Bihar State Mineral Dev. Corpn. & Anr vs Encon Builders (I) Pvt. Ltd on 21 August, 2003

Equivalent citations: AIR 2003 SUPREME COURT 3688, 2003 (7) SCC 418, 2003 AIR SCW 4186, 2003 AIR - JHAR. H. C. R. 1086, (2003) 4 ALLMR 736 (SC), (2003) 4 JCR 185 (SC), (2003) 10 ALLINDCAS 824 (SC), 2004 (1) UJ (SC) 371, (2003) 7 JT 605 (SC), 2003 (3) ARBI LR 133, 2003 (4) ALL MR 736, 2003 (3) BLJR 1907, 2003 (10) ALLINDCAS 824, 2003 (6) SLT 337, 2003 (6) SCALE 592, 2003 (7) ACE 499, 2003 BLJR 3 1907, 2003 (9) SRJ 494, 2004 UJ(SC) 1 371, (2004) 1 LAB LN 1144, (2004) 1 LABLJ 534, (2003) 3 JCR 773 (JHA), (2003) 4 PAT LJR 145, (2003) 4 CIVLJ 829, (2003) 10 INDLD 31, (2003) 3 CIVILCOURTC 462, (2003) 3 ARBILR 133, (2003) 2 WLC(SC)CVL 576, (2003) 4 JLJR 115, (2003) 6 SUPREME 1, (2003) 4 ICC 460, (2003) 6 SCALE 592, (2003) 53 ALL LR 311, (2004) 2 BLJ 12, (2004) 120 COMCAS 54

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Bench: Chief Justice, S.B. Sinha

CASE NO.:
Appeal (civil) 2025 of 1997

PETITIONER:
Bihar State Mineral Dev. Corpn. & Anr.

RESPONDENT:
Vs.

Encon Builders (I) Pvt. Ltd.

DATE OF JUDGMENT: 21/08/2003

BENCH:
CJI & S.B. Sinha.

JUDGMENT:

J U D G M E N T S.B. SINHA, J :

The appellants before the High Court are in appeal before us against the judgment and order dated 10.9.1996 passed by the High Court of Patna, Ranchi Bench, Ranchi,

in Misc. Appeal No.176 of 1995 (R) dismissing an appeal preferred by the appellants herein purported to be in terms of Section 39(1)(i) of the Arbitration Act, 1940 ('the Act' for short), against an order dated 11.9.1995 passed by the Subordinate Judge-VI, Ranchi, allowing Arbitration (Misc.) Case No.39 of 1995 filed by the respondent herein.

The basic fact of the matter is not in dispute. Appellant No.1 herein invited tender for removal of soil, sandstone, shale, conglomerates/coal etc. and stacking it up to a distance of 1. k.m. Pursuant to or in furtherance of the notice inviting tender issued by Appellant No.1, the respondent herein submitted his tender which was accepted. According to the appellants, the respondent failed and neglected to produce 10,000 M.T. of coal per month and stack the same in the dump yard which was the subject-matter of the agreement dated 17.3.1992, as a result whereof the balance job was got done by another agency.

According to the appellants by reason of the aforementioned acts of omission and commission on the part of the respondent, it suffered a huge loss. The agreement of the respondent, however, was not expressly cancelled by Appellant No.2 herein. The respondent herein allegedly invoked the purported arbitration agreement contained in the said agreement dated 17.3.1992.

Clauses 37, 59 and 60 which, according to the appellants, are relevant for the purpose of this case read thus :

"37. It will be at the absolute discretion of the Managing Director of the Corporation to terminate the agreement in the following events :

a. If the excavation work is found to be unsatisfactory.

b. If the agency be involved in any action involving moral turpitude.

c. If the agency be involved in any action causing breach of peace indiscipline at the Mines or stops the work before the expiry of the agreement period.

d. If the agency fails to comply with any of the terms and conditions contained herein or that would be mutually agreed upon for the execution of the work.

e. If the agency fails to pay full wages to workmen as per prevailing act/awards from the management premises and in presence of Corporation authorised representative. Before terminating the agreement, one month's notice under registered post on the address given in this agreement will be given to the agency without prejudice to the right and claim under the agreement and the corporation; will have the right to adjust such amount towards the financial loss that corporation might incur due to such acts or commissions of the agency from bills or security deposit or earnest deposit or through other legal proceedings."

59. If during course of inspection or on reports of officers of the Corporation the Managing Director finds that the working operation are not carried out in a workman like manner or payments to workmen are not made timely and according to provisos of the rules and regulations he may impose fine on the agency up to a maximum of rupees five thousand at a time depending on the gravity of the violations.

60. In case of any dispute arising out of the agreement, the matter shall be referred to the Managing Director, Bihar State Mineral Development Corporation Limited, Ranchi, whose decision shall be final and binding."

