
(1997) 01 AHC CK 0101
In the Allahabad High Court
Case No : F.A.F.O. No. 42 of 1997

Ghaziabad Development Authority

APPELLANT

Vs

M/s. Unique Construction, Lucknow

RESPONDENT

Date of Decision : 31-01-1997

Acts Referred:

Arbitration Act, 1940 — Section 2, 20, 20(4)

Citation : AIR 1997 All 341 : (1997) 2 AWC 1256

Hon'ble Judges : Om Prakash, J; B.K. Sharma, J

Bench : Division Bench

Advocate : Vijay Manohar Sahai, for the Appellant; Ashok Khare, for the Respondent

Final Decision : Allowed

Judgement

1. Interesting question for consideration arising from this appeal filed against the impugned order dated 10-12-1996 passed by the learned Judge Small Causes, Court, Ghaziabad on the application of the respondent, made u/s 20 of the Arbitration Act, 1940 (briefly, the Act) is whether the court below on the facts and circumstances of this case was right in exercising the power to appoint an arbitrator.

2. The parties entered into an agreement which contained an arbitration clause (Annexure "I" to the affidavit accompanying the stay application made by the appellant). Referring to the arbitration clause Sri V.M. Sahai, learned counsel for the appellant urged before us that the parties agreed that the Vice Chairman of the Ghaziabad Development Authority (GDA) will be the sole arbitrator and therefore, the Court has no jurisdiction u/s 20(4) of the Act to appoint any other arbitrator. His submission is that so long as the parties have agreed about an individual for being appointed as an arbitrator and if the arbitrator is named in the arbitration agreement, then the court has no power to appoint any other arbitrator and that the Court may assume jurisdiction to appoint arbitrator different from the one who is named in the arbitration agreement only when the

arbitrator named in the arbitration agreement, fails or refuses to discharge the duty of arbitrator. The portion of the arbitration clause insofar as is material for the purpose of this case is reproduced below :

".....All disputes and differences of kind arising out of or in connection with the contract of the carrying out of the works other than the excepted matters hereinbefore mentioned (whether during the progress of the works or after their completion and whether before or after determination, abandonment or breach of contract) shall be referred to a single Arbitrator and that to the Vice chairman case the parties can agree and the same shall be deemed to be the submission to arbitration in accordance with the provisions of the Arbitration Act, 1940 or any statutory modification thereof for the time being in force."

(Underlining by Court)

3. The question is what is the true interpretation of the delineated portion in the arbitration clause.

4. Sri Ashok Khare, learned counsel for the respondent submits that the words "the parties can agree" occurring in the arbitration clause clearly indicate that the parties can appoint arbitrator only by consent and if there is no consent of the parties, then the Court is competent to appoint an arbitrator u/s 20(4) of the Act. On the other hand, the submission of Sri V.M. Sahai learned counsel for the appellant is that the arbitration clause unequivocally points out that there would be single arbitrator and that would be the Vice Chairman of the GDA and none else. He submits that under the arbitration clause only the Vice Chairman of the GDA could be appointed as the arbitrator and the Court has no power u/s 20(4) of the Act to appoint any other arbitrator, Shri Khare urges that if the contention of the appellant is accepted, then the words "parties can agree" occurring in the arbitration clause will be rendered otiose, nugatory and surplusage and that the arbitration clause cannot be interpreted in a fashion as to render any word used in it, useless. His argument is that the words "parties can agree" clearly denote the scope of the agreement of the parties on the appointment of an arbitrator and the Court cannot close its eyes to such a clear expression. So, the question is what is the true import of the portion underlined by us in the above reproduced arbitration clause.

5. In the case of an agreement, we are of the view that the Court should resort to strict interpretation and the portion which is vague should not be stretched to the extent that some agreement is built up upon it which the parties to the agreement may not have agreed at all. In short, it is not for the Court to give rise to an agreement which was never envisaged and contemplated by the parties. The principle of the interpretation that no word used by the legislature in a legislation is useless, cannot be fitted into the situation where the question relates to the interpretation of an agreement. An agreement is not to be culled out from ambiguity. Agreement is what it exists on the face of a document. With consent of the parties nothing can be assumed unless it plainly exists. If this

