),
- E Roorkee remained unchallenged and attained the finality. It is submitted, therefore, that thereafter it was not open for the respondents again to raise the same objection that after the learned Sole Arbitrator, Shri S.S. Manocha attained the age of superannuation on 30.11.1995, he cannot continue with the arbitration proceedings, the objection which as such was overruled/rejected by the learned Civil Judge (Senior Division), Roorkee while passing the order dated 11.12.1997.
- G 6. Making the aforesaid submissions and relying upon the decisions of this Court in **Himalayan Construction Co. Vs. Executive Engineer, Irrigation Division, J&K and Anr., (2001) 9 SCC 359**, **Prasun Roy Vs. Calcutta Metropolitan Development Authority and Anr., (1987) 4 SCC 217** and **N. Chellappan Vs. Secretary, Kerala State Electricity Board and Anr., (1975) 1 SCC 289**, learned Advocate appearing for the appellant prayed to allow the present appeal and quash and set aside the impugned judgment and order passed by the High Court and consequently to restore the award declared by the Sole Arbitrator and the order passed by the learned

Civil Judge (Senior Division), Roorkee making the award Rule of the Court. A

7. The present appeal is opposed by Shri Raizada, learned Senior Advocate appearing on behalf of the respondents.

8. It is vehemently submitted by Shri Raizada, learned Senior Advocate appearing on behalf of the respondents that it is not in dispute that the learned Sole Arbitrator was appointed as per clause 52 and as he was the Chief Engineer. It is submitted, therefore, that once he retired on attaining the age of superannuation and he did not continue as a Chief Engineer, his mandate is terminated to continue with the arbitration proceedings and a new Arbitrator is to be nominated and appointed afresh as per clause 52 of the agreement. It is further submitted that right from the retirement of the Sole Arbitrator, the respondents raised an objection against his continuing with the arbitration proceedings and despite the same, he continued with the arbitration proceedings even after his retirement, as rightly observed by the High Court, he has misconducted himself, and, therefore, the High Court has rightly quashed and set aside the award declared by Shri S.S. Manocha, the learned Sole Arbitrator, who is held to have been misconducted. B C D

9. Shri Raizada, learned Senior Advocate has also heavily relied upon the State Amendment of Section 4 of the Arbitration Act, 1940 by submitting that as per the State Amendment applicable to the State of U.P., in every case, where any appointed arbitrator neglects or refuses to act, or becomes incapable of acting or dies, the vacancy shall be supplied by the person designated as mentioned in sub-section (1) of Section 4. Making the aforesaid submissions, it is prayed to dismiss the present appeal. E F

10. Heard the learned counsel appearing for the respective parties at length. The short question which is posed for consideration before this Court is whether once an officer of the department is appointed as an Arbitrator considering the arbitration clause, whether his mandate to continue the arbitration proceedings shall come to an end on his retirement? The further question which is posed is whether continuance of the arbitration proceedings by such an Arbitrator after his retirement can be said to be committing a misconduct by such a Sole Arbitrator? G

11. For the aforesaid question, the relevant arbitration clause required to be considered is clause 52. In the present case, arbitration H

- A agreement contains arbitration clause as per clause 52 of the agreement, which is reproduced hereinabove. It provides that on the receipt of the notice from the contractor of his intention to refer the dispute to the arbitration the Chief Engineer shall send to the contractor a list of three officers of the rank of Superintending Engineer or higher, who have not been connected with the work under the contract. Thereafter, the contractor shall within fifteen days of receipt of the list select and communicate to the Chief Engineer the name of one officer from the list, who shall then be appointed as the Sole Arbitrator. It further provides that if a contractor is failed to communicate his selection of name, within the stipulated period, the Chief Engineer shall without delay select one officer from the list and appoint him as the Sole Arbitrator. It further provides that if the Chief Engineer fails to send such a list within 30 days, as stipulated, the contractor shall send a similar list to the Chief Engineer within fifteen days and the Chief Engineer shall then select an officer from the list and appoint him as the Sole Arbitrator within fifteen days. It further provides that the arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940. Therefore, the only qualification for appointment as an arbitrator is that he should be the officer of the rank of the Superintending Engineer or higher. **Once such an officer is appointed as an Arbitrator, he continues to be the Sole Arbitrator till the arbitration proceedings are concluded unless he incurs the disqualification under the provisions of the Indian Arbitration Act, 1940.** Even after his retirement, the arbitration proceedings have to be continued by the same Arbitrator. Clause 52 of the agreement does not provide at all that on the retirement of such an officer, who is appointed as a Sole Arbitrator, he shall not continue as a Sole Arbitrator and/or the mandate to continue with the arbitration proceedings will come to an end.
- G 12. Identical question came to be considered by this Court in the case of **Himalayan Construction Co. (supra)**. The question before this Court was whether the High Court was justified in taking the view that the award, which is made the Rule of the Court by the learned Single Judge was illegal and liable to be set aside on the ground that the arbitrator, who was appointed by designation had retired and has ceased to hold his office when he passed the award. In that case also, the Sole Arbitrator even after his retirement prayed for extension of time and the extension was granted after hearing the parties and as no

