

CASE NO.:
Appeal (civil) 4109 of 2006

PETITIONER:
B.S.N.L. & Ors.

RESPONDENT:
M/s. Subash Chandra Kanchan & Anr.

DATE OF JUDGMENT: 13/09/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
J U D G M E N T
[Arising out of SLP (Civil) No. 9242 of 2006]

S.B. SINHA, J :

Leave granted.

The parties herein entered into a contract pursuant to a notice inviting tender by Appellant No. 1 for the work of construction of 9 Nos. Type-V quarters at Jayadev Vihar, Bhubaneswar. The said contract contained an arbitration clause in terms whereof the Chief Engineer, Telecommunication/Postal Department in charge of the work at the time of dispute or if there be no Chief Engineer the administrative head of the said Telecommunication/Postal Department was to be appointed as an arbitrator. The said provision envisaged that in terms thereof no person other than the one appointed by such Chief Engineer or administrative head of the Telecommunication/Postal as aforesaid should act as arbitrator.

A notice in terms of arbitration agreement contained in clause 25 of the contract was issued by the Respondents on 7.1.2002. A letter appointing one Shri Gurbax Singh, Principal Chief Engineer (Arb.), New Delhi as the sole arbitrator was said to have been drafted on 4.2.2002. It, however, was dispatched on 7.02.2002. On the same day, having regard to the fact that allegedly the Managing Director of the Appellant did not respond to the notice issued to him, an application was filed by Respondent herein before the High Court of Orissa purported to be under Section 11 of the Arbitration and Conciliation Act, 1996 (for short "the 1996 Act").

It is stated that the said Shri Gurbax Singh submitted his resignation whereupon the Chief Engineer appointed one Shri A.K. Naik as the sole arbitrator on 7.07.2002. He is also said to have resigned and in his place Shri Gurbax Singh was again appointed as arbitrator on 17.03.2003. The appointments were made during pendency of the said proceedings before the High Court under the 1996 Act. When the matter came up for hearing before a Division Bench of the High Court, in its order dated 20th January, 2006, it was recorded:

"Learned counsel for the petitioners placed before me a list of names of six persons to appoint one of them as Arbitrator and to refer to him the dispute between the parties for adjudication in terms of the arbitration clause. On being asked, learned counsel for the opposite parties submits that he has no objection if Shri B.C. Bhattacharya, Chartered Engineer, Former Chief Engineer, W.B. P.W.D., FD-216/4, Salt Lake City, Kolkata \026 700 091 is appointed as Arbitrator and the dispute between the parties in terms of arbitration clause is referred

to him for adjudication. In view of the aforesaid, said Shri B.C. Bhattacharya is appointed as Arbitrator and the dispute between the parties in terms of the arbitration clause is referred to him for adjudication."

The learned arbitrator appointed by the High Court thereafter entered into reference. The parties hereto appeared before him on 18.03.2006 and participated in the proceedings. Respondent also filed his statement of claim. The learned arbitrator has called upon the Appellants to file their written statement.

However, on 27th January, 2006, an application was filed by Appellant herein purported to be under Section 151 of the Code of Civil Procedure for modification of the said order dated 20.1.2006 contending:

"2. That after dictation of orders when the counsel of the op. party went out, a Junior Lawyer informed him that Your Lordship had dictated that the counsel for the opp. Party has no objection if Shri B.C. Bhattacharya, Chartered Engineer, and former C.E.W.B. PWD Kolkata is appointed as the Arbitrator, which due to inadvertence, had escaped notice/ audibility of the opp. Party counsel.

3. That then the counsel for the opposite party promptly rushed to the court and with due permission of your Lordship, apprised about such dictation with a rest for omission of the "No Objection" portion which occurred due to some communication lapses. And Your Lordship was considerable and gracious enough to ask the Stenographer on duty at that time to take down the sought for change after confirming from me whether it was about Mr. Bhattacharya of KOLKATA."

The prayer made in the said application reads as under:

"Under the circumstances stated above, the opposite party, therefore, earnestly pray that your Lordship may graciously be pleased in the ends of justice to direct appropriately for proper reflection of your Lordship's subsequent instruction in the order."

By an order dated 3rd March, 2006, the High Court refused to recall its order dated 20th January, 2006 stating:

"Now, learned counsel for opposite parties appears and submits that the aforesaid recording that he had no objection against the appointment of Shri B.C. Bhattacharya is not correct and in fact he had objection. He wants this to be recorded in the order. But, I do not find any reason to change the appointment of Shri B.C. Bhattacharya as the Arbitrator, as I am told that Shri B.C. Bhattacharya has already started functioning as Arbitrator by issuing notice to the concerned parties. Further, the learned counsel for opp. Parties could not give any reason as to why he has objection against the appointment of Shri B.C. Bhattacharya as Arbitrator. In this view of the matter, no further order is required to be passed."

Mr. Chetan Sharma, learned senior counsel appearing on behalf of the Appellants submitted that keeping in view the arbitration agreement contained in Clause 25 of the contract, the High Court had no jurisdiction to appoint any person other than the one nominated by the Chief Engineer as appointment of person other than the nominee of the Chief Engineer was invalid.

On the other hand, Mr. Parmanand Gaur, learned counsel appearing on behalf of the Respondents, submitted that the High Court having exercised its discretionary jurisdiction under Section 11 of the 1996 Act, this Court should not interfere therewith.

The relevant portions of Section 11 of the 1996 Act read as under:

"11. Appointment of arbitrators.\027 (1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Chief Justice or the person or institution designated by him is final.

(8) The Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to-

(a) any qualifications required of the arbitrator by the agreement of the parties; and

(b) other considerations as are likely to secure the appointment of an independent and impartial

arbitrator..."

