

BHARAT BHUSHAN BANSAL

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v.

U.P. SMALL INDUSTRIES CORPORATION LTD., KANPUR

JANUARY 21, 1999

[MRS. SUJATA V. MANOHAR AND R.C. LAHOTI, JJ.]

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Arbitration Act, 1940 : Sections 2(a) and 8.

Arbitration agreement—Existence of—Arbitration clause—Ingredients of—Agreement of contract provided that in respect of questions arising from or relating to any claim or right, matter or thing in any way connected with the contract, the decision of Executive Engineer was final, conclusive and binding on both parties to the contract—In respect of the remaining claims the decision of the Managing Director was final, conclusive and binding—Contractor made application under S.8 for appointment of an Arbitrator—Civil Judge allowed the application—In appeal, High Court while upholding the finding that there was an arbitration clause held that the court had no jurisdiction under S.8 to appoint an Arbitrator because none of the clauses of S.8 were attracted and, therefore, set aside the order of the Civil judge—Held : The agreement of contract does not contemplate a full-fledged arbitration under the Arbitration Act—Therefore, application under S.8 is misconceived—High Court's decision is correct though for different reasons.

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Section 2(a)—Arbitration agreement—There is a difference between an expert determination and an arbitration.

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Words and Phrases :

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"Certifier" and "arbitrator"—Meaning of.

The appellant had entered into a contract with the respondent under which the appellant had undertaken the work of construction of factory and allied buildings of the respondent. The agreement provided that in respect of certain claims the decision of the Executive Engineer was final, conclusive and binding on both the parties to the contract. In respect of the remaining matters the decision of the Managing Director was final, conclusive and binding on both the parties to the contract. The agreement did not mention that any dispute could be referred to the arbitration of

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A the Managing Director.

There were disputes between the appellant and the respondent and, therefore, the appellant made an application under Section 8 of the Arbitration Act, 1940 for appointment of an Arbitrator. The Civil Judge allowed the application. In appeal, the High Court while upholding the finding that there was an arbitration clause, held that the court had no jurisdiction under Section 8 to appoint an Arbitrator because none of the clauses of Section 8 were attracted and, therefore, set aside the order of the Civil Judge. Hence this appeal.

C Dismissing the appeal, this Court

HELD : 1. In the present case, from a reading of the agreement, it is quite clear that in respect of questions arising from or relating to any claim or right, matter or thing in any way connected with the contract, while the decision of the Executive Engineer is made final and binding in respect of certain types of claims or questions, the decision of the Managing Director is made final and binding in respect of the remaining claims. Both the Executive Engineer as well as the Managing Director are expected to determine the question or claim on the basis of their own investigations and material. There is a difference between an expert determination and an arbitration. The agreement, therefore, does not contemplate a full-fledged arbitration covered by the Arbitration Act, 1940. The High Court's decision was correct though for different reasons. As the agreement does not contemplate any arbitration, the application under Section 8 was misconceived. [185-H; 186-A; 187-G]

F *K.K. Modi v. K.N. Modi*, [1998] 3 SCC 573; *State of Orissa v. Damodar Das*, [1996] 2 SCC 216 and *State of U.P. v. Tipper Chand*, [1980] 2 SCC 341, relied on.

G *S.K. Chawla: Law of Arbitration and Conciliation*, p. 164 and *Hudson's Building and Engineering Contracts*, 11th Edn. Vol. 1, para 6.065, Vol. 2, para 18.067, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1940 of 1984.

H From the Judgment and Order dated 28.7.81 of the Allahabad High Court in C.R. No. 652 of 1980.

