Supreme Court of India
City And Industrial Development ... vs Motiram Budharmal And Ors. on 7 December, 1993
Equivalent citations: JT 1993 (6) SC 612, 1993 (4) SCALE 612, (1994) 2 SCC 21, 1994 (1) UJ 100 SC
Author: S Mohan
Bench: M Venkatachaliah, S Mohan
JUDGMENT S. Mohan, J.

1. Leave granted.

2. The appellant is a Government company being wholly owned by the Government of Maharashtra. Respondent No. 1 M/s. Motiram Budharmal is a partnership firm carrying on business as builders and contractOrs. Respondent No. 3 is a Chief Engineer of the appellant's company.

3. On 8.2.1982, the appellant's firm issued work order to 1st respondent for construction of 'E' type building in Sector 10, Vashi, New Bombay. It was stipulated that the work should be completed by 7.8.1983. The work was not completed by the 1st Respondent within that date. On 30.6.1984, the work was completed. On 29.6.1987, the Ist respondent wrote to the appellant's Executive Engineer alleging breach on the pan of the appellant. He also put forth various claims. The Ist respondent invoked the arbitration clause in the agreement. It was contested by 2nd respondent stating that claims put forth were not arbitrable. Thereafter, the Ist respondent by a letter dated 15.10.1987 protested and alleged bias against respondent No.3. He also prayed for removal of respondent No. 3 as Arbitrator. After a gap of nearly 2-1/2 years on 15.5.1990, the Ist respondent issued notice requesting respondent No. 3 to proceed with the arbitration alleging that if this was" not done, proceedings for revocation of his authority and/or for his removal would be adopted.

4. The Ist respondent filed Arbitration Petition No. 125 of 1990 in the Bombay High Court. In that proceeding, he prayed for removal of respondent No. 3 as Arbitrator and for revocation of his authority. It was directed that the respondent No. 3 should decide on the question whether the claims are arbitrable or not and to render a decision on the claims on merits by 31.12.1992. In view of this direction, 3rd respondent wrote to the parties intimating that he proposed to enter upon the reference and fixed the meeting for that purpose. However, the letter erroneously stated that the meeting was to take place on 17.2.1992. on receipt of this letter, the Ist respondent stated that since the letter was received only on 15.5.1992, it was not possible to attend the meeting. Therefore, on 15.4.1993, the Ist respondent filed another Arbitration Petition No. 78 of 1993 seeking the removal of 3rd respondent as sole arbitrator. On this petition, the High Court passed the impugned order on 14.6.1993 directing the removal of 3rd respondent as sole arbitrator and appointed an Advocate of the High Court as arbitrator in his place. It is the correctness of this order, which has been questioned in this appeal.

5. The learned Counsel for the appellant would urge that having regard to the terms of arbitration clause where there is a named arbitrator namely, the Chief Engineer, it is not open to the Court to appoint an Advocate arbitrator. If the intention of the parties was that the dispute being technical in nature should be decided by a person with technical expertise, appointment of an advocate will not remedy the situation.

6. In order to invoke Section 8 of the Arbitration Act (hereinafter referred to as 'the Act'), it has to be decided first whether the parties intended to supply the vacancy. When the arbitration agreement evinces an intention not to supply the vacancy, the Court will have ho power under Section 8(1)(b) of the Act. This is not a case where the contract is silent about supplying the vacancy.

7. The High Court, it is urged, had failed to take into account the conduct of the 1st respondent, the party applying for removal. Such a conduct clearly shows that he was not interested in proceeding with the arbitration. After writing the letter dated 18.5.1992, no step, whatever, was taken by the Ist respondent. When the Ist respondent was not interested, the High Court should have held the arbitration agreement ceased to have effect. A declaration to that effect ought to have been made; that would have been in consonance with Section 12 of the Act.

8. In opposition to this, the learned Counsel for the respondents would urge that this is a case in which the arbitration agreement stipulated only the Chief Engineer to be the arbitrator. The parties did not intend not to supply the vacancy. Therefore, the High Court was fully competent to appoint another arbitrator after the removal of named arbitrator. Such a power is available to High Court under Section 12(2)(a) of the Act. In support of this argument, reliance is placed on Chief Engineer v. R.C. Sahu 1980 (49) Cuttack Law Times 259. The present case falls under Sections 11 and 12 of the Act.

9. If the agreement is silent as regards supplying the vacancy, the law, it is urged, presumes that the parties intended to supply the vacancy. Where, therefore the Court is moved under Section 8 of the Act to appoint an arbitrator, it was well within its jurisdiction to appoint another arbitrator. Reliance is placed on P.G Agencies v. Union of India AIR 1971 SC 2298.

10. The arbitrator named in agreement was removed because he failed to use all reasonable dispatch in proceeding with the reference and making an award. Therefore, no exception could be taken to the impugned order.

11. Before we go into the question of law, a factual analysis may be highly necessary in this case to determine the applicability of Section 8 of the Act.

12. When on 7.10.1987, the 3rd respondent wrote a letter in answer to the Ist respondent that the claims put forth were not arbitrable, what the Ist respondent did was to write a reply on 15.10.1987. In that letter, he alleged bias against 3rd respondent. On that score, he should be removed. After this letter, no action was taken for more than 2-1/2 years by the Ist respondent. It was only on 9.7.1990, he filed an arbitration petition for removal of the arbitrator. But the learned Single Judge dismissed the petition on 6.1.1992 and directed the 3rd respondent to hold a preliminary meeting on the question as to whether the claims are arbitrable. The 3rd respondent informed the parties that he proposes to enter upon reference and fixed the meeting on 17.2.1992. No doubt, the date mentioned as 17.2.1992 was a mistake. But after writing the letter on 18.5.1992 the Ist respondent, no step whatever, was taken for almost a year. All these facts will clearly point out the remiss on the part of Ist respondent. If really the 3rd respondent did not fix a meeting, nothing preventing the Ist respondent to call upon him to fix the meeting. In the context of unexplained delay of Ist respondent

from 7.10.1987 to 10.5.1990, from 15.5.1992 to 15.4.1993, the delay on the part of the arbitrator from May, 1992 to December 1992 was not such as to warrant the removal nor could it be said that there was a lack of such dispatch on his part warranting removal. Therefore, we find it difficult to appreciate when the learned Single Judge in his impugned order dated 14.6.1993 held that on 18.5.1992, Ist respondent addressed a letter to respondent No, 3 regarding convening of meeting but respondent No. 3 did nothing and that he did not fix any meeting for conducting the arbitration.

13. Hence, this is not a case which would fall under Section 11 of the Act. Accordingly, the exercise of the power by the High Court under the order appealed against cannot be upheld. Once, we reach this conclusion, it is unnecessary to go into the legal aspect and decide whether the parties intended that the vacancy should not be supplied and, therefore, a new arbitrator should not have been appointed. Besides, this is a case in which the parties intended that respondent No. 3, Chief Engineer, alone should be the arbitrator, having regard to the facts that he is possessed of technical expertise, the dispute itself of being technical nature in relation to building construction. Therefore, the appointment of advocate arbitrator will not be effectual. Respondent No. 3, Chief Engineer is directed to enter upon arbitrator and shall complete the proceedings before 31.3.1994 after due notice to parties.

14. With the result, the impugned order is set aside and the appeal is allowed