

(2007) 04 AHC CK 0087
In the Allahabad High Court

Agra Development Authority and Others	APPELLANT
Vs	
Sheikhein International and Another	RESPONDENT

Date of Decision : 06-04-2007

Acts Referred:

Arbitration Act, 1940 — Section 20, 39
Arbitration and Conciliation Act, 1996 — Section 21, 85
Evidence Act, 1872 — Section 115

Citation : (2007) 5 ADJ 393 : (2007) 3 ARBLR 1 : (2007) 3 AWC 2371

Hon'ble Judges : Pankaj Mithal, J; Amitava Lala, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Amitava Lala, J.—These are the appeals u/s 39 of the Arbitration Act, 1940 (hereinafter referred to as the Act, 1940") arising out of the order(s) passed by the learned IInd Additional Civil Judge (Junior Division), Agra on 19th February, 1996 in Arbitration Petition Nos. 499 and 500 of 1995-Sheikhein International v. Agra Development Authority, Agra and Ors. Since both the appeals are similarly placed and connected with each other, the same are heard analogously and decided by this solitary judgment.

2. The sole issue in the aforesaid appeals is that without giving adequate opportunity to the appellants the learned judge appointed an arbitrator, thereby the orders impugned passed by the learned court below are wholly without jurisdiction and are liable to be set aside. In this context the appellant relied upon Clause 30 of the contract, which provided an arbitration clause as follows:

30. In case any dispute or difference shall arise between the Agra Development Authority and the contractor either during the progress of the work or after its completion or after the determination, breach of the contract concerning the work or execution thereof or as to the constructions or meaning of abandonment or these presents of the tender, drawings, specifications or instructions hereinbefore referred to or as to any other matter or things arising out of or

connected with or incidental to the contract or the work to be executed or payments to be made in pursuance thereof then either party shall forthwith give to the other notice in writing of such dispute or difference and such dispute or difference shall be referred to an arbitrator to be mutually agreed upon by the contractor and the Agra Development Authority. Upon every reference the cost shall be in the discretion of the arbitrator. In the event of the parties not agreeing in the selection of an arbitrator the Vice-Chairman of Agra Development Authority shall be asked to appoint a sole arbitrator. The award of such arbitrator shall be final and binding on both parties.

3. From the order(s) impugned we find that on the basis of mutual consent the matter was fixed for hearing in the court for the purpose of appointment of arbitrator on the basis of the list of nominees given by both the parties before the court. The court was pleased to select one candidate from the panel of nominees of the respondents and appointed him as arbitrator justifying his competency about the engineering matter. We further find that the appellants herein submitted to the jurisdiction of the arbitrator and participated in the arbitration proceedings. As contended before the court, parties have agreed to adopt the arbitral proceeding under the new Act, i.e. as per Section 85 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act, 1996"). Ultimately the award was passed on 3rd August, 1996. On 18th July, 1996 this appeal has been preferred challenging the original order of appointment dated 19th February, 1996. A question arose as to how the award could have been passed when an order of stay was in operation in this appeal at the relevant point of time. According to the respondents, the order of stay, which has been passed on 26th July, 1996, was received by the arbitrator only on 5th August, 1996, i.e. after passing the award.

4. Section 39 of the old Act, i.e. Act, 1940 speaks certain criteria for the purpose of preferring an appeal, which are as follows:

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;
- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement; (vi) setting aside or refusing to set aside an award.

5. The order, which has been passed by the court below, is u/s 20 of the Act, 1940. Such Section 20 speaks about the application to file arbitration agreement in the appropriate court. Section 20(4) of the Act, 1940 is significant in respect of the dispute herein, which is as follows:

(4) Where no sufficient cause is shown, the court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the

parties, whether in the agreement or otherwise or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the court.

6. However, by way of U.P. Amendment of Section 20 of the Act, the portion "shall order the agreement to be filed and" was omitted from the original section.

7. It appears from there that where the parties cannot agree upon an arbitrator, the court can appoint. Therefore, we have to visualise the matter against the background of law. Clause 30 of the arbitration agreement speaks about appointment of an arbitrator mutually agreed upon by the contractor and Agra Development Authority. When an application u/s 20 of the Act, 1940 is made to refer the dispute to the arbitrator by the court, it will be presupposed that there was no mutuality. In any event, the court is empowered to appoint an arbitrator where the parties cannot agree. Even thereafter the court has relied upon mutuality and called for the names from the contesting parties to choose one of the nominees to be appointed as an arbitrator. He may be a nominee of one party or the other but when the court appointed him due to disagreement amongst themselves, the court cannot be said to be at fault for any reason whatsoever. Moreover, independency of such appointee cannot be questioned. This is the scope of Section 20 of the Act, 1940, by which the appointment was made. Whether one of the party had any concurrence or not, is immaterial in such a situation. Parties have submitted to the jurisdiction of the court u/s 20 of the Act, 1940 for the purpose of court's appointment, thereafter a court can appoint anybody as arbitrator irrespective of any mutuality amongst the parties. Section 20 of the Act, 1940 has a superseding effect over the contractual agreement having an arbitration clause when the parties are inclined to get the intervention of the court. Therefore, when court intervenes appointing any of the nominees of either of the parties, that order cannot be challenged taking a plea that one of the party has no concurrence in respect of the appointment. If such nomination is disputed on the plea of concurrence, it will be interference with the independent judicial system not merely an objection to the appointment. Factually, it is to be remembered that the respondents have given several nominees when the appellants have relied upon one nominee. Therefore, even no question of apprehension of biasness can be available. On the contrary, reference to the single nominee of the appellants could have contra effect which the appellants cannot ignore.