The respondent also allegedly made claim against the appellants. The disputes were said to have been referred to Appellant No.2 herein purported to be in terms of clause 60 of the said agreement. But who referred the said dispute and how it was done is not borne out from the records.

Allegedly, 22.6.1995 was the date fixed for hearing of the matter before Appellant No.2 which was subsequently adjourned to 6.7.1995. The respondent herein questioned the validity of clause 60 of the agreement by a letter dated 15.7.1995.

It thereafter filed an application under Section 33 of the Act in the Court of the Subordinate Judge-VI, Ranchi. The said application was allowed by the learned Subordinate Judge, by reason of an order dated 11.9.1995, whereby and whereunder, Appellant No.2 was restrained from acting as an Arbitrator. The learned Judge further held that clause 60 of the agreement cannot be construed to be an arbitration agreement.

Aggrieved thereby and dissatisfied therewith, the appellants preferred an appeal before the High Court. By reason of the impugned judgment, the said appeal was dismissed. The appellants are in appeal before us against the said judgment.

Mr. Dinesh Dwivedi, learned senior counsel appearing on behalf of the appellants, would submit that the courts below committed manifest illegality in passing the impugned judgment insofar as they held that clause 60 of the agreement does not constitute an arbitration agreement as the same satisfies the definition thereof as contained in Section 2(a) of the Act, insofar as it contains the following essential elements of an arbitration agreement, namely, (a) the agreement is in writing; (b) the agreement is to submit a present or a future difference; (c) dispute is to be referred to a named arbitrator; and

(d) the decision of the arbitrator is final.

The learned counsel would contend that as the essential elements of arbitration are satisfied from clause 60 of the agreement, it was not necessary to specifically use the terminology 'arbitration' therefor and no particular form is required therefor. Reliance in this connection has been placed on Smt. Rukmanibai Gupta vs. The Collector, Jabalpur and others [AIR 1981 SC 479].

The learned counsel would further submit that the High Court further erred insofar as it failed to take into consideration the fact that an employee of the Principal can be named as an arbitrator wherefor bias on his part cannot be presumed. Strong reliance in this behalf has been placed on The Secretary to the Government, Transport Deptt., Madras vs. Munuswamy Mudaliar and others [AIR 1988 SC 2232], State of U.P. vs. Tipper Chand [(1980) 2 SCC 341], K.K. Modi vs. M.N. Modi & Ors. [JT 1998 (1) SC 407], Michael Golodetz and Others vs. Serajuddin and Co. [AIR 1963 SC 1044] and State of Orissa and Others vs. Narain Prasad and Others [(1996) 5 SCC 740]. The short question which arises for consideration in this appeal is as to whether the learned court below committed an illegality in refusing to refer the matter to arbitration.

The essential elements of an arbitration agreement are as follows :

> (1) There must be a present or a future difference in connection with some contemplated affair. (2) There must be the intention of the parties to settle such difference by a private tribunal.
>
> (3) The parties must agree in writing to be bound by the decision of such tribunal.
>
> (4) The parties must be ad idem.

There is no dispute with regard to the proposition that for the purpose of construing an arbitration agreement, the term 'arbitration' is not required to be specifically mentioned therein. The High Court, however, proceeded on the basis that having regard to the facts and circumstances of this case, the arbitration agreement could have been given effect to. We may, therefore, proceed on the basis that Clause 60 of the Contract constitutes an arbitration agreement. A finding has been arrived at by the High Court that the Second Appellant was the only competent authority to arrive at his satisfaction that the agreement was liable to be terminated. By reason of the power conferred upon the Managing Director of Appellant No.1, he is also entitled to impose fine on the contractor depending upon the gravity of violation of the agreement.

The respondent would contend that although the agreement was not expressly terminated, the work had illegally been re-allotted to another agency by the second appellant. The correctness or otherwise of the said decision on the part of the second appellant was in question. The High Court, therefore, arrived at a finding that as for all intent and purport the agreement was terminated by Appellant No.2, he could not assume the role of an arbitrator.

There cannot 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 cannot 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.

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. The case at hand not only satisfies the test of real bias but also satisfies the real danger as well as suspicion of bias. [See Kumaon Mandal Vikas Nigam Ltd. vs. Girja Shankar Pant and Others [(2001) 1 SCC 182].

In Judicial Review of Administrative Action, by De Smith, Woolf and Jowell (Fifth Edition at page 527), the law is stated in the following terms :

> "The various tests of bias thus range along a spectrum. At the one end a court will require that, before a decision is invalidated, bias must be shown to have been present. At the other end of the spectrum, the court will strike at the decision where a reasonable person would have a reasonable suspicion from the circumstances of the case that bias might have infected the decision. In between these extremes is the "probability of bias" (this being closer to the "actual bias" test), and the "possibility of bias" (this being closer to that of reasonable suspicion)".

