THE STATE OF BIHAR

*v.*

M/s. KARAM CHAND THAPAR & BROTHERS LTD.

1961

*April 7.*

(S. K. DAS, J. L. KAPUR, M. HIDAYATULLAH, J. C. SHAH and T. L. VENKATARAMA AIYAR, JJ.)

*Stamp—Award—Arbitrator sending copies of the award to parties and to the court, duly signed—Validation of unstamped award—Decree passed thereon—Validity—Indian Stamp Act, 1899 (2 of 1899), s. 35.*

*Arbitration—Agreement to refer to arbitration—Execution on behalf of Governor by person specifically authorized—Requirements of authorization—Government of India Act, 1935 (25 & 26 Geo. 5 Ch. 42), s. 175(3).*

A dispute between the respondent company and the Government of Bihar over the bills for the amount payable to the company in respect of the construction works carried out by it for the Government was referred to arbitration. The agreement to refer to arbitration was executed on behalf of the Governor by L, an executive engineer, who had been specifically authorised to do so by a Secretary to the Government. The arbitrator made his award and sent copies thereof to the parties. The respondent applied to the Court under the provisions of the Arbitration Act, 1940, for a decree in terms of the award. The State filed objections thereto and the matter was registered as a suit. While the suit was pending the arbitrator sent to the court a copy of the award duly signed by him for being filed as provided in the Act, and on the receipt thereof the respondent had it validated on payment of the requisite stamp duty under s. 35 of the Indian Stamp Act, 1899. The appellant, the State of Bihar, contended that no decree could be passed on the basis of the award on the grounds (1) that the agreement for reference to arbitration did not comply with the requirements of s. 175(3) of the Government of India Act, 1935, inasmuch as it was not signed by the person authorised to do so under the notification issued by the Government of Bihar on April 1, 1937, in exercise of the powers conferred by s. 175(3), and (2) that the instrument before the court was a certified copy and that under s. 35 of the Indian Stamp Act, 1899, a copy could not be validated or acted upon.

*Held*, that s. 175(3) of the Government of India Act, 1935, does not prescribe any particular mode in which authority must be conferred and that where authorisation is conferred *ad hoc* on any person, the requirements of the section must be held to be satisfied.

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*Held*, further, that the award sent by the arbitrator to the court was the original and not a copy of the award and by applying the provisions of s. 35 of the Indian Stamp Act, 1899, it was effectively validated.

*The Rajah of Bobbili* v. *Inuganti China Sitaramasami Garu*, (1899) L.R. 26 I.A. 262, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 209 of 1959.

Appeal from the judgment and order dated October 5, 1956, of the Patna High Court in Miscellaneous Appeal No. 367 of 1953.

*L. K. Jha* and *R. C. Prasad*, for the Appellant.

*M. C. Setalvad, Attorney-General for India, N. De* and *P. K. Mukherjee*, for the respondents.

1961. April 7. The Judgment of the Court was delivered by

*Venkatarama Aiyar J.*

VENKATARAMA AIYAR, J.—This is an appeal against the Judgment of the High Court of Patna in an appeal under the Arbitration Act, 1940. The appellant is the State of Bihar, and the respondents are a company registered under the Indian Companies Act, doing business as building contractors. They entered into three contracts for the construction of aerodrome, hangarettes, buildings, stores and other works at Ranchi, the first of them being contract No. 21 of 1942 dated November 5, 1942, and the other two being contracts Nos. 6 and 8 dated April 5, 1943. After the above works were completed, disputes arose between the parties over the bills and eventually by an agreement dated February 6, 1948, they were referred to the arbitration of one Col. A. W. S. Smith. The arbitrator made his award on June 4, 1948, and sent a copy thereof to the parties. The respondents thereupon filed a petition under ss. 17 and 20 of the Indian Arbitration Act, 1940, for a decree in terms of the award. The appellant filed objections thereto, and the petition was then registered as Title Suit No. 53 of 1951. While this suit was pending, the arbitrator who had meantime left for Hong Kong sent to the court of the Additional Subordinate Judge of

Ranchi before whom the suit was pending a copy of the award duly signed by him, for being filed as provided in the Act. Notices were issued by the court under s. 14(2) of the Act, and, in answer thereto, the appellant filed an application to set aside the award on various grounds. To this, the respondents filed their reply statement. In view of this application, the respondents did not press their petition under ss. 17 and 20 of the Arbitration Act, which was in consequence dismissed, and the proceedings which commenced with the receipt of the award from the arbitrator were continued as Title Suit No. 53 of 1951. After an elaborate trial the Additional Subordinate Judge, Ranchi, passed a decree in terms of the award except as to a part which he held to be in excess of the claim. The appellant took the matter in appeal to the High Court of Patna which confirmed the decree of the Subordinate Judge but granted a certificate under Arts. 132 and 133(1) of the Constitution, and hence this appeal.