8. Mr. Shashi Kant Gupta, learned Counsel appearing for the appellants, cited judgment reported in *Union of India v. Prafulla Kumar*, (1983) 1 LLJ 304 to establish that if there is no such agreement, the court will have to appoint an arbitrator of its choice. However, in doing so it is desirable that the court should consider the feasibility of appointing an arbitrator according to the terms of the contract. Therefore, we have to construe as to whether any mutuality is there and any sufficient opportunity was given to appoint an arbitrator to the parties or not. From the impugned judgment and order it appears that in spite of several notices to settle the claim as well as for referring the dispute to the arbitrator,

the appellant authority refused to do so. Therefore, factually the appointment is within the four-corners of the Act itself. However, from the judgment, as referred on behalf of the appellants reported in Union of India (UOI) and Another Vs. Sohan Lal Puglia, we find that the Supreme Court held that the court ought to have directed the parties to appoint arbitrators in terms of the agreement. In (2004) 10 SCC 504 : 2005(1) ALR 368 (SC) Union of India and Anr. v. M.P. Gupta, the Supreme Court interfered when there was an ex parte order appointing an G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, is a citation of both the parties. In this judgment it was held that in the absence of any named arbitrator it would be open to the contracting parties to agree for an appointment of an arbitrator by agreement even after the proceedings were laid in the court u/s 20 of the Act. In the absence of any such agreement, the court gets jurisdiction and power to appoint an arbitrator. Thus, when the notice was given to the opposite party to appoint an arbitrator in terms of the contract and when no action had been taken, it must be deemed that such opposite party had neglected to act upon the contract. When no agreement was reached, even in the court between the parties, the court gets jurisdiction and power to appoint an arbitrator. Factual part of the case is totally covered by the ratio of the judgment, according to us. Factually notice was given but no arbitrator was appointed. Even thereafter the court proceeded on the basis of the mutual agreement and directed to submit the list of their nominees and ultimately found one appropriate out of several nominees on the part of the respondents but not sole nominee on the part of the appellants. Court had given reasons for such appointment. Therefore, there is no wrong.

9. From the analysis of Dhanrajamal Gobindram Vs. Shamji Kalidas and Co., it appears to this court that filing of the arbitration agreement in the court is appealable u/s 39 then it follows a ministerial act of reference to an arbitrator appointed by the parties. If the parties do not agree, the court may be required to make a decision as to who should be selected as an arbitrator, and that may be a function either judicial or procedural or even ministerial; but it is unnecessary to decide which it is. By citing Food Corporation of India and Another Vs. A. Mohammed Yunus, learned Counsel appearing for the appellants contended that any appointment in derogation of the agreement will be without jurisdiction. In such circumstances, it is always open to the aggrieved party to take the stand that the award is not legally and properly obtained. In 1961 ALJ 516 -Deoki Nandan Garg v. Jagdish Prasad it was held by a Division Bench of this High Court that when consent is not forthcoming, it is open to the court to appoint an arbitrator. A Full Bench of the Delhi High Court in Ved Prakash Mittal Vs. Union of India and Others, held that the intention of Section 20(4) of the Act, 1940 is to confer power on the court to make an appointment when machinery of appointment has broken down.

10. Now, the next question is whether the appellants are estopped from raising this point after participation in the arbitration proceeding or not. In State of Rajasthan Vs. Nav Bharat Construction Co., it was held following the ratio of

Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another, that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceedings preclude such a party from contending that the proceedings were without jurisdiction. Basically the principle of waiver and estoppel is not only applicable where the award had been made but also where a party had challenged the proceedings, in which he participated. Learned Counsel appearing for the appellants contended before the court that their participation is not such which can be construed as long participation. According to us, the words "long participation", which have been used here, are not disjunctive but conjunctive in nature with the word "acquiescence". The acquiescence is the appropriate word to construe the cause. Question of long participation possibly arose in that particular matter which continued for a considerable period. This arbitration proceeding was not continued for a considerable period but effective participation was there. One aspect is very clear that the arbitrator was appointed on 19th February, 1996 and the award was obtained on 3rd August, 1996. This appeal was preferred on 18th July, 1996. Therefore, it can be safely presumed that sufficient acquiescence was there to preclude the appellants from taking the plea of improper appointment of arbitrator and jurisdiction. If we go by the judgment of Prasun Roy v. The Calcutta Municipal Development Authority and Anr. (supra) it will be seen that acquiescence was made known following the book of Russell on Arbitration, 18th Edition, Page 105, which explains the position as follows:

If the parties to the reference either agree before hand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence.