K.K. Mohan for the Appellant. A

The Judgment of the Court was delivered by

MRS. SUJATA V. MANOHAR, J. The appellant had entered into a contract with the respondent under which the appellant had undertaken the work of construction of factory and allied buildings of the respondent at India Complex, Rae Bareilly. The agreement is dated 19.10.1973. Clauses 23 and 24 of the agreement are as follows : B

"Decision of the Executive Engineer of the UPSIC to be final on certain matters : C

Clause 23 : Except where otherwise specified in the contract, the decision of the Executive Engineer shall be final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, the specification, design, drawings and instructions herein before mentioned, and as to the quality of workmanship or materials used on the work or as to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications, estimates, instructions, orders or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work, or after the completion thereof or abandonment of the contract by the contractor shall be final and conclusive and binding on the contractor. D

Decision of the M.D. of the U.P.S.I.C. on all other matters shall be final : E

Clause-24 : Except as provided in Clause 23 hereof the decision of the Managing Director of the U.P.S.I.C. shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract or these conditions or concerning abandonment of the contract by the contractor and in respect of all other matter arising out of this contract and not specifically mentioned herein." F

There were disputes between the appellant and the respondent in connection with the payments to be made under the terms of the said contract and in connection with the work of the said contract. The appellee H

- A plant made an application under Section 8 of the Indian Arbitration Act, 1940 before the Civil Judge, Kanpur. He applied for the appointment of an independent Arbitrator in the place of the Managing Director. The respondent denied that there was any arbitration clause in the said contract. The court, however, allowed the petition of the appellant under Section 8 of the Arbitration Act and appointed one D.D. Sharma, Executive Engineer, as Arbitrator. In appeal, the High Court, while upholding the finding that there was an arbitration clause, held that the court below had no jurisdiction under Section 8 to appoint another Arbitrator in the place of Managing Director since none of the clauses of Section 8 was attracted in the present case. The High Court, therefore, set aside the order of the court below and
- B dismissed the application of the appellant under Section 8. From this judgment the appellant has filed the present appeal.

The first question that requires consideration is whether there is any clause in the contract which provides for arbitration between the parties.

- D The relevant Clauses are Clauses 23 and 24. Under Clause 23, the decision of the Executive Engineer is final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, specifications, designs etc. and as to the quality of workmanship or materials used or relating to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications etc. or otherwise concerning the execution or failure to execute the same. Under Clause 24, except as provided in Clause 23, the decision of the Managing Director of the respondent shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract and in respect of all other matters arising out of the contract and not specifically mentioned in the said Clause. Therefore, in respect of certain claims the decision of the Executive Engineer is final and binding on both the parties to the contract. While in respect of the remaining matters, the decision of the Managing Director of the respondent is final, conclusive and binding on both the parties to the contract. Clause 24 does not mention that any dispute can be referred to the arbitration of the Managing Director. Clause 24 also does not spell out any duty on the part of the Managing Director to record evidence or to hear both parties before deciding the questions before him. From the wording of Clause 24 it is difficult to spell out any intention of the parties to leave any disputes to the adjudication of the Managing
- E Director of the respondent as an Arbitrator.

In the case of *K.K. Modi v. K.N. Modi & Ors.*, [1998] 3 SCC 573, a bench of this Court (of which one of us was a member) had the occasion to consider the essential ingredients of an arbitration clause. Among the ingredients which are described in the said judgment, two important ingredients are; that the agreement between the parties must contemplate that substantive rights of parties will be determined by the agreed Tribunal and that the Tribunal will determine the rights of the parties in an impartial and judicial manner with the Tribunal owing an equal obligation of fairness towards both sides and also that the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended to be enforceable in law. There is a difference between an expert determination and arbitration. S.K. Chawla in the Law of Arbitration and Conciliation at page 164 states as follows :

"4. Arbitration agreement to be distinguished from agreement for decision by an engineer or expert, Contracts may contain a clause that on certain questions the decision of an engineer, architect or another expert shall be final. The decision given in such cases by the engineer etc., is not an award. As pointed out by Bernstein, such a person is under no obligation, unless the contract otherwise provides, to receive evidence or submissions and is entitled to arrive at his decision solely upon the results of his own expertise and investigations. The procedure involved is not arbitration, and the Arbitration Act does not apply to it. The primary material on which such person acts is his own knowledge and experience, supplemented if he thinks fit by (i) his own investigations; and/or (ii) material (which need not conform to rules of 'evidence') put up before him by either party. An Arbitrator on the other hand, acts primarily on material put before him by the parties. The determination by an engineer or an expert would involve a less thorough investigation. Only one mind will be brought to bear on the problem. There will be no discovery of documents, there will not normally be any oral 'evidence' or oral submissions."

