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EVEREST CO-OWNERS, A.B.C.

v.

M.P. STATE WARE HOUSING CORPORATION AND ANOTHER

OCTOBER 13, 1992

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[S. RANGANATHAN AND B.P. JEEVAN REDDY, JJ.]

*Arbitration Act, 1940:*

C Sections 8, 20, 31 and 33—Arbitration clause in the agreement—Sole Arbitrator to be appointed by both parties—One party making application before Court—Absence of formal prayer—Whether application valid under Section 20—Could appointing Arbitrator—Validity of—Rejection of application for stay of Arbitration proceedings—Interference under the Special Leave jurisdiction.

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*Constitution of India, 1950:*

Article 136—Special Leave jurisdiction—Arbitration proceedings—Stay application—Refusal of—Interference with.

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The appellant constructed some godowns which were let out on rent to Food Corporation of India for five years. During the said period of five years, the Respondent took the premises on rent from the Food Corporation of India without notice to, or consent of the appellant. Subsequently, the Respondent Corporation expressed its willingness to enter into a lease deed with the appellant, and there was a joint inspection of the godowns by the appellant, and some senior officials from both the Food Corporation and the Respondent Corporation. This Committee in its report listed out certain damages to the premises which were to be repaired and some missing parts to be replaced by the Respondent. Thereafter the Respondent entered into an agreement of lease with the appellant. This agreement contained an arbitration clause providing for appointment of sole Arbitrator by both the parties.

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Clause 2 of the lease agreement provided among other things, that in case of any damage, the lessee would be liable for the cost of repair to the damage caused during the period of occupancy by the lessees. The extent of damage was to be assessed by the lessors on the basis of the prevailing

market rates in respect of material, labour and other contingency charges. A

The term of the lease having come to an end, a joint inspection of the premises was carried out by the appellant and some officials of the Respondent-Corporation, and this Committee in its report enumerated a number of items of damages to the premises. The appellant wrote to the Respondent calling upon it to pay damages to the tune of Rs.4,76,984.55 and followed it up with a lawyer's notice. The respondent did not reply. B

Thereafter, the appellant made an application under Ss.8 and 20 of the Arbitration Act, before the District Judge praying for appointment of an Arbitrator. After following the procedure, the District Judge appointed a retired IAS Officer as Arbitrator. The respondent filed an application under S.33 of the Act raising an objection that the lease deed was inadmissible in evidence as it has not been registered under the Registration Act, which is still pending. The respondent also applied for stay of arbitration proceedings and the same was rejected. C

In the meantime, the arbitrator made an award. The respondent made an application for setting aside the award and the application is pending before the District Judge. D

The Respondent preferred two appeals before the High Court, one against the appointment of Arbitrator and another against the refusal to stay the Arbitration proceedings. The High Court set aside the appointment of the Arbitrator. Consequently it dismissed the other appeal as infructuous. E

Being aggrieved by the High Court's order, the appellant preferred to the present appeals. F

Allowing the appeals, this Court,

HELD: 1. The lease agreement itself was not denied and it is clear that it provides for the appointment of arbitrator and this was obviously so whether both parties agreed or not. The circumstances also make it clear that there were disputes between the parties regarding the extent of damages to the premises during the tenancy by the respondent. Though there was no formal prayer requesting that the arbitration agreement be filed, there was clearly a valid application under section 20. [1954 A-B] H

**A** 2.1. The High Court erred in setting aside the order of the District Judge appointing an Arbitrator. The application filed by the appellant before the High Court was under section 8 read with section 20 of the Arbitration act. In other words, there was a prayer in terms of section 20 of the Act. The appellant's averment in his application that the respondent had taken from it three godowns on rent for a period of five years on the basis of the written agreement dated 12.1.1983 between the parties was admitted by the respondent. In its reply, the respondent also stated that whatever agreement there was between the parties that was all in writing and there was no other verbal or oral understanding. The respondent did not allege either that the agreement was not binding between the parties or that the document ought to have been registered and was inadmissible without such registration. The joint inspection report on which the appellant relied was also no denied. The various averments in the reply clearly show that there was a factual dispute between the parties regarding the extent of damages to the godowns and the extent of liability of the respondent in this regard. All the facts necessary to warrant the appointment of an Arbitrator under section 20 of the Arbitration Act clearly emerged out of the averments in the application and the reply. [952 E-F-G-H; 953 A-D]