Though the controversy between the parties ranged in the courts below over a wide area, before us, it was restricted to two questions—whether there was a valid agreement of reference to arbitration binding on the Government and whether a decree could be passed on the unstamped copy of the award filed in the court. On the first question, the appellant contends that the agreement for reference to arbitration does not comply with the requirements of s. 175(3) of the Government of India Act, 1935, which was the Constitutional provision in force at the relevant date, and it is therefore void, that the award passed in proceedings founded thereon is a nullity and that no decree should be passed in terms thereof. Section 175(3) is as follows:—

> "Subject to the provisions of this Act with respect to the Federal Railway authority, all contracts made in the exercise of the executive authority of the Federation or of a province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property

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made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise."

Under this section, a contract entered into by the Governor of a Province must satisfy three conditions. It must be expressed to be made by the Governor; it must be executed; and the execution should be by such persons and in such manner as the Governor might direct or authorise. We have now to examine whether the agreement to refer to arbitration dated February 6, 1948, satisfies the above conditions. It is expressed to be made between the Governor of Bihar and the respondents. It is also a formal document executed by one Y. K. Lall, Executive Engineer, Ranchi Division, and by the respondents. So the only point that remains for consideration is whether the Executive Engineer was a person who was directed or authorised by the Governor to execute the agreement in question. The appellant contends that he was not, and relies in support of his contention on a notification dated April 1, 1937, issued by the Government of Bihar. That notification, in so far as it is material, is as follows:

"In exercise of the powers conferred by sub-section (3) of section 175 of the Government of India Act, 1935, the Governor of Bihar is pleased, in supersession of all existing orders, to direct that the undermentioned classes of deeds, contracts and other instrument may be executed on his behalf as follows:—

A. In the case of the Public Works Department (subject to any limit fixed by Departmental orders).

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| ..... | ..... |
| 2. All instruments relating to the execution of works of all kinds connected with buildings, bridges, roads, canals, tanks, reservoirs, docks and harbours and embankments, and also instruments relating | By Secretaries to Government, Chief Engineers, Superintending Engineers, Divisional Officers, Sub-divisional Officers, Assistant or Assistant Executive |

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| to the construction of water works, sewage works, the erection of machinery, and the working of coal mines. | Engineers, and the Electric Inspector. |
| ..... | ..... |
| 12. All deeds and instruments relating to any matters other than those specified in heads 1 to 11. | By Secretaries and Joint Secretaries to Government". |

There was a discussion in the courts below as to whether the present agreement fell within item 2 or item 12. If the agreement could be held to be an instrument relating to the execution of works, it would fall within item 2, and the Executive Engineer would be a person authorised under this notification to enter into this contract, but if it does not fall within that item, it must fall within entry 12, in which case he would not be competent to execute the agreement. Both the courts below have held that the agreement to refer to arbitration was not one relating to execution of works as that had been completed and the dispute related only to payment of the bills, and that further the essential feature of an arbitration agreement was the constitution of a private Tribunal and it could not therefore be brought within item 2 and that accordingly it fell within item 12. But the learned Judges of the High Court were also of the opinion that Y. K. Lall, the Executive Engineer had in fact been specifically authorised to execute the arbitration agreement, and that that was sufficient for the purpose of s. 175(3). The appellant impugns the correctness of this conclusion and contends that it is not warranted by the record. It becomes, therefore, necessary to refer in some detail to the correspondence bearing on this point. On July 26, 1947, Mr. Murrel, Secretary to the Government, wrote to Col. Smith as follows:

"I am directed to say that the Government of Bihar propose to appoint you as Arbitrator for the settlement of a claim put forth by Messrs. Karam Chand Thapar and Brothers Limited in connection with the construction of the Hinoo Aerodrome at Ranchi—Job 108.....If you agree to undertake the

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work,.....the necessary forms of acceptance of appointment of Arbitrator etc. may please be forwarded to this Department for completion by the Government of Bihar and by the Contractor."

To this, Col. Smith sent a reply agreeing to act as arbitrator. In that letter he also suggested that the contract between the parties might be suitably amended so as to permit arbitration. This is significant, because under cl. 23 of the contract, all disputes between the parties had to be referred to the Superintending Engineer whose decision was to be final, and if that had been amended as suggested, the arbitration clause would have become part of the original contract and there would have been no occasion for the present contention. Referring to the above suggestion for amending the agreement, the Secretary, Mr. Murrel, wrote on September 5, 1947, to Col. Smith that the opinion of the Legal Remembrancer would have to be got. On January 19, 1948, Col. Smith wrote to the Secretary that he was ready to take up his duties as arbitrator and again desired that the contract should be amended so as to provide for arbitration. On January 27, 1948, the Secretary to the Government informed Col. Smith that opinion had been received from the Legal Remembrancer that an agreement for arbitration should be executed in accordance with the provisions of the Arbitration Act and that a "draft agreement (copy enclosed) has been drawn up accordingly and steps are being taken to execute it as quickly as possible". On the same date, the Executive Engineer wrote to the respondents as follows:—

> "It has since been decided by Government to determine your claims in connection with the above through arbitration conducted in accordance with the provisions of the Arbitration Act I of 1940. You are therefore requested to please attend the Divisional Office immediately to execute necessary agreement for the purpose."

