

(1994) 09 BOM CK 0026

In the Bombay High Court

Case No : C.R.A. No. 1039 of 1993 & Civil Revision Application No. 1029 of 1992

Kasturba Health Society

APPELLANT

Vs

M/s. National Building Construction Corporation Ltd.

RESPONDENT

Date of Decision : 07-09-1994

Acts Referred:

Arbitration Act, 1940 — Section 8, 9

Citation : AIR 1995 Bom 267 : (1995) 1 MhLj 205

Hon'ble Judges : A.S. Desai, J

Bench : Single Bench

Advocate : A.S. Jaiswal, for the Appellant; R.L. Khapre, for the Respondent

Judgement

1. In terms of Clause 60 of Contract dated 15-1-1972, the non-applicant appointed one Daljitsingh as an Arbitrator whereas applicant appointed Dr. Agrawal. On 3-10-1983, non-applicant called upon the applicant to supply vacancy, as Dr. Agrawal refused to act as an Arbitrator. As there was a failure, non-applicant approached the civil Court pursuant to Section 8 read with Section 9 of the Arbitration Act, with a prayer that Daljitsingh be appointed as a sole Arbitrator. By the impugned order, the civil Court granted the relief as prayed for. Hence, this revision by original non-applicant.

2. Mr. Jaiswal, the learned Counsel for the present applicant, mainly contended that Clause 60 of the Contract provides for appointment of an Arbitrator by each party to the dispute. According to Mr. Jaiswal, in case of vacancy, the Court u/s 8 of the Act can supply, only by appointing any other person. The Court u/s 8 of the Act has no power to supply the vacancy by directing the Arbitrator of one party, to act for the both. Such appointment is, therefore, per se illegal.

3. The arbitration clause empowers the parties to nominate one Arbitrator each. The clause envisages that such person to be nominated needs to be competent in the opinion of a party. The clause, however, does not convey that each party has to nominate a different person. When the right is to be exercised with

discretion, the choice of nomination can occasionally fall on one person. Clause 60 of the Contract does not expressly or otherwise make such nomination impermissible.

If two persons are appointed as Arbitrators and one ceases to act for any of the reason as stipulated by clause (b) to sub-section (1) of Section 8 of the Act, the vacancy is to be supplied. Firstly it is by the party. In case of failure, then with the intervention of the Court.

The person, who is already working as an Arbitrator for one of the parties, can be directed to act in place of person, who has refused to work. This is a permissible mode or method of supplying the vacancy having regard to intendment of Clause 60 and scheme of Section 8 of the Act. Moreover, Section 9 of the Act permits the other party, in case of vacancy, to proceed with the reference before sole Arbitrator. In view of this, law recognises appointment of a sole Arbitrator even when as per contract, parties are entitled to appoint different Arbitrators on their behalf. I, therefore, do not find any patent illegality in the order passed by the civil Court.

4. Mr. Khapre contended that the applicant failed to appoint an Arbitrator in place of Dr. Agrawal, though called upon by non-applicant by letter dated 3-10-1983. Furthermore, even before the civil Court, the applicant did not seek an opportunity to appoint an Arbitrator to supply the vacancy of Dr. Agrawal. In view of this, Mr. Khapre rightly contended that it would not be expedient now for the applicant to canvass any grievance as regards appointment of a sole Arbitrator.

5. Mr. Jaiswal, relying on a decision in *The Union of India (UOI) Vs. Shri Om Prakash*, , Yas urged that Civil Court u/s 8 of the Act, can appoint an Arbitrator. However, Section 8 does not empower the Court to make reference of a dispute.

Mr. Khapre urged that in the present case, there is no question of making reference by the Court. He pointed out that before occurrence of vacancy, Arbitrators were dealing with the dispute. As such, there is no question of making fresh reference by the Court. Having regard to the dictum laid down by the Supreme Court, Mr. Khapre agreed for modification of the order under challenge. In view of this, the following order :

The revision application is partly allowed. The impugned order is modified as under :

Mr. Daljitsingh is appointed as a sole Arbitrator. He will act according to law.

However, in the circumstances, there will be no order as to costs.

Order accordingly.