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us cannot fall within the ambit of the expression "Judgment, decree or final order".

For these reasons we are of the opinion that leave to appeal cannot be granted and that the application must be dismissed. Ordered accordingly.

There will be no order as to costs.

B.R.T.

APPELLATE CIVIL

Before Grover, J.

THE STATE OF PUNJAB,—*Appellant.*

versus

M/S. JAWAHAR MAL & SONS,—*Respondents.*

First Appeal from Order No. 76 of 1958.

1958

Oct., 29th

Arbitration Act (X of 1940)—Section 34—Order refusing to stay the suit—Whether should be interfered with in appeal—Arbitrator named in the agreement taking evidence and making a report while dispute going on—Whether should be made to act as arbitrator—Suit involving complicated questions of law and fact—Whether should be tried by the Court or referred to arbitrator.

Held, that the discretion which has been exercised by the Court below should not be interfered with where it has been properly exercised after a due consideration of all the circumstances. On a matter of exercise of discretion one ought not lightly to allow an appeal from a Court which has not proceeded on wrong judicial lines.

Held, that where the person named as an arbitrator calls upon a party to produce all evidence relating to the case before him and the evidence and account books are produced, after examining which he makes certain recommendations to the Government relating to the matter which are unfavourable to that party, it will not be right to

put him in such a position that it would not be fitting or decorous or proper for him to act as an arbitrator. Further more if the allegations on which the suit is founded are such that complicated questions of law and fact are bound to arise which can be appropriately decided by a Court only, it will not be right to refer the suit to the arbitrator for decision.

Case law reviewed.

First Appeal from the order of Shri R. S. Bindra, Senior Sub-Judge, Simla, Camp Ambala, dated the 18th April, 1958, dismissing the defendant's application dated 18th April, 1958, under section 34 of the Indian Arbitration Act, leaving the parties to bear their own costs.

L. D. KAUSHAL, for Appellant.

F. C. MITTAL AND N. N. GOSWAMI, *for Respondents.*

JUDGMENT

Grover, J.

GROVER, J.—This is an appeal against an order of the Senior Sub-Judge, Simla, refusing to stay a suit under the provisions of section 34 of the Indian Arbitration Act.

The suit was filed by Jawahar Mal and Sons for recovery of Rs. 68,349-5-3 against the Punjab State for damages for breach of a contract which had been entered into for erection of a high level bridge over the Rangeelpur Naddi. The State moved the Court under the provisions of section 34 of the Arbitration Act for stay of proceedings on the ground that there was an arbitration clause in the agreement and that the disputes between the parties had to be decided by arbitration. Various pleas were raised on which the following issues were framed:—

(1) Whether there is any valid agreement between the parties to refer the disputes arising between them to arbitration?

(2) Whether Shri Walaya Ram was competent to enter into the said agreement on behalf of the plaintiff-firm?

(3) Has the Superintending Engineer, Ambala Circle, debarred himself from acting as an arbitrator by his conduct.

(4) Relief.

It has been held by the Court on issue No. 1 that clause 25-A which related to the arbitration agreement had not been scored out as alleged by the plaintiff but was intact when the plaintiff submitted the tender and had been scored out after the tender had been accepted and was, therefore, binding on the parties. On issue No. 2 it was found that Walaya Ram had the authority to enter into an agreement relating to arbitration on behalf of the plaintiff-firm. On issue No. 3, however, the Court considered that the disputes had to be decided by Shri Bikramjeet, the Superintending Engineer, who had already expressed his opinion on the merits of the case in a report submitted to the Government. In these circumstances, the Court considered that the plaintiff could have a legitimate impression that Shri Bikramjeet might not be able to form an independent view of the controversy between the parties. following the observations made in *The Union of India and others* v. *Messrs Narayan Cold* Storage Ltd., Amritsar (1), and Bristol Corporation v. *John Aird and Co.* (2), the learned Judge decided that the dispute between the parties should not be referred to the arbitrator but should be decided by the Court itself. The State is dissatisfied with the order and has come up to this Court in appeal.

(1) A.I.R. 1958 Punjab 24.
(2) 1913 A.C. 241.