Pursuant to this letter, the respondents joined in the execution of the agreement dated February 6, 1948, along with the Executive Engineer for referring the

dispute to arbitration. On February 25, 1948, the Secretary informed the arbitrator that the draft agreement had been slightly modified in consultation with the Government Pleader, and he also wrote to the Executive Engineer that certain formal corrections should be made in the agreement and signed by both the parties. And that was done.

Having carefully gone through the correspondence, we agree with the learned Judges of the High Court that the Executive Engineer had been authorised by the Governor acting through his Secretary to execute the agreement for reference to arbitration. It will be seen that it was the Secretary who from the very inception took the leading part in arranging for arbitration. He was throughout speaking in the name of and on behalf of the Government and he did so "as directed". The subject-matter of the arbitration was a claim which concerned the Government. The proposal at the earlier stages to amend cl. 23 of the original contract so as to include an arbitration shows that the intention of the parties was to treat the agreement for arbitration as part and parcel of that contract. Even after the agreement was executed, the Secretary made corrections and modifications in the agreement on the basis that it was the Government that was a party thereto. The conclusion from all this is, in our judgment, irresistible that Y. K. Lall, the Executive Engineer had been authorised to execute the agreement dated February 6, 1948.

It was suggested that the Secretary was possibly labouring under a mistaken notion that the agreement to refer to arbitration was covered by item 2 and acting under that misconception he directed Y. K. Lall to execute the agreement. Even if that were so, that would not make any difference in the position, because the Secretary undoubtedly did intend that Y. K. Lall should execute the agreement and that is all that is required under s. 175(3).

It was further argued for the appellant that there being a Government notification of a formal character,

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we should not travel outside it and find authority in a person who is not authorised thereunder. But s. 175(3) does not prescribe any particular mode in which authority must be conferred. Normally, no doubt, such conferment will be by notification in the Official Gazette, but there is nothing in the section itself to preclude authorisation being conferred *ad hoc* on any person, and when that is established, the requirements of the section must be held to be satisfied. In the result, we hold that the agreement dated February 6, 1948, was executed by a person who was authorised to do so by the Governor, and in consequence there was a valid reference to arbitration.

It is next contended that as the copy of the award in court was unstamped, no decree could have been passed thereon. The facts are that the arbitrator sent to each of the parties a copy of the award signed by him and a third copy also signed by him was sent to the court. The copy of the award which was sent to the Government would appear to have been insufficiently stamped. If that had been produced in court, it could have been validated on payment of the deficiency and penalty under s. 35 of the Indian Stamp Act, 1899. But the Government has failed to produce the same. The copy of the award which was sent to the respondents is said to have been seized by the police along with other papers and is not now available. When the third copy was received in court, the respondents paid the requisite stamp duty under s. 35 of the Stamp Act and had it validated. Now the contention of the appellant is that the instrument actually before the court is, what it purports to be, "a certified copy", and that under s. 35 of the Stamp Act there can be validation only of the original, when it is unstamped or insufficiently stamped, that the document in court which is a copy cannot be validated and "acted upon" and that in consequence no decree could be passed thereon. The law is no doubt well-settled that the copy of an instrument cannot be validated. That was held in *The Rajah of Bobbili* v. *Inuganti China Sitaramasami Garu* (1), where it was observed:

(1) (1899) L.R. 26 I.A. 262.

"The provisions of this section (section 35) which allow a document to be admitted in evidence on payment of penalty, have no application when the original document, which was unstamped or was insufficiently stamped, has not been produced; and, accordingly, secondary evidence of its contents cannot be given. To hold otherwise would be to add to the Act a provision which it does not contain. Payment of penalty will not render secondary evidence admissible, for under the stamp law penalty is leviable only on an unstamped or insufficiently stamped document actually produced in Court and that law does not provide for the levy of any penalty on lost documents".

Therefore the question is whether the award which was sent by the arbitrator to the court is the original instrument or a copy thereof. There cannot, in our opinion, be any doubt that it is the original and not a copy of the award. What the arbitrator did was to prepare the award in triplicate, sign all of them and send one each to the party and the third to the court. This would be an original instrument, and the words, "certified copy" appearing thereon are a mis-description and cannot have the effect of altering the true character of the instrument. There is no substance in this contention of the appellant either. In the result, the appeal fails and is dismissed with costs.

*Appeal dismissed.*