

(1990) 08 DEL CK 0022

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 147 of 1989

Jamshedpur Engineering and Machine Manufacturing Co. Ltd. **APPELLANT**

Vs

Union of India and Others **RESPONDENT**

Date of Decision : 01-08-1990

Acts Referred:

Citation : (1990) 42 DLT 407 : (1990) 19 DRJ 232 : (1990) 2 ILR Delhi 126

Hon'ble Judges : P.K. Bahri, J

Bench : Single Bench

Advocate : M.G. Ramachandran and Madhu Tawetia, for the Appellant;

Judgement

P.K. Bahri, J.

(1) This is a petition filed u/s 8(2) of the Indian Arbitration Act seeking appointment of arbitrator. The facts, in brief, are that the petitioner had entered into a contract with the respondents which contained an arbitration clause and disputes having arisen out of the said contract, the petitioner invoked the arbitration clause but as the arbitrator was not being appointed by the respondent he filed a petition Suit No. 197S-A86 under Section 20 of the Arbitration Act seeking the filing of the arbitration agreement in Court and for reference of the claim of the petitioner to the tune of Rs. 19,69,728.00 to the arbitrator to be nominated in accordance with the arbitration clause, Consequently. Dr. B.N.Mani, Additional Legal Adviser, Ministry of Law, was nominated as Sole Arbitrator by respondent No. 2 in accordance with the arbitration clause and who entered upon reference and beheld the proceedings and completed the recording of the evidence and had fixed the case for final arguments when counsel for the respondents, made a request for re-opening of the case and for leading more evidence. The arbitrator allowed additional evidence. But when the case came up before the arbitrator on February.27, 1989, the arbitrator expressed unwillingness to continue as arbitrator mentioning

(2) The respondents have filed the reply and have taken the plea that arbitrator

can be appoint only by respondent No. 2 and respondent No. 2 had now appointed arbitrator and this petition has become infructuous. In the rejoinder filed by the petitioner it has been pleaded that respondent No. 2 has been left with no authority when the petition has been filed in court and it is now for the court to appoint an arbitrator. The. arbitration clause clearly contemplate nominate of arbitration by respondent No. 9 and it is provided in the arbitration clause that in case for one reason or the other respondent No. 2 does not nominate any arbitrator, then matter shall .not be referred to arbitration at all. Counsel for the respondents has contended that in view of the language used in the arbitration clause the provisions of Section 8(2) of the Arbitration Act cannot be invoked. However, this point already stands settled by a Full Bench of this Court in Ved Prakash Mithal, v. Union of India & Others A.I.R 1984 Delhi 325. An similar type of arbitration clause had come up for consideration before the Full Bench and the Full Bench held that in such a case the court would, not be powerless to make appointment of the arbitrator itself. " In the said case. Chief Engineer was the persona designata who was to nominate the arbitrator and it was also provided iu the arbitration clause that if for any reason or the. other it is not possible that arbitrator to be appointed by Chief Engineer the arbitration agreement itself would fall through. The Full Bench expressed the view that to such an arbitration clause provisions of Section 8 would not apply. I would come to that opinion of the Full Bench a bit later. But coming to the other point raised before the Full Bench .at first I may mention that the Full Bench was of the view that the court has clearly power to appoint arbitrator if the Chief Engineer refuses to appoint one on a request made to him. After quoting Section 20(4) of the Arbitration Act after discussing the various judgments on the point, it was held that the court is not powerless to appoint an arbitrator if the Chief Engineer fails to appoint an arbitrator without good reasons. They passed the order in that case that the Chief Engineer is directed to nominate the arbitrator in accordance with clause 25 the agreement within two-month failing which Shri M L. Jain Advocate, shall be the arbitrator. So, it was clearly held that mere fact that the arbitration clause lays down that if no arbitrator is appointed by the Chief Engineer, the matter shall not be " referred to arbitration, does not in any manner inhabit the power of the court in directing the nomination of the arbitrator by the person designata and failing which appointing an arbitrator in its discretion.

(3) The learned counsel for the respondents has contended that was a case where initially the persona designata had failed to nominate the arbitrator that the court came to the conclusion that court is not powerless to direct appointment of an arbitrator, But in-the present case the question is whether provisions of Section 8 of the Arbitration Act are applicable and on this point the Full Bench has Clearly held that-provisions of Section 8 cannot be invoked As a matter of fact, the question whether the provisions of Section 8 of the Arbitration Act could or could not be invoked was not really in issue and what was in issue before the Full Bench was whether the provisions of Section 20(4) of the