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The Deputy Advocate-General has invited my attention to the statement contained in the Law and Practice of Building Contracts by Keating at pages 188 and 189 which is as follows:—

> "Parties to an arbitration are normally entitled to an unbiased arbitrator with no interest in the result of the proceedings. Where the architect of a contract is appointed arbitrator for that contract he is interested to the extent that he is employed and paid by one of the parties to the dispute, and is probably further interested in that in his capacity as agent for the employer he may have given orders relating to the matter in dispute, or have already expressed a strong view on the subject, and may even 'be judge, so to speak, in his own quarrel'. Such interests have been held not to be sufficient in themselves to disqualify the architect from acting as arbitrator. It has been held that the contractor must show, if not that the architect is biased, that at least there is a probability that he would be biased. The basis of these decisions was that "the court..... ought to hold that nothing known at the time of the contract, nothing fairly to be expected from the position of the engineer when he becomes arbitrator, can be alleged as a ground why it should not keep the parties to their bargain.' "

It is contended that in such contracts the engineer or the architect is the proper person who should decide the disputes arising between the contracting parties even if he is the employee of one of the

parties. In *Ives & Barker* v. *Willans* (1), in which also the question was whether an action should be stayed or not in view of an arbitration clause by which the dispute was to be referred to the engineer Lindley, L. J., considered that such contracts were of a special nature and it had been ascertained by long experience that engineers of the highest character might be trusted, and, when a contractor entered into such a stringent provision, he knew the man he had to deal with. It was further laid down that in order to make out that such an arbitrator was not a proper person to decide the dispute, the sub-contractors must prove a great deal more than that the engineers had formed an opinion already on the subject of the dispute; they must attack the character of the engineers to such an extent, and in such a manner, as to show that the engineers would probably be guilty of some misconduct in the matter of arbitration and that they would not act fairly. Lopes, L. J., dealing with the attacks which had been made against the engineers as arbitrators in that case, observed that the parties knew perfectly well, when they consented to those engineers acting as arbitrators, that difficulties of the nature suggested might arise. They perfectly well knew that these engineers were the persons who were to determine the quality and character of the materials in question; they knew that these engineers had to do that as well as to act as arbitrators. Knowing that, they agreed that they would accept the arbitrators and they could not turn round and say that, because their judgment was erroneous, therefore, they were not bound to accept it. They agree to be bound by the judgment of the arbitrators, however, erroneous it might be, provided it was honest, provided it was not tainted

(1) (1894) 2 Ch. D. 478.

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with fraud or with misconduct. Mr. Kaushal points out that the mere fact that an opinion has been expressed by the engineer would not be sufficient to debar him from acting as an arbitrator. In *Jackson* v. *Barry Railway Company* (1), there was an arbitration clause by which disputes had to be referred to the company's engineer. A dispute arose whether the contract required the interior of a certain embankment to be made of stone, or whether rocky marl was allowable, so that, if the contractor by the direction of the engineer used stone, he would be entitled to be paid for it as an extra. A correspondence took place between the contractor and the engineer, in which the engineer stated his view to be that the contract bound the contractor to use stone and that it was not extra. The company then referred the dispute to the arbitration of the engineer. After this reference and on the day for which the first appointment had been made the engineer wrote to the contractor a letter in which he repeated his former view. An action was brought to restrain the company from proceeding with the arbitration by the engineer. Kekewich, J., held that the correspondence showed that the engineer had finally made up his mind on the point and was, therefore, disqualified to act as an arbitrator, and granted an injunction. The Court of Appeal, however, held that considering the position of the engineer who, as engineer of the company, must necessarily have already expressed an opinion on the point in dispute, his writing after the commencement of the arbitration a letter repeating the same opinion would not disqualify him from acting as arbitrator unless, on the fair construction of the letter, it appeared that he had made up his mind so as not to be open to change it upon argument. It may

(1) (1893) 1 Ch. D. 238.

be mentioned that A. L. Smith, L. J., expressed a dissenting opinion, and the following observations made by him at page 250 are noteworthy:—

> "It appears also to me that when a dispute arose and Mr. Barry became the arbitrator, no matter how difficult it might be for him to lay aside his preconceived opinions, expressed as they properly may have been by him as engineer to the contractor, he was in duty bound as far as possible to do so and to keep an open mind as to the matters upon which he was called upon to adjudicate, and if it be shewn that he has failed in this duty, then, in my judgment, to use the words of Sir George Jessel, he is not fit or competent to adjudicate upon the case."