**E** 2.2. So far as the actual appointment of the arbitrator is concerned, the agreement envisages the appointment of the arbitrator by both parties. Indeed, this position was obviously accepted by the respondent. Despite opportunities given, the respondent did not suggest any names nor did it appear and put forward any specific objection to the name proposed by the appellant. Having regard to the circumstances, the District Judge acted rightly in appointing an arbitrator to adjudicate on the dispute between the two parties. [954 C-D]

**G** 3. The application under section 31(3) for stay of the proceedings before the Arbitrator has been dismissed because the respondent had not raised the objection during the pendency of the section 20 application and because the Court interpreted its own record dated 8.4.1991 as showing that both counsel had agreed to the appointment of an arbitrator by the Court. The arbitrator had been directed to file the award by 11.11.1991 and already, two months had elapsed. In the circumstances, the Court saw no reason to grant stay of the arbitration proceedings. The application under section 33 itself has been kept pending as the parties asked the District Judge to decide only the question of stay. Hence the order dated 27.9.91

refusing to stay the proceedings cannot be interfered with under Article 136 of the Constitution of India. The High Court did not interfere with the order because the question of stay became academic in view of its decision setting aside the appointment of the Arbitrator. Eventhough the appointment of the Arbitrator is now declared valid, there is no reason to interfere with the Order dated 27.9.91 refusing to grant stay of the arbitration proceedings. [954 F-H; 955-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4199-4200 of 1992.

From the Judgment and Order dated 13.1.1992 of the Madhya Pradesh High Court in M.A. Nos. 481 and 482 of 1991.

Appellant appeared in person.

A. Choudhary, Shahsi Thakur and Abhijat P. Medh for the Respondents.

The Judgment of the Court was delivered by

RANGANATHAN, J. Special leave is granted and the appeals are disposed of after hearing both counsel.

The appeal has been preferred from an order of a learned Single Judge of the Madhya Pradesh High Court dated 13.1.1992 by which the learned Judge set aside an order passed by the District Judge appointing one Shri R.B.L. Shrivastava to arbitrate on the disputes between the appellant and the M.P. State Ware Housing Corporation. Consequent on this order, the learned Judge dismissed another appeal filed before it (Miscellaneous Appeal No.482 of 1991) as infructuous.

The facts leading the present appeal are as follows:-

The appellant Gopal Saran Singh claims to represent "Everest Co-owners, A.B.C." owning certain godowns situated in Satna. According to the appellant, these godowns were constructed in 1977 for, and let out on rent to, the Food Corporation for a period of five years. Again according to the appellant, even during the period of five years, the M.P. State Ware Housing Corporation (hereinafter referred to as 'the Respondent') took the premises on rent from the Food Corporation of India without notice

A to, or consent of, the appellant. Subsequently, it is said, the respondent expressed its willingness to enter into a lease deed with the appellant in respect of the godowns. Before taking over the godowns from the appellant and the execution of a lease agreement, the appellant alleges, there was a joint inspection of the godowns by the appellant, senior officers of the Food Corporation of India and two senior officials of the respondent. The report of this "Committee" listed certain damages to the premises and referred to a decision "that the above damages are to be repaired and missing parts are to be replaced by the respondent" in consultation with and in concurrence with the owners of the godowns. The respondents thereafter entered into an agreement of lease dated 12.1.1983 with the appellant. This agreement contained an arbitration clause under which "all disputes and differences arising out of or in any way touching or concerning the lease agreement shall be referred to sole arbitration of any person appointed by both the parties." Clause 2 of the lease agreement also provided that the lessee was to maintain the godown and to keep the godown fit in all respects during the term of the tenancy and also kept it insured against fire etc. and in case of any damages, it would be liable for the cost of repair to the damage caused during the period of occupancy by the lessee. The extent of damages was to be assessed by the lessors on the basis of prevailing market rates in respect of material, labour and other contingency charges. This agreement of lease was signed by the Managing Director of the respondent and the appellant.

On 22.3.1988, the term of the lease came to an end. According to the appellant, in March, 1988, a joint inspection of the premises was carried out by the appellant along with three officials of the respondent-Corporation. The report of this "committee" enumerates a number of items of damage to the premises. On 13.9.1988, the appellant wrote to the respondent calling upon it to pay the damages caused to the godown by the respondent. On 28.12.1989, the appellant sent a lawyer's notice claiming damages to the tune of Rs.4,76,984.55p. as per details set out in the earlier letter and requiring that, in case the assessment done by the petitioner was disputed, the dispute should be referred to the arbitrator appointed by both the parties as per the agreement of lease. The respondent did not reply to either of the notices given by the appellant.