In the present case, reading Clauses 23 and 24 together, it is quite clear that in respect of questions arising from or relating to any claim or right, matter or thing in any way connected with the contract, while the decision of the Executive Engineer is made final and binding in respect of certain types of claims or questions, the decision of the Managing Director

- A is made final and binding in respect of the remaining claims. Both the Executive Engineer as well as the Managing Director are expected to determine the question or claim on the basis of their own investigations and material. Neither of the clauses contemplates a full-fledged arbitration covered by the Arbitration Act.
- B A clause very similar to the present clause was also held to be not an arbitration clause by this Court in the case of *State of Orissa & Anr. v. Damodar Das*, [1996] 2 SCC 216. The language of that clause was very similar to the present clause. Under the clause in question "except where otherwise specified in this contract, the decision of the Public Health
- C Engineer, for the time being", was to be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of specifications, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract..... or otherwise concerning the works or the execution or failure to execute the same....." This Court held that this clause did not spell out any intention to refer any disputes and differences between the parties to arbitration.
- E The wording of the clause in the present case is very similar to the wording which was interpreted as not an arbitration clause in the above case. Both the above judgments of this Court have relied upon an earlier decision of this Court in the case of *State of U.P. v. Tipper Chand*, [1980] 2 SCC 341. The clause which was interpreted in the above case was also materially similar to the clause before us. Clause 22 of the contract in that case provided; "except where otherwise specified in the contract the decision of the Superintending Engineer for the time being shall be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned. The decision of such engineer as to the quality of workmanship or materials used on the work or as to any other question claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications..... or otherwise concerning the works, or the execution or failure to execute the same.....shall also be final, conclusive and binding on the contractor". This Court held that the clause did not contain an arbitration agreement
- H either expressly or by implication. The intention was to vest the Superin-

tending Engineer with supervision and administrative control over the work. A

In Hudson's Building and Engineering Contracts, Eleventh Edition, Volume 1, in Paragraph 6.065, while making a distinction between a Certifier and an Arbitrator in a building contract, it has been emphasised that essentially the Certifier in a construction contract will often be performing an administrative rather than a judicial function, and when doing so there may often be no formulated dispute before him at all. He has been described as a "preventer of disputes" in contradistinction to an Arbitrator whose function can only arise once a dispute is in existence. He is not under the same obligation to afford the parties or their representatives a full hearing and receive evidence from them. Thus each contractual provision may need to be carefully scrutinised to see into which category the person named falls. B

In the present case the Managing Director is more in the category of an expect who will decide claims, rights, on matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner. In paragraph 18.067 of Volume 2 of Hudson on Building and Engineering Contracts, Illustration (8) deals with the case where, by the terms of a contract it was provided that the engineer "shall be the exclusive judge upon all matters relating to the construction, incidents and the consequence of these presents, and of the tender, specifications, schedule and drawings of the contract, and in regard to the execution of the works or otherwise arising out of or in connection with the contract, and also as regards all matters of account, including the final balance payable to the contractor, and the certificate of the engineer for the time being, given under his hand, shall be binding and conclusive on both parties". It was held that this clause was not an arbitration clause and that the duties of the engineer were administrative and not judicial. C

Since Clause 24 does not contemplate any arbitration, the application of the appellant under Section 8 of the Arbitration Act, 1940 was misconceive. The appeal is, therefore, dismissed though for reasons somewhat different from the reasons given by the High Court. There will, however, be no order as to costs. D

V.S.S.

Appeal dismissed. E

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