Lindley, L.J., however. considered that unless an inference could be drawn from the evidence that the engineer had precluded himself by the letter from keeping his mind open and from deciding according to the evidence and according to the advice which might be given him, he should not be stopped from carrying on the arbitration, particularly because under the 19th section of the Arbitration Act, 1889, there was a method by which the contractor could, if he felt aggrieved, obtain the opinion of the Court upon the true construction of the contract. Bowen, L.J., considered that the contractor was catching at a straw and was endeavouring on the ground that the engineer had revealed a view which everyone was aware he entertained, to escape from an onerous arbitration clause which the contractor accepted as part of the consideration for his bargain. These cases were followed by Aston, A.J.C, in *Messrs*

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Mc.Kenzies, Ltd. v. *Messrs Sulleman & Co,* (1), but there is hardly any discussion of the principles which could be applicable in such cases.

The law on the subject has been fully laid by the House of Lords in *Bristol Corporation* v. *John Aird & Co.* (2). The contractor had executed works under a contract containing a provision for the reference of disputes to the engineer of other party to the contract. Upon final settlement of account there arose a bona fide dispute of a substantial character between the contractor and the engineeer involving a probable conflict of evidence between them. An application for stay of the action had been made but the Master had refused to stay the same. Scrutton, J., sitting in chambers and the Court of Appeal had also affirmed his order. When the matter came before the House, Lord Atkinson made the following observations at pages 247-248:—

> "But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shewn in fact that there is any reasonable prospect that he will be so biased as to be likely not to decide fairly upon those matters, then the contractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of the land. But I think he has more than that right.

(1) A.I.R. 1933 Sind. 75.
(1) 1913 A.C. 241.

> If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of law and they are entitled to say, in answer to an application to the Court to exercise the discretion which the 4th section of the Arbitration Act vests in them, 'We are not satisfied that there is not some reason for not submitting this question to the arbitrator.' "

In that particular case Lord Atkinson applying the above principles considered that on two most important matters, namely, the filling and the excavation between the monoliths, Mr. Squire, who was the engineer, would necessarily be at once in the position of a judge and a witness. His Lordship could not imagine any position more unpleasant, position more undesirable. It was held that the discretion refusing to stay the action had been properly exercised. Lord Moulton, while laying down that the Court must consider all the circumstances of the case with a strong bias in favour of maintaining the special bargain between the parties, observed, however, that at the same time the Court had to see with vigilance that it was not driving either of the parties to a tribunal where he would not get substantial justice. Lord Moulton appears to have rested his decision largely on the discretion which had been exercised by the Courts below. At pages 259 to 260 are certain observations made by him which are particularly noteworthy in such cases and which read as follows:—

> "But in this case the way in which the disputes arose and what has happened in

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connection with them make me feel that a Court may well take the view that there is good reason why this matter should not be referred to arbitration as provided by the contract. I agree with the cases like *Walmsley* v. *While* (1), and *Joplin* v. *Postlethwaite* (2), which lay down that this is a matter of a judicial discretion for the Court. I find in this case that the Court of Appeal after a very long hearing has unanimously come to the conclusion that there are reasons why this claim should not be referred to arbitration, and the able arguments which your Lordships have heard have not convinced me that the Court of Appeal was wrong in coming to that conclusion; and, therefore, without differing from the Court of Appeal in this but mainly from a feeling that on a question of Judicial discretion one ought not lightly to allow an appeal from a Court which has not proceeded on wrong judicial lines, I have come to the conclusion that the appellants have not made out their case, and I concur in the motion which is about to be put to your Lordships."

As stated by Russell on Arbitration at page 111 it may be presumed that the Court will not lightly interfere with an appointment deliberately agreed upon by the parties, and the provision common in building contracts, by which certain possible disputes between building contractor and building owner are determined by the architect or engineer, will still be enforceable.