On 1.3.1990, the appellant made an application before the learned District Judge, Satna purporting to be under sections 8 and 20 of the

Arbitration Act praying that the Court be pleased to appoint an arbitrator as per Arbitration Clause and refer the dispute between the parties to the said arbitrator. The respondent filed a reply dated 6.11.1990. Thereafter, the application came up for hearing before the learned District Judge on several occasions. According to the appellant, the learned District Judge recorded the following minutes in the order-sheet on 8.4.1991:-

"The applicant by Shri C.B. Sharma, Advocate. The non-applicant by Shri M.D. Sharma, Advocate. The advocates for parties have agreed that the agreement be filed as applicant regarding the appointment of Arbitrator. Now according to consent of parties the Arbitrator is to be appointed. The applicant's Advocate Shri C.B. Sharma has proposed two names. The list of these was given to M.D. Sharma, Advocate. Shri M.D. Sharma suggested that he would give his consent about the said Arbitrators after negotiating with his party or would propose the name of his own Arbitrator. For this proceeding-case put-up on 7.5.1991."

On 7.5.1991, the proceedings got adjourned as the Judge was on leave. On 11.5.1991, the minute reads:-

"Parties want time for submitting name for Arbitrator. Time granted. Case fixed for submitting the name of Arbitrator."

On 20.6.1991, minute reads:-

"Today name of Shri R.B. Lal Shrivastava, I.A.S. (Retired) was proposed by 'Fanch' Shri C.B. Sharma (Arbitration). Now non-applicant either to accept the above name or propose another name within 15 days."

On the next date of hearing viz. 5.7.1991, the appellant was represented by counsel but there was no counsel or other representative on behalf of the respondent. No name of any Arbitrator had been proposed by the respondent either. In the circumstances, the learned District Judge appointed Shri R.B. Lal Shrivastava, I.A.S. (Retired), as Arbitrator and directed him to submit his award after hearing the parties and examining the documents

A. by 11.11.1991.

B On 6.7.1991, the respondent filed an application under section 33 of the Arbitration Act. In this application, the respondent put forward an objection that the lease deed dated 12.1.1983 was inadmissible in evidence as it had not been registered under the Registration Act. The respondent also applied for stay of the arbitration proceedings. The District Judge rejected the stay application on 27.9.1991 but the application under section 33 remains pending. Eventually, the Arbitrator made an award dated 1.11.1991. The respondent filed an application for setting aside the award which is also pending before the learned District Judge.

C The respondent preferred two appeals before the High Court. The first was an appeal against the order of the learned District Judge dated 5.7.1991 appointing the Arbitrator (Miscellaneous Appeal No.481 of 1991). The other was an appeal against the order dated 27.9.1991 refusing to stay the proceedings before the Arbitrator notwithstanding the pendency of the application under section 33 of the Arbitration Act. These two appeals were disposed of by the High Court on 13.1.1992 and it is from this common order that the present appeals have been filed by the appellant.

E We have heard the appellant who appeared in person as well as counsel for the respondent. We are of opinion that the High Court erred in setting aside the order of the District Judge appointing Mr. Shrivastava as an Arbitrator. The application filed by the applicant before the Court was under section 8 read with section 20 of the Arbitration Act. In other words, there was a prayer in terms of section 20 of the Act. The appellant had mentioned in his application that there was an arbitration clause in the agreement between the parties; that disputes in respect of the contract between the parties had arisen inasmuch as the appellant claimed damages to the tune of Rs.4.76 lakhs which was not accepted by the respondent; that the respondent had not also taken any steps to appoint an arbitrator in terms of the arbitration clause and that, in the circumstances, the court should be pleased to appoint an arbitrator on the basis of the agreement and refer the dispute between the appellant and the respondent to the arbitrator for making an award. The appellant's averment in paragraph 1 of his application that the respondent had taken from the applicant three godowns on rent for a period of five years on the basis of the written agreement between the parties dated 12.1.1983 which was Annexure 'A' to

