
(1993) 07 DEL CK 0021

In the Delhi High Court

Case No : Interim Application No's. 8131 and 13452 of 1992 and Original
Miscellaneous Petition No. 52 of 1992

General Marketing and Mfg Co. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 26-07-1993

Acts Referred:

Citation : (1993) 3 AD 233 : (1993) 2 ARBLR 432 : (1993) 26 DRJ 617

Hon'ble Judges : Sat Pal, J

Bench : Single Bench

Advocate : A.N. Parikh, Poonam and A.S. Rawat, for the Appellant;

Judgement

Sat Pal, J.

(1) This is a petition filed by the petitioner u/s 8 and 12 of the Arbitration Act, 1940 (hereinafter referred to as the Act). In this petition the petitioner has prayed for appointment of an independent Arbitrator of the status of a retired judge of this Court or the Supreme Court of India. The petition has been opposed by the Union of India. respondent herein.

(2) Briefly stated the facts of the case are that on 4.3.71 petitioner company entered into a rate contract with the respondent for the supply of spare parts for the "TEREX" make of earthmoving and construction equipment of USA/Canada/UK origin for the period from 17.2.71 to 16.2.74. Certain disputes arose between the parties which were referred to Arbitration in terms of the clause 24 of the Agreement. By his award dated, 29th July, 1977, the Arbitrator dismissed the petitioner's claim for Rs.5,30,852.48 with 18% interest.

(3) The petitioner company challenged the abovementioned award which was set aside by a learned Single Judge of this Court vide judgment dated 23.11.89. By this judgment respondent was directed to appoint an Arbitrator within two months to adjudicate disputes referred in petitioner's letter dated 6th March, 1975. Pursuant to this judgment Shri P.S. Kaicker, Addl. Legal Adviser, Ministry of

Law was appointed as sole Arbitrator on 29.4.80 but before he could give his award, he resigned on 25.10.82. Thereafter the respondent appointed Dr. P.C. Rao, Addl. Legal Adviser, Ministry of Law as sole Arbitrator in place of Shri Khaicker on 11.7.83. But Dr. Rao also submitted his resignation on 9.9.83, Thereafter the petitioner company filed Omp No.8/84 in this Court praying therein that a retired judge of the Court be appointed as an Arbitrator. During the pendency of the said petition the respondent appoint Mrs. R. Lakshman as Arbitrator on 20.3.84. Mrs.Lakshman gave her award on 19.1.89.

(4) The award given by Mrs.Lakshman was filed in this Court on 14th March, 1985 in suit No.1823A/84. The petitioner filed objections dated 11.4.84 against the said award which was set-aside by a learned Single Judge of this Court vide judgment dated 14th February, 1992. The operative part of the judgment is reproduced herein below:-

"In short, the award stands set aside. It is remitted back to the arbitrator to be appointed by the Director General of Supplies & Disposals, New Delhi, for fresh decision particularly in the light of this order. The arbitrator shall be appointed within a period of two months from the date of this order. The petitioner shall be entitled to costs of that proceedings. Counsel's fee Rs.300.00 .

(5) From the above judgment it is evident that the respondent was directed to appoint the Arbitrator within a period of two months from the date of the order i.e. by 13th April, 1992. It may be pointed out here that the petitioner meanwhile served a notice dated 2.4.92 on the respondent calling upon the respondent to appoint the Arbitrator forthwith. Since the respondent failed to appoint the Arbitrator within the period fixed by this Court and also failed to do so within 15 days from the service of the notice, the petitioner has filed the present petition for appointment of an independent Arbitrator.

(6) Mr. Parikh, learned Senior counsel appearing on behalf of the petitioner submitted that since the respondent has failed to appoint the Arbitrator within a period of two months, as directed by this Court vide judgment dated 14.2.92 and failed to appoint the arbitrator even within 15 days from the service of the notice dated 2nd April, 1992, the respondent had abdicated himself of the power to appoint the Arbitrator under the contract. He, Therefore, contended that an independent Arbitrator preferably a retired judge of this Court be appointed as an Arbitrator. In support of his contention, the learned counsel placed reliance on a Supreme Court judgment reported in the case of Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, and a judgment of Punjab & Haryana High Court reported in the case of Banarasi Dass Mitta Vs Housing Board, 1988(1) Arb LR, 170. The learned counsel also submitted that the matter was initially referred for adjudication by the Arbitrator long ago and two awards given by the Arbitrators appointed by the respondent have already been set-aside by this Court. He further submitted that the matter has also been delayed as two arbitrators, namely, Shri P.S. Kaicker and Dr. P.C. Rao resigned before the proceedings could be concluded. He, Therefore, contended that it is in the interest of justice that

now a retired judge of this Court should be appointed as an Arbitrator.