In "The Law and Practice of Commercial Arbitration in England by Sir Michael J. Mustill and Stewart C. Boyd, it is stated :

> "Since the general principles of law relating to bias apply in the same way to arbitrations as to other tribunals, and since instances which are sufficiently serious to bring about the intervention of the Court are very rare indeed, there is no need to deal with the subject in detail."

In 'Russell on Arbitration', 22nd Edition, the law is stated thus :

> "4-030 Actual and apparent bias. A distinction is made between actual bias and apparent bias. Actual bias is rarely established, but clearly provides grounds for removal. More often there is a suspicion of bias which has been variously described as apparent or unconscious or imputed bias. In such majority of cases, it is often emphasized that the challenger does not go so far as to suggest the arbitrator is actually biased, rather that some form of objective apprehension of bias exists. 4-032 Pecuniary interest. There is an automatic disqualification for an arbitrator who has a direct pecuniary interest in one of the parties or is otherwise so closely connected with the party that can truly be said to be a judge in his own cause. 5-052 Impartial. Section 33(1) of the Arbitration Act 1996 states that the tribunal must act "impartially". An arbitrator must also appear impartial and if there are justifiable doubts as to his impartiality this will provide a ground for his removal by the court under section 24(1)(a) of the Arbitration Act 1996 or may mean that the award can be challenged."

Mr. Dwivedi placed strong reliance in Munuswamy Mudaliar's case (supra). In that case an application under Section 5 of the Act was filed. Furthermore, the fact of the said case is not applicable in the present case inasmuch as therein actual work by the contract did not start. In that

situation, the risk and cost clause was invoked. The only contention raised therein was that as the said clause was invoked by the Chief Engineer; the Superintending Engineer being an inferior authority to him would not be in a position to dispense with the justice effectively. It was, in that situation, held by this Court as under :

> "This is a case of removal of a named arbitrator under S.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 S.5 of the Act."

Such is not the position here.

In Serajuddin's case (supra), this court was concerned with an application under Section 34 of the Arbitration Act. It was held :

> "...The Court insists, unless sufficient reason to the contrary is made out upon compelling the parties to abide by the entire bargain, for not to do so would be to allow a party to the contract to approbate and reprobate, and this consideration may be stronger in cases where there is an agreement to submit the dispute arising under the contract to a foreign arbitral tribunal..."

It was further observed :

> "...The Court ordinarily requires the parties to resort for resolving disputes arising under a contract to the tribunal contemplated by them at the time of the contract. That is not because the Court regards itself bound to abdicate its jurisdiction in respect of disputes within its cognizance : it merely seeks to promote the sanctity of contracts, and for that purpose stays the suit..."

In the said case, the question of bias on the part of the arbitrator did not fall for consideration.

In Narain Prasad's case (supra), this Court was not dealing with an arbitration matter but with the conduct of the parties in relation to enforcement of a contract in a liquor vend. Therein the

respondent filed a writ petition for coming out his contractual obligation and in the said fact situation obtaining therein this Court observed :

> "...A person who enters into certain contractual obligations with his eyes open and works the entire contract, cannot be allowed to turn round, according to this decision, and question the validity of those obligations or the validity of the Rules which constitute the terms of the contract. The extraordinary jurisdiction of the High Court under Article 226, which is of a discretionary nature and is exercised only to advance the interests of justice, cannot certainly be employed in aid of such persons. Neither justice nor equity is in their favour".

In K.K. Modi's case (supra), clause 9 of a memorandum of agreement came up for consideration, which was in the following terms :

> "Implementation will be done in consultation with the financial institutions. For all disputes, clarifications etc. in respect of implementation of this agreement, the same shall be referred to the Chairman, IFCI or his nominees whose decisions will be final and binding on both the groups."

It was held that the same did not constitute an arbitration clause.

Yet again in Tipper Chand's case (supra) whereupon reliance has been placed by Mr. Dwivedi, the following clause was not held to be an arbitration clause :

> "For any dispute between the contractor and the Department the decision of the Chief Engineer PWD Jammu and Kashmir, will be final and binding upon the contract."

As in the instant case, the test of bias on the part of Appellant No.2 is fully satisfied, the impugned order is unassailable. As bias on the part of the second Appellant goes to the root of his jurisdiction to act as an arbitrator, the entire action is a nullity. As the acts of bias on the part of the second appellant arose during execution of the agreement, the question as to whether the respondent herein entered into the agreement with his eyes wide open or not takes a back-seat. An order which lacks inherent jurisdiction would be a nullity and, thus, the procedural law of waiver or estoppel would have no application in such a situation. 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.

Furthermore, as the learned Subordinate Judge, inter alia, held that clause 60 did not constitute an arbitration agreement, the same could not have been the subject-matter of an appeal under Section 39(1)(i) of the Act inasmuch as thereby the arbitration agreement was not superseded.

For the reasons aforementioned, there is no merit in this appeal which is dismissed. As the respondent did not appear, there shall be no order as to costs.