Evidently, the Managing Director of the Appellant was served with a notice on 7th January, 2002. The letter appointing the arbitrator was communicated to Respondent on 7th February, 2002. By that time, 30-days period contemplated under the Act lapsed. The Managing Director of the Appellant was required to communicate his decision in terms of Clause 25 of the contract.

What would be the meaning of the term 'communicate' came up for consideration before this Court in *State of Punjab v. Amar Singh Harika* [AIR 1966 SC 1313], wherein it was held:

"\005It is plain that the mere passing of an order of dismissal would not be effective unless it is published and communicated to the officer concerned. If the appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in the case of a judicial order pronounced in Court, the authority may change its mind and decide to modify its order\005"

[See also *Sultan Sadik v. Sanjay Raj Subba and Others*, (2004) 2 SCC 377]

The contract entered into by and between the parties was subject to the provisions contained in the 1996 Act.

Although in terms of the arbitration agreement contained in Clause 25 of the contract, ordinarily the arbitrator appointed by the Managing Director should act as arbitral tribunal in respect of the disputes and differences between the parties to the contract; in this case, the Appellants must be held to have waived their right as they consented to the appointment of Shri Bhattacharya as an arbitral tribunal. The High Court having appointed the arbitral tribunal on consent, it is, in our opinion, not open to the Appellants now to contend that no such concession was made.

We are not oblivious of the recent decision of this Court in *Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd. and Another* [(2006) 6 SCC 204], wherein Balasubramanian, J. stated the law in the following terms:

"\005It is true that in the arbitration agreement there is no specific provision authorizing the Managing Director to appoint a substitute arbitrator if the original appointment terminates or if the originally appointed arbitrator withdraws from the arbitration. But, this so called omission in the arbitration agreement is made up by the specific provision contained in Section 15(2) of the Act. The withdrawal of an arbitrator from the office for any reason is within the purview of Section 15(1)(a) of the Act. Obviously, therefore Section 15(2) would be attracted and a substitute arbitrator has to be appointed according to the rules that are applicable for the appointment of the arbitrator to be replaced. Therefore, what Section 15(2) contemplates is an appointment of the substituted arbitrator or the replacing of the arbitrator by another according to the rules that were applicable to the appointment of the original arbitrator who was being replaced. The term "rules" in Section 15(2) obviously referred to the provision for

appointment, contained in the arbitration agreement or any Rules of any Institution under which the disputes were referred to arbitration. There was no failure on the part of the concerned party as per the arbitration agreement, to fulfil his obligation in terms of Section 11 of the Act so as to attract the jurisdiction of the Chief Justice under Section 11(6) of the Act for appointing a substitute arbitrator. Obviously, Section 11(6) of the Act has application only when a party or the concerned person had failed to act in terms of the arbitration agreement. When Section 15(2) says that a substitute arbitrator can be appointed according to the rules that were applicable for the appointment of the arbitrator originally, it is not confined to an appointment under any statutory rule or rule framed under the Act or under the Scheme. It only means that the appointment of the substitute arbitrator must be done according to the original agreement or provision applicable to the appointment of the arbitrator at the initial stage. We are not in a position to agree with the contrary view taken by some of the High Courts."

But, herein the issue is entirely different. Apart from failure on the part of the Managing Director of the Appellant to appoint an arbitrator within the specified time, the Appellants evidently waived their right under the arbitration agreement.

Mr. Sharma's submission to the effect that the learned counsel who consented to the appointment of Shri Bhattacharya was a junior counsel and he had no instructions in this behalf cannot be accepted. No such statement was made before the High Court. It had never been contended before the High Court that the counsel had no authority to make such concession.

Moreover, the application filed under Section 151 of the Code of Civil Procedure by the Appellant did not contain such statements. The High Court, thus, did not commit any error in recording that such a concession had in fact been made by the learned counsel. In a matter of this nature again, the High Court's decision subject to just exception must be held to be final.

Furthermore, in terms of Order III, Rule 1 of the Code of Civil Procedure, a litigant is represented by an advocate. A concession made by such an advocate is binding on the party whom he represents. If it is binding on the parties, again subject to just exceptions, they cannot at a later stage resile therefrom. The matter may, however, be different if a concession is made on a question of law. A wrong concession on legal question may not be binding upon his client. Here, however, despite the stand taken by the Appellant in its written statement before the High Court the learned Advocate consented to appointment of a person as an arbitrator by the High Court in exercise of its jurisdiction under Section 11 of the 1996 Act, in our considered view, the same should not be permitted to be resiled from. A person may have a legal right but if the same is waived, enforcement thereof cannot be insisted.

In Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai Patel and Ors. [2006 (8) SCALE 631], this Court observed:
"The matter may be considered from another angle. If the first respondent has expressly waived his right on the trade mark registered in the name of the appellant-Company, could he claim the said right indirectly? The answer to the said question must be rendered in the negative. It is well-settled that what cannot be done directly cannot be done

indirectly. The term 'Waiver' has been described in the following words: "Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted upon it is sufficient consideration. It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration. [See 16 Halsbury's Laws (4th edn) para 1471]

Waiver may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel. [See 45 Halsbury's Laws (4th edn.) para 1269]

In *Indu Shekhar Singh and Ors. v. State of U.P. and Ors.* 2006 (5) SCALE 107, this Court held: "They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they cannot be allowed to turn round and contend that the conditions are illegal"

Prima facie also it does not appear that the allegations contained in the said application were supported by an affidavit. In that view of the matter, no credence to the averments contained therein cannot be given.

Furthermore, it is not a case where this Court should exercise its discretionary jurisdiction. For the reasons aforementioned, this appeal is dismissed. No costs.