

(1996) 02 DEL CK 0016
In the Delhi High Court
Case No : Suit No. 578-A/95

International Security and Intelligence Agency Ltd.	APPELLANT
Vs	
Municipal Corporation of Delhi and others	RESPONDENT

Date of Decision : 22-02-1996

Acts Referred:

Citation : (1996) 02 DEL CK 0016

Hon'ble Judges : S.K. Mahajan, J

Bench : Single Bench

Advocate : Mr. Rajiv Mehra, for the Appellant; Mr. M. Chopra, for the Respondent

Judgement

S.K. Mahajan, J.—An agreement No. B-167/Dir (A) dated 7th June, 1989 was entered into between the petitioner and the slum wing of Delhi Development Authority. The slum wing of Delhi Development Authority was subsequently transferred to Municipal Corporation of Delhi and the said contract was ratified by the respondent Corporation as well. Certain disputes under the contract had arisen between the parties which in terms of clause 16 of the agreement were liable to be referred to an arbitrator. By notice dated 26th September, 1994 the petitioner called upon the respondent to appoint an arbitrator in terms of the agreement between the parties and refer the disputes to him for adjudication. Despite service of notice, the arbitrator was not appointed and as such the present petition was filed under Sections 5, 8(b) and/or 20 of the Arbitration Act for revoking the authority of the named arbitrator and for appointment of an independent arbitrator for adjudication of the dispute as set forth in annexure P. 2 to the petition.

2. On being served with the summons of the suit, the respondents filed its reply on 7th May, 1995. It was stated in the said reply that since after the filing of the suit, by order dated 15th May, 1995 all disputes/claims mentioned in the suit have been referred to Sh. R. S. Yadav, Superintending Engineer (Planning), Slum and JJ Department as the sole arbitrator to decide the disputes and make his award regarding the disputes which had been raised by the petitioner. It was,

Therefore, stated that the petition had become infructuous and was liable to be dismissed.

3. The petitioner not being satisfied with the appointment of Sh. R. S. Yadav as an arbitrator, is seeking to proceed with the petition. Challenge to the appointment of Mr. R. S. Yadav has been made on two grounds, namely, (1) after service of notice u/s 8, respondent cannot appoint an arbitrator and in any case the arbitrator has failed to use all reasonable dispatch in entering upon and proceeding with the reference; and (2) the matter was to be referred to the sole arbitration of Commissioner (S & JJ), Delhi Development Authority or a person nominated by him and as the appointment had been made by the Director (S & JJ), the same cannot be in terms of the arbitration agreement.

To appreciate the contentions of the parties, it will be useful to quote the arbitration agreement which is as under :

"In case of any dispute regarding interpretation of above terms and conditions of contract and their non-implementation of any other matter, incidental there to, covered in this agreement, the matter will be referred to the sole arbitration of Commissioner (S & JJ) DDA or person nominated by him whose decision shall be final and binding on both the parties."

5. The contention of Mr. Mehra, learned counsel for the petitioner that the appointment of Mr. R. S. Yadav, is not in terms of the arbitration agreement, in my opinion, is without any basis. Under the agreement, no doubt, the appointment was required to be made by the Commissioner (S & JJ), Delhi Development Authority. However, on transfer of the slum wing from Delhi Development Authority to Municipal Corporation of Delhi, the designation of the Commissioner was changed to Director (S & JJ). Mr. Manjeet Singh who was earlier the Commissioner (S & JJ) Delhi Development Authority on its transfer to Municipal Corporation of Delhi became Director (S & JJ). In my opinion, Therefore, in case the appointment of Mr. R. S. Yadav is otherwise valid no objection thereto can be taken on the ground that the same has not been made by the Commissioner (S & JJ).

6. The only question, Therefore, which remains for consideration is whether the arbitrator had acted with reasonable dispatch in entering upon and proceeding with the reference and whether after the service of notice u/s 8, the respondent cannot make appointment of an arbitrator.