(1) (1892) 67 L.T. 433.
(2) (1889) 61 L.T. 629.

But while considering the question of stay of an action owing to the existence of an arbitration clause, the principles that have been laid down by the House of Lords in *Hickman & Co.* v. *Roberts and others* (1), must be followed. In the present case it is common ground that the entire evidence which the plaintiff-firm had to produce has been produced with regard to their claim before the engineer. It would be proper at this stage to notice the actual nature of the claim and the allegations on which it is founded. The contract is alleged to be for construction of a high level bridge on the basis of plans, layouts and alignments which had been prepared on behalf of the defendant. The plaintiff's case is that the preparatory work had started and a good deal of money was expended on labour, purchase of materials etc. According to the terms of the contract it had been agreed that the defendant shall provide a certified and signed copy of the layouts, alignments, plans etc., and that demarcation of the site had also to be made. The plaintiff requested the defendant for demarcation as also for the layouts, plans etc., which were necessary for the execution of the work, but the defendant inordinately and without justification delayed in furnishing the plaintiff with the necessary demarcation and the details. Later on, the defendant shifted the previous layouts, designs and plans and suggested another site without any other change to which also the plaintiff agreed as he had invested lot of money on labour, purchase of materials etc. The plaintiff started the work of digging of the wells, manufacture of steel well curbs, bending, threading and cutting of steel bars etc. etc., and purchased materials of the value of Rs. 36,000 odd for the execution of the work. The plaintiff had spent Rs. 78,000 odd in all on the preparatory work when

(1) 1913 A.C. 229.

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the defendant, through its officers, desired to substitute an absolutely new contract in place of the one originally tendered for. This, according to the plaintiff, the defendant was not entitled to do. The plaintiff claims the damages sustained by him for the aforesaid reasons.

Shri Bikramjeet who appeared as a witness on behalf of the Punjab State admitted that he did write to the plaintiff to produce all evidence relating to the case before him and that account-books and other evidence were produced. After examining that evidence he did make certain recommendations to the Government relating to the matter. According to the learned trial Judge, it is evident that the report was not favourable to the plaintiff. If it had been favourable, the firm might have compromised the matter outside the Court. It appears from the circumstances of the present case that the report could not have been favourable to the plaintiff as in spite of an effort having been made for its production by the plaintiff it was never produced. With this background it is not difficult to see the force in the argument of Mr. Faqir Chand Mital who appears on behalf of the plaintiff-firm that the Superintending Engineer has already made up his mind and that there is nothing left further for his decision and, in fact, he has already given a decision, and the award which he will now give, if the matter is referred to him, will simply embody the decision expressed in his report. It is contended that the position may have been different if the Engineer had formed a certain opinion with regard to the works or materials as had been done in some of the English cases. That may not have presented any hurdle in the way of his acting fairly and without bias, but in the present case it will be very difficult, according to Mr. Mital, to accept that on the same

evidence the Engineer will change his opinion and give a different award. In any case, it is suggested that the Engineer is likely to be biased and it will not be possible for him to decide fairly upon the matters which arise for decision in the present case and which are of a very different nature from those which arose in the earlier English cases, namely, *Ives and Barber* v. *Willians* (1), and *Jackson* v. *Barry Railway Company* (2). There may or may not be much substance in the contention that Shri Bikramjeet, the Superintending Engineer, would, in any way, be biased; but it seems to me that it will not be right to put him in such a position that it would not be fitting or decorous or proper for him to act as an arbitrator in the words of Lord Atkinson. There is bound to be a good deal of embarrassment for the Engineer if he wishes to change his report now as he has already made a final report to the Government. I consider, therefore, that in the present case the discretion which has been exercised by the Court below should not be interfered with as it has been properly exercised after a due consideration of all the circumstances. Lord Moulton in *Bristol Corporation case* (3), laid a good deal of stress, as has been stated before, on this aspect of the matter, and to use his Lordship's words "on a question of judicial discretion one ought not lightly to allow an appeal from a Court which has not proceeded on wrong judicial lines". I am also fortified in the view which I am taking in this case by certain recent decisions of this Court. In *The Union of India and others* v. *Messrs Narayan Cold Storage Ltd., Amritsar* (4), Tek Chand, J., considered that any order to stay legal proceedings in a Court of law would not be granted if it could be shown that

(1) (1894) 2 Ch. D. 478.
(2) (1893) 1 Ch. D. 238.
(3) 1913 A.C. 241
(4) A.I.R. 1958 Punjab 24.