approach is adopted in the matter of interpretation of an agreement then the words which are vague and ambiguous are to be left out from the consideration and the words which are free from any ambiguity should be focused. From the perusal of arbitration clause, it can be unmistakably gathered that there would be a single arbitrator and that would be the Vice Chairman of the GDA. To this extent the Parties to the agreement had agreed and this proposition does not admit any doubt. What meaning can be given to the phrase "parties can agree" occurring in the arbitration clause is a matter of guess, conjecture and surmises and. no edifice of agreement-however conducive to the justice and laudable--can be built upon that. The golden principle is that ambiguous words are to be left out and ignored while interpreting a given agreement clause. Keeping in view this principle of arbitral agreement--interpretation we are of the considered view that the parties to the agreement had agreed only to the appointment of the Vice Chairman of the GDA as arbitrator and no significance can be attached to the disjointed words "parties can agree" having no nexus to rest of the arbitration clause.

6. S. Rajan Vs. State of Kerala and another, , the Supreme Court enunciated that where the agreement" itself specifies and names the arbitrator, it is obligatory upon the Court, in case it is satisfied that, the dispute ought to be referred to the arbitrator, to refer the dispute to the arbitrator specified in the agreement and that it was not open to the Court to ignore the arbitrator named in the agreement and to appoint another person as an arbitrator. The Court further clarified that only in cases where the arbitrator specified and named in the agreement refuses or fails to act, does the Court get the jurisdiction to appoint another person or persons as an arbitrator. This is what the Court said -- is the clear purport of sub-section (4) of Section 20 of the Act.

7. The submission of Sri Khare is that the respondent requested the GDA several times to refer the dispute to the Vice Chairman of the GDA, but no action was paid by the GDA to such request and, therefore, it should be inferred that the sole arbitrator as named in the arbitration clause, failed to act and that being so, the Court will be fully empowered to appoint an arbitrator of his choice u/s 20(4) of the Act. At no stage it is shown that the dispute was referred to the Vice Chairman. When no reference was made to the Vice Chairman, no inference can be withdrawn that he failed to discharge the duties as the arbitrator and if that is so, the submission of Sri Khare that the arbitrator failed to act and, therefore, the Court could appoint another arbitrator has to be rejected. It is not the failure of the GDA, but the failure of the arbitrator which is material. The Vice Chairman may be Chief Executive Officer of the GDA; but the question is whether the Vice Chairman failed to act as the arbitrator. If the GDA failed to make reference to the Vice Chairman, it cannot be said that the Vice Chairman as the arbitrator failed to act and, therefore, even on the submission of Sri Khare, no jurisdiction can be said to have been vested in the Court to appoint any other person as the arbitrator.

8. In Union of India (UOI) Vs. Prafulla Kumar Sanyal, , the Court while construing Section 20(4) held in paragraph 3 thus:

"....-..... If no such arbitrator had been appointed and when the parties cannot agree upon an arbitrator, the Court may proceed to appoint an arbitrator by itself. Thus if an arbitrator had been appointed whether in the agreement or otherwise, the Court shall make an order of reference to him..... If an arbitrator had not been appointed, as required in the subsection, 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 an arbitrator. If there is no such agreement, the Court will have to appoint arbitrator of its choice."

9. From this authority, it follows that first choice will be that of the arbitrator who is named in the arbitration agreement; second choice will be for the arbitrator, the parties have agreed to and if these two propositions failed, then only the Court can step into to appoint an arbitrator of its choice u/s 20(4) of the Act.

10. In the case in hand, the first two options have not been explored by the Court below and it straightway appointed arbitrator of its choice on the ground that the GDA failed to get an arbitrator nominated with the consent of the Vice Chairman and, therefore, u/s 20(4), the Court can appoint arbitrator of its choice. The reasoning of the Court runs counter to the arbitration agreement and the law, germane on the point of arbitration.

11. If the dispute is referred to the Vice Chairman of the GDA as per the arbitration agreement and if he fails to act upon and if he refuses to discharge the duties as arbitrator, then another arbitrator could be appointed with the consent of the parties and if no consent is given by them, then only the Court would be justified to exercise the power u/s 20(4) of the Act to appoint arbitrator of its choice.

12. For the reasons the appeal succeeds and is allowed. The impugned order dt. 10-12-1996 passed by the Judge. Small Cause Court, Ghaziabad is set aside and the matter is remitted to the Court below to refer the dispute to the Vice Chairman of the GDA, who is named as the sole arbitrator in the arbitration agreement.

13. Appeal allowed.