11. The same principle was also squarely followed in the judgment reported in Neelakantan and Bros. Construction Vs. Superintending Engineer, National Highways, Salem and Others, In N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another, Three Judge Bench of the Supreme Court also followed the same principles as laid down in the book Russell on Arbitration. In Union of India (UOI) Vs. K.P. Mandal, in case of adjudication in the arbitration, principle of estoppel as u/s 115 of the Evidence Act was applied on the facts and circumstances of the case therein and laid down the following principle:

Held that in the circumstances, although there could be no representation by A as to the actual competence of the arbitrator, the rule of estoppel will still bind him and will still prevent him from contending that M was not qualified under the terms of the agreement to arbitrate in the dispute.

12. The next question arose before this court that when the parties agreed to be governed by the new Act, i.e. Act, 1996, whether they are precluded from proceeding before the court challenging the appointment and jurisdiction of the

arbitrator under the old Act, i.e. Act, 1940 or not. In *Delhi Transport Corporation Ltd. Vs. Rose Advertising*, it was held that the conduct of the arbitration proceedings and the participation of the parties therein show that the parties acted under the Act, 1996. Even the arbitrator proceeded on that understanding and gave his award in pursuance of the Act, 1996. Therefore, order, if any, passed under the old Act, i.e. Act, 1940 is unsustainable. In *M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.*, it was held by the Supreme Court that after commencement of the new Act it would be governed by the same although arbitration proceeding has commenced prior to enforcement of the Act. Section 85 of the Act, 1996 is making the repeal and saving provisions. If the parties agree to the Act, which was prevailing at the time of commencement prior to enactment, it will be governed by the same. But if the parties agreed to be governed by the new Act, i.e. Act, 1996 then it will be governed by the subsequent Act. In this case, the parties have already agreed to be governed by the new Act. Therefore, no such plea can be taken by the appellants under the old Act. There is no scope of any interpretation in the light of Section 21 of the Act, 1996 in respect of commencement of the arbitral proceeding after the agreement to proceed under the Act, 1996. In *Union of India and Another Vs. Monoranjan Mondal and Others*, a Division Bench of the Calcutta High Court held that where prior to the coming into force of Act, 1996, the arbitral proceedings did not commence because arbitrators appointed did not indicate their willingness to act as such or entered upon any reference, thus, arbitral proceedings not having commenced under the Arbitration Act, 1940 before the 26th January, 1996 in any manner whatsoever the provisions of Act, 1940 cannot be held attracted. In any event by showing a Three Judge Bench judgment of the Supreme Court reported in *Secretary to the Government of Orissa and Another Vs. Sarbeswar Rout*, learned Counsel appearing for the respondents wanted to indicate that direction by the arbitrator to the parties to file their statements of claim says commencement on the date on which the direction has been given.

13. Lastly, an incidental question arose whether the award dated 3rd August, 1996 is effective award when an order of stay was granted by this court in this proceeding on 26th July, 1996 although the same was communicated to the arbitrator after passing of this award, i.e. on 5th August, 1996. Learned Counsel appearing for the appellants contended before this court by citing a judgment reported in *Mulraj Vs. Murti Raghonathji Maharaj*, that when the arbitrator has knowledge of stay order, that arbitrator must stay its hands and anything if does thereafter, would be nullity so long as the stay order is in force. Learned Counsel appearing for the respondents relied upon a Full Bench judgment of this High Court reported in 1971 ALJ 1074 *Baleshwar Dayal v. State of U.P. and Ors.* to establish that the stay order operates from the moment of its communication to the party concerned and it becomes effective only from the time it is communicated to the party concerned. Therefore, apparently when stay order of this court was communicated to the arbitrator after passing the award, such order cannot be said to be existable at the time of hearing. An arbitrator cannot

be blamed in passing an award, when no such communication has been made to him and for putting stamps for the purpose of completion of necessary formalities.

14. In further, we have to see whether the award is nullity due to stay order or not. According to us, question of nullity can be raised when the proceeding is legal. But when the proceeding itself is nullity due to intervention of the Act, 1996, all consequential orders arising from such proceedings are nullity. In a case of nullity versus nullity, the stay order, which has been passed in a proceeding, is unenforceable in the eye of law. Therefore, award of the arbitrator cannot be said to be interfered by the stay order passed by the court at an interim stage.

15. Therefore, totality of the discussion as above speaks that no order can be passed in the appeals by this court. Therefore, both the appeals stand dismissed. Interim order, if any, in the connected application(s) stands vacated.

16. However, no order is passed as to costs.