
(1984) 05 DEL CK 0032
In the Delhi High Court
Case No : First Appeal No. 23 of 1984

G.D. Tewari and Co.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 28-05-1984

Acts Referred:

Citation : (1984) 26 DLT 74 : (1984) 2 ILR Delhi 180 : (1984) 2 ILR Delhi 159

Hon'ble Judges : Gian Chand Jain, J;A.B. Rohtagi, J

Bench : Division Bench

Advocate : B.K. Divan, R.M. Bagai and Mukesh Gupta, for the Appellant;

Judgement

Avadh Behari Rohatgi, J.

(1) This appeal is fully covered by the decision of the full bench in Ved Prakash Mithal v. Union of India. (Suit No. 625-A of 1982) (1). In that suit we have, pronounced the order today.

(2) The learned Judge in the impugned order followed the decision of the division bench in Kishan Chand v. Union of India. 2nd (1974) Del 673. Following Kishan Chand) he held that the petition of the contractor u/s 20 of the Arbitration Act was not legally maintainable and that court can neither appoint an arbitrator itself nor compel the Chief Engineer to make such an appointment. On this view he dismissed the petition.

(3) In Ved Prakash Mithal a full bench has overruled the decision in Kishan Chand v. Union of India (supra). The full bench has held that the court has the power to make the appointment if the Chief Engineer refuses to make.

(4) In Kishan Chand the division bench held that the court u/s 20 of the Arbitration Act has no power to appoint an arbitrator under clause 25 of the contract. The appointment must be had from the Chief Engineer, the person designated in the arbitration clause. This, in their view. was an

"INSUPERABLE obstacle" to the appointment of the arbitrator by the court. They

held that the court's power to appoint the arbitrator has been expressly excluded by the arbitration clause. In support of their view they referred to two English cases : Re Williams and Stepney (1891) Qbd 257 and Re Wilson & Son and The Eastern Countries Navigation and Transport Co. (1892) 1 Qbd 81. They came to the conclusion that the stipulation about the appointment of the arbitrator by the Chief Engineer and no body else was an absolute stipulation and "the purpose of this stipulation was to negate the power of the Court to appoint an arbitrator under the Arbitration Act."

(5) The full bench has held this" view to be erroneous. The cardinal vice in this reasoning is that the learned judges of the division bench made the Chief Engineer the master of the arbitration clause. He could destroy the arbitration agreement by his refusal to appoint the arbitrator. If the Chief Engineer does nothing on being invited to appoint an arbitrator the arbitration clause becomes extinct. By mere inactivity the Chief Engineer will not stimulate the clause into life and will thereby render the arbitration agreement nugatory. This was their train of reasoning.

(6) The full bench has held that the clause in accordance with the law enacted in section 4 of the Arbitration Act (the Act) merely gives a right to nominate the arbitrator to the Chief Engineer and nothing more. The right to nominate is part of the procedure for bringing the tribunal into existence. On a true construction of the, arbitration clause the, full bench came to the conclusion that the Chief Engineer cannot frustrate the arbitration agreement. Nor can he repudiate the clause at his whim or will. If the office of the Chief Engineer or the Administrative Head exists it is incumbent on the holders of those offices to explain to the court the "reason" why it is not "possible" to appoint the. arbitrator. The Chief Engineer cannot keep mum. He is answerable to the court. The court will ask him the question Has something happened which means that the contractor is disentitled to invoke the arbitration clause ? Though he is the government's own man he cannot act as the tool of one of the parties. He stands squarely between the two parties, having no special affiliation to either. The arbitration clause contemplates an adversarial procedure. The claimant contractor and the government are the two parties to the dispute. The Chief Engineer is a third party. He nominates the arbitrator. He has a limited role assigned to him by the clause. He cannot arrogate to himself the role of a party to the dispute. He is not the delegate or the representative of the government. In his integrity the parties have reposed confidence and have consented to a method by which the arbitrator is to be appointed by the Chief Engineer, The rule of construction is this :

"THE court ought not to be too ready to find technical difficulties" so as to defeat the very object of the parties in having their disputes decided by "arbitration".

[Per Singleton LJ. in Kiril Mischief Ltd. v. British Doughout Co. Ltd. (1954) 1 LR 237]. The division bench in Kishan Chand denied to the court the right of control over the Chief Engineer. The full bench has held that this is all wrong. The power to appoint the arbitrator resides in the Court if the Chief Engineer simply does

not act and gives no "reason" why it is not "possible" for him to appoint the arbitrator. Arbitration is subject to a measure of statutory control ; but this control in no way detracts from the essentially contractual nature of arbitration. The Chief Engineer has not been assigned such supremacy as totally to oust the power of the court to remedy or prevent injustice in the arbitration process. Nor can he obstruct or frustrate the purpose of the agreement viz. a fair arbitration to be conducted in accordance with the terms of the clause.

(7) The arbitration clause in the present case expressly says that the Arbitration Act shall apply to the arbitration proceedings. This aspect was overlooked, in Kishan Chand. The building contract defines the contractual rights and duties of the parties. But there is a residual power in the court to appoint the arbitrator u/s 20(4) if the Chief Engineer for no good reason simply refused to appoint. The existence of such a power, associated as it is with the requirements of an adversarial process, remains, subject to the statutory law regulating arbitrations, a powerful weapon for justice in the armoury of the law. even though the occasions for its use will be few and far between. In 99 per cent of cases the Chief Engineer, we have no doubt, will obey the direction of the court and appoint the arbitrator.

(8) Where parties agree to refer present or future differences to arbitration, they enter into a contract, an implied term of which is that each has a right to a fair arbitration. The implication arises necessarily from the nature and purpose of their agreement which is to submit their dispute (or disputes) to the arbitrate of an independent and impartial arbitrator to be appointed by the Chief Engineer. That there shall be a right to a fair arbitration is the essence of the clause. This right is fundamental.