Arbitration Act could be taken resort to by : the court for directing nomination of arbitrator by the persona designata and on his failure. was the court entitled to appoint the arbitrator on its own ? In case the Full Bench is to be considered to have laid down the law that provisions of Section 8 of the Arbitration Act are inapplicable to the arbitration clause of the nature which was being construed before the Full Bench case and which has come up for consideration before this court, then the same would appear to be in conflict with. the law laid down by the Supreme Court in Chander Bhan Harbhajan Lal Vs. State of Punjab, in this judgment the arbitration clause again contemplated nomination of arbitrator by a persona designata and the Supreme Court clearly held that provision of Section 8 are applicable even in such a matter. This judgment of the Supreme Court was not brought to the notice of Full Bench of Delhi High Court.. The Supreme Court has observed as follows:

"Equally untenable is the contention that Section 8 is not applicable to cases where the condition stipulates-the appointing of a Settlement Committee by one of the parties."

The submission which was made before the Supreme Court was relying on the wording of Section, 8 that 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 or in supplying the vacancy. The Supreme Court observed that this part of the section no doubt contemplate two parties but the section cannot be. read as not being applicable where the agreement provides for the nomination of the committee by one of the parties for the section itself says that the party may serve the other parties. The words "may serve the other parties" will include not serving other parties incases .in which the service on the other party is not contemplated. So, mere fact that authority by agreement between the parties is conferred on one of the parties to nominate the arbitrator does not take away the application of the provisions of Section 8 to such a situation where the part. which is authorised to nominate the arbitrator fails to do so So, the reasoning given in the e Poll Bench judgment that Section 8 would only apply where the arbitrator is to be appointed by consent of both the parties is "not consonance with law laid down by the Supreme Court, the Bombay High Court in the case Western Coalfields Ltd. and Others etc. Vs. Harichand Rai and etc., . has also understood the Supreme Court judgment in this very, manner and has held that clause (a) of Section 8(1) will have application only when the agreement itself provides that the arbitrator are to be appointed by the consent of the parties which means new arbitrators are to be appointed by consent which is quite different from their .nomination by one of the parties in pursuance of the express terms of, the agreement. In the case before the Bombay High Court. Western Coalfields Ltd. (supra), the &arbitrator was to he nominated in accordance with arbitration clause by Managing Director of Western Coalfields. The question which arose was whether by virtue of the said clause in the arbitration agreement it could be said that an arbitrator was to be appointed by consent of the parties so as to invoke provisions of Section 8(1)(a) of the

Arbitration Act. But the court came to the conclusion that having regard to the language of the arbitration clause the disputes and differences had to be referred to an arbitrator nominated by the Managing Director. There is no quarrel with this proposition of law laid down by the Bombay High Court. The question which arises before this Court is whether provisions of Section 8(2) of the Arbitration Act could be invoked which read as follows :

"If the appointment is not made within fifteen clear 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 party 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 if he or they had been appointed by consent of all parties."

(4) It would be useful to refer to some facts in the case of Chander Bhan (supra) in order to clearly appreciate the ratio laid down in that case. The arbitration clause; in the said case provided for nominating a committee to arbitrate in the matter by the State Government. Such a Committee was constituted and award was given which was, however, set aside and Committee had ceased to function. The Government had given a notice u/s 8(1) to the opposite party to concur in the appointment of a fresh committee. As the opposite party failed to concur in the matter the Government filed a petition u/s 8(2) and the court appointed the Committee suggested by the Government. "The question which arose before the Supreme Court was whether provisions of Section 8 (could at all be invoked in such a case The Supreme Court clearly held that Section 8(2) was applicable So, I need not say more on the point as it has, been authoritatively held that Section 8(2) of the Arbitration Act applies where the arbitrator is not appointed after notice is served within 15 days hereof. Present is a converse case. Here the opposite party had served a notice on the persona designata supply the vacancy arising out of the previous arbitrator retiring from the arbitration and the persona designata having failed to supply the vacancy within the stipulated period which necessitated the opposite party to file the present petition. So, the Court it is not powerless to direct appointment of another arbitral or by taking resort to provisions of Section 8(2) of the Arbitration Act.

(5) However the next question which arises for decision is whether the arbitrator which has been now nominated in accordance with the arbitration clause by the persona designata should be appointed an arbitrator by this Court or not ? Counsel for the petitioner has argued that the persona designata has no jurisdiction left with him to nominate the arbitrator when he failed to nominate the arbitrator within 15 days of service of notice on him by the petitioner.

