

(1997) 09 DEL CK 0023

In the Delhi High Court

Case No : Civil Miscellaneous Appeal No's. 40 and 639 of 1997

A.M. Rasool Const. and Engg. Services Pvt. Ltd.

APPELLANT

Vs

National Bldgs. Const. Corporation Ltd.

RESPONDENT

Date of Decision : 25-09-1997

Acts Referred:

Citation : (1998) 1 AD 1008 : (1998) 71 DLT 298 : (1997) 43 DRJ 732

Hon'ble Judges : S.K. Mahajan, J; Mahinder Narain, J

Bench : Division Bench

Advocate : George Thomas and M.K. Das, for the Appellant;

Judgement

Mahinder Narain, J.

(1) Only a short point is involved in this appeal and that is whether in the absence of project Director, who is to act as an arbitrator or to appoint somebody else as arbitrator, the Chairman-cum-Managing Director can appoint another person to be the arbitrator?

(2) In the impugned order, it has been accepted that the Chairman-cum-Managing Director can appoint the arbitrator instead of the Project Director as according to a circular issued by the Chairman-cum-Managing Director, the powers exercisable by the Project Director (overseas) are to be henceforth exercised by the Chairman-cum-Managing Director.

(3) Appointment of an arbitrator is a matter of agreement between the parties. It is not possible for one of the parties to the arbitration agreement to unilaterally change the person who is to act as arbitrator or who is to nominate the person to act as an arbitrator.

(4) Counsel for the appellant relies upon the provisions of Section 4 of the Arbitration Act, 1940 (for short, the Act), which is as follows:-

"4. Agreement that arbitrators be appointed by the third party.

The parties to an arbitration agreement may agree that any reference there under shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment."

(5) Counsel also refers to provisions of Section 20 of the Act, particularly clause (4) thereof in support of his contention that in the facts and circumstances of the instant case, it is the Court which ought to have appointed the arbitrator. Section 20 of the Act reads as under :-

"20.Application to file in Court arbitration agreement

(1)Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2)The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3)On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed. (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.

(5)Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

(6) Counsel for the appellant also refers to and relies upon a judgment of Hon"ble Single Judge of Orissa High Court, reported as 1979(48) Cuttak Law Times 138, wherein it has been held that :-

"SECTION 4 of the Act provides that the parties to an arbitration agreement may agree that any reference there under shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder, for the time being, of any office or appointment. That being so, if by the arbitration agreement a particular person was designated in the agreement to appoint an arbitrator, no person other than that person can appoint the arbitrator."

(7) In the instant case, clause 14 of the contract, which is reproduced at page 22 of the appeal papers, is the arbitration agreement between the parties. The said provision reads as under :-

"14. Disputes if any relating to or arising out of the provisions of this Contract shall be referred to the Sole arbitration of the Project Director who may either himself arbitrate the dispute or refer the same for arbitration to some other officer of the Corporation other than the officers connected directly with the supervision of the works at work site. The decision of the arbitrator shall be final and binding on both the parties."

(8) Clause 14 of the contract between the parties in clear terms establishes that both the parties to the agreement agree to the sole arbitration of the Project Director who is to undertake the arbitration either himself, or to appoint some other person of the Corporation other than the officers connected directly with the supervision of the works at work site to act as arbitrator. The said provision is certain and clear.

(9) However, no person in the respondent Corporation is designated as Project Director now. Therefore, it is not possible for the "Project Director" to act as arbitrator, or appoint another person as arbitrator as the Project Director does not exist.

(10) In the circumstances, the only course of action which is open is to make an appointment by the Court itself u/s 20(4) of the Act, which has not been done in the instant case.

(11) Counsel for the respondent submits that by virtue of Office Order No.1686/90, dated 6.8.1990, the powers which were vested in the Projects Director (Overseas Projects) were to be exercised by the Chairman-cum-Managing Director himself. The said Office Order reads as under :-

"National building Construction Corporation Limited

(A Govt. of India Enterprise)

Team in Pursuit Of Excellence

NBCC House

LODHI Road

NEW Delhi-110003 Office Order NO. 1686/90

In super session of all previous office orders issued on this subject, the Chairman-cum-Managing Director is pleased to decide and direct that all the powers that were vested in the Projects Director (Overseas Projects) shall henceforth be exercised by the Cmd himself, provided, however, the Chief Project Managers posted at the foreign Projects will continue to exercise the powers separately delegated to them. sd/- (K.R. Sundaram) Chief Manager (Personnel)"

(12) Clause 14 of the agreement between the parties contemplates arbitration by the Project Director and not by the Project Director (Overseas Project). The said office order, Therefore, has no application to the facts and circumstances of the instant case.

(13) In the circumstances, the appeal succeeds. The impugned order is set aside. The matter is remanded to the Hon"ble Single Judge to proceed in the matter in accordance with law, and to appoint an arbitrator as postulated by Section 20(4) of the Act.

(14) Parties are directed to appear before the Hon"ble Single Judge on 10th November 1997.