(7) Mr. Rawat, the learned counsel appearing on behalf of respondent however, submitted that after the prevent petition was filed, the respondent had appointed Shri Ram Bahadur, Addl. Legal Adviser, Ministry of Law and Justice, as the Arbitrator on 5.6.92 and after Mr. Ram Bahadur resigned, the respondent has appointed Shri K.D. Singh Addl. Legal Adviser, Ministry of Law and Justice as sole Arbitrator. He further contended that in terms of clause 24 of the agreement, the disputes could be referred to the sole arbitration of an officer of the Ministry of Law to be appointed by the respondent. He, Therefore, contended that since the respondent has already appointed Shri K.D. Singh, an officer in the Ministry of Law and Justice as sole Arbitrator, the petition filed by the petitioner is liable to be dismissed. In support of his contention he placed reliance on a judgment of the Supreme Court reported in the case of M/s. Harbans Singh Tuli & Sons Builders Pvt. Ltd. Vs Union of India, 1992(1) Scale 61.

(8) I have given my thoughtful consideration to the submissions made by the learned counsel for the parties. The contention of the learned counsel for the respondent that since clause 24 of the Agreement provides that every dispute shall be referred to the sole arbitration of an officer in the Ministry of Law appointed by the respondent No. 1 and as such this Court has no power to appoint any other person as an arbitrator, is without any merit. Here it will be relevant to refer to a judgment of the Supreme Court reported in the case "of Union of India (UOI) Vs. Prafulla Kumar Sanyal, . In this case it was contended on behalf of the Uoi that clause 29 of the Agreement provided that any matter of dispute shall be referred to the sole Arbitration of the person appointed by the President of India and as such an Arbitrator can be appointed only under the terms of the agreement. Rejecting this contention the Supreme Court held that "it will not be obligatory on the part of the Court to make an order of reference to the arbitrator that maybe appointed by the President. If an Arbitrator had not been appointed as required in Section 20(4) of the Act, the Court is to find whether the parties could agree upon an Arbitrator. If the parties agree, the Court has to appoint the person agreed as to an arbitrator. If there is no such agreement the Court will have to appoint an arbitrator of its choice." The Supreme Court, however, agreed to the suggestion that the President be asked to appoint an Arbitrator as contemplated in terms of clause 29 within two months. It was, however, further directed by the Court that in case the President failed to appoint the Arbitrator within two months, the Arbitrator appointed by the High Court (who was an advocate) would enter upon his duties.

(9) Following the law laid down by the Supreme Court in the case of Prafulla Kumar Sanyal (supra), a Full Bench of this Court in the case of Ved Prakash Mittal Vs. Union of India and Others, , held that in terms of the agreement, the party must approach the appointer first but on the refusal or neglect of the appointer clause, (4) of Section 20 of the Act will spring into action. Accordingly the Full Bench directed the Chief Engineer to appoint an Arbitrator in accordance

with Clause 25 of the Agreement within two months failing which Shri M.L. Jain, Advocate (retired Registrar of this Court) would be the Arbitrator.

(10) In the present case as stated earlier, a learned Single Judge of this Court vide order dated 14th February, 1992 directed the respondent to appoint the Arbitrator within two months from the date of the order. Admittedly the respondent failed to appoint the Arbitrator within the stipulated period of two months. The respondent failed to appoint the Arbitrator even within 15 days from the receipt of the notice dated 2nd April, 1992 served by the petitioner. In view of these facts the respondent is deemed to have abdicated himself of the power to appoint Arbitrator under the contract in terms of the law laid down by the Supreme Court in the case of *Nandyal Co-op. Spinning Mills Ltd.* (supra), it is, Therefore, a fit case where this Court will have to appoint an independent arbitrator of its choice. As regards the case of *Harbans Singh Tuli & Sons Builders Pvt. Ltd.* (supra) relied upon by the teamed counsel for the respondent it may be stated that the ratio of the judgment in that case is not applicable to the facts of the present case which are quite different from the facts of that case. In fact in that case also the Supreme Court approved a judgment of Orissa High Court reported in the case of *Executive Engineer, Prachi Division, Bhubaneswar Vs. Gangaram Chhapolia and Another*, wherein it was held that on the failure of the Chief engineer to appoint a proper Arbitrator in accordance with the clause 23 of the Agreement within 15 days of due service of notice, as provided in Sub-Section (2) of Section 8 of the Act, the Court had the jurisdiction to appoint an Arbitrator.

(11) In view of the above discussion the petition is allowed. I appoint Shri D.R. Khanna, a retired Judge of this Court as Arbitrator to adjudicate disputes between the parties. The fees of the Arbitrator will be fixed by the learned Arbitrator himself and will be shared equally between the parties. I further direct that the arbitration records be sent to the Arbitrator forthwith.

(12) Since the petition has been allowed, the IAs.8131/92 and 13452/92 have become infructuous. Accordingly both these applications are dismissed as infructuous.