the application was admitted by the respondent. In paragraph 2 of its reply, the respondent also stated that whatever agreement there was between the parties that was all in writing and there was no other verbal or oral understanding. The respondent did not allege either that the agreement was not binding between the parties or that the document ought to have been registered and was inadmissible without such registration. So far as the claim for damages is concerned, the joint inspection report on which the appellant relied was not denied; it was only stated that the respondent's officials had signed the agreement under "local influence". Though there was an allegation that the respondent had paid a sum of Rs. 1,07,562.96 to the appellant, the averment was that this was an amount paid by way of enhanced rent under pressure by the appellant. In fact, the various averments in the reply clearly show that there was a factual dispute between the parties regarding the extent of damages to the godowns and the extent of liability of the respondent in this regard. In our opinion, all the facts necessary to warrant the appointment of an Arbitrator under Section 20 of the Arbitration Act clearly emerged out of the averments in the application and the reply.

The course of the proceedings before the Court also reinforce this conclusion. On behalf of the respondent it is submitted that the appellant has furnished a wrong translation of the note recorded by the District Judge on 8.4.1991 which was in Hindi, the correct translation of which should, it is said, read as follows:-

"The applicant through Shri C.B. Sharma, Advocate, the non-applicant through Shri M.D. Sharma, Advocate, Arguments of Advocates of both sides heard *According to the applicant*, the Advocates for both parties accept that in agreement form there is provision for appointment of arbitrators. The counsel for the petitioner, Shri C.B. Sharma proposed two names. The list given to M.D. Sharma who expressed that he will give his consent after establishing contacts with his client or will propose names from his side. For this purpose the case may be put-up on 7.5.91."

In our opinion even this, assuming it to be the correct translation of the proceedings on that day, does not advance the case of the respondent. It

- A** will be seen that there is no mention in this note of any objection by counsel for the respondent that the agreement was inadmissible. The agreement itself was not denied and it is clear that it provides for the appointment of arbitrators and this was obviously so whether both parties agreed or not. The circumstances also make it clear that there were disputes between the parties regarding the extent of damages to the premises during the tenancy by the respondent. Though there was no formal prayer, requesting that the arbitration agreement be filed, there was clearly a valid application under Section 20.
- B**

- C** So far as the actual appointment of the arbitrator is concerned, the agreement envisages the appointment of the arbitrator by both parties. Indeed, this position was obviously accepted by the respondent. There is nothing to indicate that, on 8.4.1991, the respondent objected to any reference at all to arbitration. Its counsel only took time to suggest names on his part. Despite opportunities given, the respondent did not to suggest any names nor did it appear and put forward and specific objection to the name proposed by the appellant. Having regard to the circumstances, the District Judge acted rightly in appointing Shri R.B.L. Shrivastava as arbitrator to adjudicate on the disputes between the two parties.
- D**

- E** Counsel for the respondent also relied upon the fact that an application had been made under section 33 challenging the existence of the arbitration agreement. This application was filed on 6.7.1991, that is, one day after the appointment of the arbitrator by the District Judge. Another application also appears to have been presented by the respondent on 23.9.1991 under section 31(3) praying for the stay of the proceedings before the Arbitrator. The application under section 31(3) has been dismissed because the respondent had not raised the objection during the pendency of the section 20 application and because the Court interpreted its own record dated 8.4.1991 as showing that both counsel had agreed to the appointment of an arbitrator by the Court. The arbitrator had been directed to file the award by 11.11.1991 and already, two months had elapsed. In the circumstances, the Court saw no reason to grant stay of the arbitration proceedings. The application under section 33 itself has been kept pending as the parties asked the District Judge to decide only the question of stay. We are of opinion that the order dated 27.9.91 refusing to stay the proceedings cannot be interfered with under Article 136. The High Court did not interfere with the order because the question of stay
- F**
- G**
- H**

became academic in view of its decision setting aside the appointment of the Arbitrator. But even though we have disagreed with that order and held that the appointment of the Arbitrator was valid, we see no reason to interfere with order dated 27.9.91 refusing to grant stay of the arbitration proceedings in the circumstances set out above. A

For the reasons stated above we are of opinion that these appeals will have to be allowed. The order of appointment of the arbitrator by the District Judge is upheld. The order refusing to stay the arbitration proceedings is also upheld particularly in view of the fact that the arbitrator has since made his award and the application for stay has now become infructuous. Both appeals are therefore allowed. There will, however, be no order as to costs. B C

G.N.

Appeals allowed.