(9) Section 20 of the Arbitration Act is based on this theory. The right arises from the judicial element inherent in the arbitration process which is a process for reaching a decision where parties have not themselves resolved their differences". Arbitration while consensual, is also an adversarial process. Though the parties choose a tribunal, agree on its procedure and agree to accept its award as final, the process is adversarial. Embedded in the adversarial process" is a right that each party shall have a fair hearing, that each should have a fair opportunity of presenting and developing his case.

(10) Where the tribunal does not come into existence because the Chief Engineer does not act, the court has the power to appoint the arbitrator. As a rule the court will ask him to appoint the arbitrator after hearing him and overruling the objections, if they are without any merit. Because that is the mode to which the parties have consented. Even though he has once refused. the court will give him another opportunity to act in terms of the clause.

(11) From very early times the court has exercised a measure of judicial control and review of the arbitration process. This remain true of most of the arbitrations under the Arbitrations Act, 1940. This power of the court has been exercised in

many ways : for example by setting aside awards, removal of arbitrators where their impartiality, fitness or competence is impugned, by superseding the reference etc. The Arbitration Act, 1940 bears witness to the importance attached in various branches of our arbitration law to a measure of judicial control and review. The source of the right to go to arbitration is contractual, it is true. But the court is given by the Act, the right to assert control over the arbitration proceedings at various stages. ,

(12) The full bench rejected the view that the power of the Court has been excluded by agreement of the parties". No such Intention can be inferred from the clause which says in so many words that the Arbitration Act shall apply. All that the clause does is that it makes the Chief Engineer or Administrative Head the sole appointers .If their offices are abolished then the court may not appoint. This is the meaning of the clause. But if there is a Chief Engineer he cannot destroy the clause by his refusal or neglect.

(13) The Arbitration Act generally (and section 20 in particular) is an operation manual. The Act tells us how. the arbitration clause shall be worked when there is a breakdown of the machinery provided in the arbitration clause. "The law of arbitration is thus mainly procedural in content." (Mustill and Boyd Commercial Arbitration (1982) ed. 121].

(14) The role assigned to the Chief Engineer is merely to appoint the arbitrator. The full bench has held that it is a ministerial function which he discharges under the clause. The judicial function inheres! in the court. The Chief Engineer is not superior to the court. The Chief Engineer cannot enlarge, in his own favor, his jurisdiction and destroy the clause. He cannot make the arbitration abortive for no rhyme or reason. It is a contradiction which is inconceivable that the Chief Engineer shall combine in his own person the powers of the appointers and the destroyer of the clause.

(15) The fallacy in the reasoning of the division bench is that they did not differentiate between judicial and ministerial functions, the full bench pointed out.

(16) If the arbitration had been a statutory arbitration and the Chief Engineer did not appoint the court could direct him by issue of prerogative writs or orders to appoint the arbitrator in accordance with the statutory provision. This was settled in England by R. v. National Joint Council for the Craft of Dental Technicians (Disputes Committee), ex parte Neat (1953) 1 All E R 327. This legal position has been accepted by the House of Lords in Bremer Vulkan Sachifan bund Maschienfabrik v. South India Corporation [(1981) 1 All E R 289 per Lord Diplock]. Brenner Vulkan"s case is one of the most important decisions in the history of English arbitration.

(17) But the present clause is a consensual private arbitration between two parties to a building contract. Section 20 of the Act will apply to it. No prerogative writ or order can be issued. But u/s 20 an order will be made asking the Chief Engineer to appoint the arbitrator failing which the court itself will

appoint. For this conclusion the full bench found support in Union of India (UOI) Vs. Prafulla Kumar Sanyal, .

(18) In a word the full bench held that the Chief Engineer is not supreme. He cannot put an end to the clause by his unilateral action or inaction. He is subject to the jurisdiction of the court u/s 20 of the Act. The notion of absolute power is an anathema, whatever be the field of law contractor administration. The Chief Engineer, the agreed appointers exercises a controlled power controlled by section 20. Such a view as was propounded by the division bench will lead to most unhappy results, the full bench declared.

(19) With regard to the two English rulings of 1891 and 1892 referred to in Kishan Chand it is enough to say that they have no application to clause 25. Every agreement will have to be construed with reference to the language used therein. (Teamco Private Ltd. Vs. T.M.S. Mani,) . At every stage in the development of the law of arbitration, the courts have begun by studying the arbitration agreement, so as to ascertain what it says expressly about the problem in issue, and what relevant terms may reasonable be implied. In our opinion the statute law is plain on the point. Section 4 of the Act provides for the mode of appointment by a third party. If the third party fails to make the appointment, the statute will intervene to remedy the default. There is no riddle, no legal puzzle in this. On a true construction of the clause this seems plain. This is how the relation between, the arbitral process and the. court should be harmonised. Those who advocate the theory of negation of- courts powers will do well to remember the words of Lord Atkin which he wrote in a letter to Sir Herbert .Evatt in 1941:" How little the public realise how dependent they are for their happiness on an impartial administration of justice. I have often thought it is like oxygen in the air they know and care nothing, about it p until it is withdrawn" (Quoted Geoffery Lewis : Lord Atkin p. 176).

(20) For reasons given in Ved Prakash, Mithal (supra) we allow the appeal and set aside the order of the learned single judge dated January 9, 1984. We order the Chief Engineer to appoint an arbitrator in accordance with clause 25 of the agreement within two months from today failing which Shri M. L. Jain, Advocate (retired Registrar of this court), shall be the arbitrator. In the circumstances" of the case we leave the parties to bear heir own costs.