7. In *Puran Chand v. H.P. Forest Corporation* 1995 (1) Arb. LR 113, the question which had arisen for consideration was "in case one of the named arbitrators to whom notice is given to take cognizance of the dispute, having arisen between the parties, neglects to discharge his duties, as such, he abdicates his authority to intimate either of the parties, whether the court gets jurisdiction to appoint one of the other arbitrators so named by the parties." In that case, in terms of the arbitration clause, the Managing Director was to act as the arbitrator. On receipt of a notice calling upon him to act as an arbitrator, when he did not enter

upon the reference within fifteen days of the said notice, a petition was filed in the High Court for appointment of an independent arbitrator. The High Court of Himachal Pradesh held that if no arbitrator had been appointed in terms of the contract within fifteen days from the date of receipt of the notice, the Managing Director would be deemed to have abdicated himself of the power to enter upon the reference or to appoint another arbitrator under the contract and the court gets jurisdiction to appoint an arbitrator u/s 8(1)(a) of the Arbitration Act.

8. Section 8 of the Arbitration Act reads as under :

"Powers of court to appoint arbitrator or umpire (1) In any of the following cases :

(a) Where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of action, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy, or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments in supplying the vacancy.

(2) If the appointment is not made within fifteen days after service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

9. This section had also come up for interpretation by the Supreme Court of India in *Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao, , and G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, .*

10. In *Nandyal Co-operative Spinning Mills Ltd. v. K. V. Mohan Rao, (supra)*, it was held as under :

"It would thus be clear that if no arbitrator had been appointed in terms of the contract within 15 days from the date of receipt of the notice, the administrative head of the appellant had abdicated himself of the power to appoint arbitrator under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a). The contention of Shri Rao, Therefore, that since the agreement postulated preference to arbitrator appointed by the administrative head of the appellant and if he neglects to

appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. It is seen that under the contract the respondent contracted out from adjudication of his claim by a civil court. Had the contract provided for appointment of a named arbitrator and the named person was not appointed, certainly the only remedy left to the contracting party was right to suit. That is not the case on hand. The contract did not expressly provide for the appointment of a named arbitrator. Instead power has been given to the administrative head of the appellant to appoint sole arbitrator. When he failed to do so within the stipulated period of 15 days enjoined u/s 8(1)(a), then the respondent has been given right under Clause 65.2 to avail the remedy u/s 8(1)(a) and request the court to appoint an arbitrator. If the contention of Shri Rao is given acceptance, it would amount to putting a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself."

11. This judgment was relied upon in *G. Rama Chandra Reddy and Co. v. Chief Engineer, M.E.S. Madras*, (Supra). It was held that when notice was given to the opposite contracting party to appoint an arbitrator in terms of the contract and if no action had been taken, it must be deemed that he neglected to act upon the contract and the court gets jurisdiction and power to appoint an arbitrator.

12. It is thus clear that if the Director (S & JJ), Municipal Corporation of Delhi has either himself not entered upon the reference or has not appointed an arbitrator within fifteen days from the date of receipt of notice from the petitioner, he will be deemed to have abdicated his authority to nominate the arbitrator and the court gets jurisdiction to appoint one for deciding the disputes between the parties. It will not be correct to say that as the arbitrator has already been appointed since after filing of the present petition, the petition has become infructuous. In my opinion, once a right has accrued to the petitioner to get an arbitrator appointed by filing the present petition, the said right cannot be frustrated by appointing the arbitrator by the Director (S & JJ) during the pendency of the proceedings. In my opinion, after the filing of the petition, it is only the court which will have a right to appoint an arbitrator and the petition, Therefore, has not become infructuous merely because the respondent has by an order dated 15th May, 1995 appointed an arbitrator. The said arbitrator, in my opinion, will have no jurisdiction to enter upon the reference and decide the disputes between the parties.

13. For the reasons aforesaid, I allow this petition, revoke the authority of Mr. R. S. Yadav, arbitrator appointed by the respondent and appoint Justice Jagdish Chandra (Retd.) 123, Dayanand Vihar, Vikas Marg, Delhi 110092 as an arbitrator to decide the disputes between the parties. Arbitrator shall fix his own fee to be shared equally by the parties.

14. Petition stands disposed of, accordingly.