such objection was raised at that time, and thereafter the nominated Arbitrator, who was the officer, passed the award. This Court overruled the objection that after the retirement of the Sole Arbitrator, who was appointed by designation cannot continue arbitration proceedings after his retirement and cannot pass the award.

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13. In the present case also the Sole Arbitrator, who at the relevant time was the Chief Engineer and was qualified to become the Sole Arbitrator was even nominated and/or appointed by the Chief Engineer as per clause 52. **Therefore, considering the clause 52 of the agreement, it cannot be said that his mandate to continue with the arbitration proceedings would come to an end on his retirement.**

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14. It is further required to be noted that even the very objection was raised by the respondents before the learned Civil Judge (Senior Division), Roorkee when the question of extension of time was being considered by the learned Civil Judge (Senior Division), Roorkee. The learned Civil Judge (Senior Division), Roorkee overruled such an objection and granted further one month's extension to the Sole Arbitrator to complete the arbitration proceedings. The said order has attained the finality. Therefore, thereafter, it was not open for the respondents to again raise such an objection.

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15. Now, so far as the reliance placed upon the amendment to Section 4 of the Indian Arbitration Act, 1940 as applicable to the State of U.P. is concerned, the aforesaid has no substance. State amendment of Section 4 of Arbitration Act, 1940 as applicable to State of U.P. upon which the reliance has been placed reads as under:-

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“XXXXXXXXXX

(2) In every such case where any appointed arbitrator neglects or refuses to act, or **becomes incapable of acting or dies**, the vacancy shall be supplied by the person designated as aforesaid.”

On fair reading of the aforesaid provision, we are afraid that the aforesaid provision shall be applicable at all. It cannot be said that the Sole Arbitrator had become incapable of acting on his retirement from service.

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16. Even the observations made by the High Court in the impugned judgment and order that the Sole Arbitrator has misconducted

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- A himself by continuing with the arbitration proceedings after his retirement is also not tenable at law. In the present case, the learned Civil Judge (Senior Division), Roorkee extended the time to the Sole Arbitrator to complete the arbitration proceedings and granted further period of 30 days which was after his retirement and after specifically overruling/rejecting the objections raised by the respondents that after retirement, he cannot continue with the arbitration proceedings. Therefore, once the learned Sole Arbitrator continued with the arbitration proceedings and passed the award within the extended period of time, it cannot be said that he has misconducted himself as he continued with the arbitration proceedings.
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 - C 17. In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court quashing and setting aside the award as well as the order passed by the learned Civil Judge (Senior Division), Roorkee making the impugned award Rule of the Court deserves to be quashed and set aside. Accordingly, the present
 - D appeal is allowed. The impugned judgment and order passed by the High Court dated 19.06.2007 passed in A.O. No.1489 of 2001 is quashed and set aside and the award passed by the learned Sole Arbitrator dated 08.01.1998 and the order passed by the learned Civil Judge (Senior Division), Roorkee dated 20.04.2001 passed in Original Suit No. 4 of 1998 and Misc. Suit No.3 of 1998 making the award, Rule of the Court are hereby restored.
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18. In the facts and circumstances of the case, there shall be no order as to costs.

Bibhuti Bhushan Bose

Appeal allowed.