(6) Counsel for the petitioner has made reference to Union of India v Mangaldas N. Varna Air 1958 Mad 296. In the said case the umpire was to be appointed by the arbitrators. A notice was given to the arbitrators to appoint the umpire within 15 days of service of notice. The umpire was however, appointed after 15 days and a contention was raised before the Madras High Court that such

appointment is not valid A Division Bench of the said High Court held that if she request for appointing the umpire is complied with in response to the notice, mere fact that appointment has been made more than 13 days after the service of notice would not "invalidate the appointment of the umpire. However, if the requirements of Section 8(2) are satisfied and an application is made to the court to appoint an umpire, there after of course, when the Court is seized of the matter the arbitrators could not be permitted to appoint the umpire meaning thereby that than it is for the court to appoint the umpire. Similarly, in the present case, after, the petitioner had served the notice on the respondents having failed to nominate the arbitrator within the stipulated period and petitioner to nominate the arbitrator and the respondents having already filed the petition u/s 8(2) of the Arbitration Act, it is evident that there after the respondents had no power to nominate the arbitrator and it could be-Court only which could appoint the arbitrator.

(7) Counsel for the, respondents has cited Union of India v. Mis. Himco India Private Ltd. Air 1985 Cal 404. This judgment is distinguishable on facts What has been laid down in the said judgment's that if arbitrator appointed in accordance with the arbitration clause has expressed unwillingness to act as arbitrator or refuses to act as arbitrator again/the procedure laid down in the agreement of arbitration-has to be followed for appointing the arbitrator. In the present case, that is what was required to be done by the petitioner in requesting the persona designata to nominate another arbitrator when then the previous arbitrator had retired from the arbitration and that procedure contemplated in the arbitration clause was followed by the petitioner but the respondents failed to nominate the arbitrator within time and after the petition has been filed u/s 8(2), the respondents could not in law nominate the arbitrator.

(8) Counsel for the respondents also cited V.G. Ghawda Pvt. Ltd. Vs. Union of India (UOI), Again, this judgment is on a totally different aspect. In the said case the General Manager had purported to appoint one officer as" an arbitrator. The opposite party did not raise any question about his suitability. The court held that there is nothing wrong in the appointment of said officer as an arbitrator. The contention being raised by the respondent is that the person, who has been now nominated a arbitrator by the respondent should be accepted as a arbitrator because nothing has been alleged against him. This is not a case where court is to consider whether the person, who has been nominated as arbitrator by the respondent after the filing of the petition, is a suitable person or not. The question which arises for consideration is whether respondent could nominate the arbitrator after the petition has been filed u/s 8(1) of the Arbitration Act. "Reference was made to Rai Bahadur Basakha Singh and Sons (Contractors) Pvt. Ltd. Vs. Indian Drugs and Pharmaceutical Ltd., , a case decided by a Single Judge of this Court, but in view of the judgment of the Full Bench in Ved Parkash (supra) the law laid down in this judgment was over-ruled Single Judge had expressed the view that if persona designata fails to appoint the arbitrator the court has no power to entertain the petition u/s 20 of the Arbitration Act for

giving directions to "persona designate to nominate the arbitrator , his failure to do so to appoint any other arbitrator. To be far to the counsel for the respondents" , I say that as soon as the judgment of the Full Bench was brought to her notice she did not try to further argue this point. It is evident from the very wording of the arbitration clause that parties never intended that the vacancy which may occur would not be supplied. In Union of India Vs. R.B. Ch. Raghunath Singh and Co., ,the Supreme Court has clearly held that the court had no power to supply the vacancy only if the arbitration agreement did show that the parties did not intend to supply the vacancy " and if no such intention could be called out from the arbitration clause, the court could supply the vacancy. The Supreme Court also observed that when. there was a named arbitrator even though he was named office, it was open to the court to supply the vacancy in his place u/s 8(a)(b) of the Arbitration Act.

(9) Counsel for the respondents also cited Food Corporation of India Vs. Ghanashyamdas Agarwal, . which follows the judgment of this Court given in the case of Rai Bahadur Basakha Singh (supra). So, the judgment would be of no help to the respondents in view of the Full Bench judgment of this Court. "In Food Corporation of India Vs. Bibhutibhusan Patra and Others, , a Single Judge of the Orissa High Court has held while interpreting similar type of arbitration clause that court has the power to appoint arbitrator by taking resort to provisions of Section 8(2) of Arbitration Act.

(10) So, in view of the discussion above, I hold that it is now for the Court to appoint the arbitrator. The disputes have arisen between the parties on account of a contract -regarding of goods. So, no technical points are involved in such disputes and I allow the petition and appoint Shri Dalip Singh, Advocate, a retired Judicial .Officer, who has also worked as Income Tax. Appellate Tribunal, as an arbitrator in place of Dr. B.N. Mani. I hope the arbitrator shall decide the matter at an early date because almost all the proceedings are complete in the matter as recorded by the previous arbitrator. I fix Rs. 10,000.00 (ten thousand only) as fee of the arbitrator to be paid equally by both the parties.