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there was good ground for apprehending that the arbitrator was not likely to act fairly in the matter for that it was for some reason improper that he should arbitrate on the dispute. On the question of discretion also it has been observed by him that where the same has been exercised by the trial Court in a manner which cannot be considered to be arbitrary, the appellate Court will not interfere. In *Punjab State* v. *Lakshmi Narain Gupta* (1), decided by G. L, Chopra, J., on 15th of May, 1957, there was a similar clause of reference to the arbitration of the Superintending Engineer. The Court below had declined to stay the suit. The Superintending Engineer had visited the works and had pointed out a number of defects and issued directions to be complied with by the contractor. He had made certain observations in his inspection-note relating to the quality of the mud plaster and the rounding of the corners which were adverse to the contractor; The learned Judge considered that the inspection-note left no doubt that the Superintending Engineer had already expressed his opinion in clear terms in respect of the main terms between the parties. The principles of law laid down by Lord Atkinson in *Bristol Corporation* v. *John Aird and Co.* (1), were applied. In *Dwarkadas Co.* v, *Keshardeo Budna* (3), Das, J., as he then was, has examined a similar point at length and has laid down that the principle of sanctity of an arbitration agreement is subject to the discretion of the Court, for there must be read in every such agreement an implied term or condition that it will be enforceable only if the Court, having due regard to all the surrounding circumstances, thinks fit, in its discretion to enforce. A party to

(1) F.A.O. 146 of 1955.
(2) 1913 A.C. 241.
(3) I.L.R. (1948) 1 Cal. 190.

an arbitration agreement may be released from his bargain if he can show that the selected arbitrator has not kept an open mind but has made up his mind against the party by any act or conduct which is more than a passing expression of opinion or there is a probability that he would in fact be biased or that there is sufficient reason to suspect that he will act unfairly or that he has been guilty of continued unreasonable conduct. After considering the English case law it was observed as follows at page 206:—

> "The point to be noted is that while the decisions of the Court of appeal relating to arbitration clauses in building-contracts gave forceful and emphatic expression to the principle of sanctity of contract the later decisions of the House of Lords in similar cases laid more emphasis on the discretion of the Court. In those decisions of the House of Lords I can clearly discern a change of the angle of vision and a new attitude and outlook towards the question. The two House of Lords cases I have mentioned which placed greater emphasis on the discretion of the Court appear to me to show that the Court was receding from the extreme position taken up by the Court of appeal in respect of arbitration clauses in building contracts."

Even if some difficulty was created by the nature of observations contained in the earlier English decisions in the matter of deciding whether stay should be granted or refused in such cases, the

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position now is clear in veiw of the observations and the principles contained in the Calcutta case.

Moreover, there are other considerations also which impel me to hold that this is not a fit case in which the suit ought to be stayed under section 34 of the Arbitration Act. One of the matters in controversy between the parties is whether clauses 12 relating to "alterations in specifiications and designs"), 13 (relating to "no compensation for alteration in, or restriction of, work to be carried out") and 25 (relating to "claims for payment of an extraordinary nature to be referred to Government for decision") were scored out along with clause 25-A, which related to arbitration, before the tender was submitted. While discussing this matter, the Court has made certain general observations with regard to their not having been scored out as alleged by the plaintiff. The issue under which this matter has been discussed covered only clause 25-A and, therefore, the observations with regard to the other clauses cannot be considered to be final at this stage. The Court will be in a better position than the arbitrator to decide whether clauses 12, 13 and 25 were so scored out or not. Furthermore, the allegations on which the suit is founded are such that complicated questions of law and fact are bound to arise which can be appropriately decided by a Court only.

For the reasons given above, the appeal fails and is dismissed. In the circumstances of the case, however, I leave the parties to bear their own costs in this Court. The parties are directed to appear before the Court below on 24th November, 1958, for further proceedings.

B. R. T.