
(1996) 12 RAJ CK 0011
In the Rajasthan High Court
Case No : Civil Revision No. 941 of 1993

Kuldeep Dhankar

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 17-12-1996

Acts Referred:

Arbitration Act, 1940 — Section 20, 8

Citation : (1997) 1 WLC 589 : (1996) 2 WLN 503

Hon'ble Judges : M.G. Mukherji, C.J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.G. Mukherji, C.J.—This revision application by Kuldeep Dhanker against Union of India through General Manager, Telecommunication, District Jaipur has been filed impugning an order dated July 8, 1993 passed by the District Judge, Jaipur City in Civil Misc. Case No. 345/91 whereby the learned District Judge instead of appointing an independent arbitrator as prayed for by the plaintiff-petitioner appointed over again the Member (T.O.), Directorate of Telecommunication, New Delhi as Arbitrator with a further direction upon him that he should himself act as Arbitrator and give an award within 4 months.

2. The plaintiff came to the court with the case that the Jaipur Telecommunication District invited tenders for publishing telephone Directory (English Edition) of Jaipur and the plaintiff petitioner gave a tender which was accepted. There was an agreement dated October 6, 1987 in between the General Manager, Telecommunication, District Jaipur on the one hand and the plaintiff petitioner on the other in his capacity as Proprietor of M/s Winner Advertising. According to the agreement the printing material was to be provided by the Department within 60 days but the Department failed to observe the time schedule of supplying the printing material. The petitioner however supplied 60 advance copies of the Directory within 60 days from the date of supplying the material by the Department which stood approved with slight modification.

Thereafter the petitioner supplied 23 copies of the Directory on December 21, 1988. The remaining copies of the Directory were also ready for supply but on December 22, 1988 the Department Informed the petitioner that the Directory was not acceptable to them and thereupon a penalty of Rs. 2,88,000/- was imposed illegally and arbitrarily. Since the department was not ready and inclined to sort out the material, the petitioner filed an application u/s 20 of the Indian Arbitration Act for appointment of an Arbitrator pursuant to the arbitration clause in the agreement. The arbitration clause inter alia was to the effect that all disputes or differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion" and whether before or after the determination of the contract, shall be referred by the petitioner to the General Manager, Telecommunication, District Jaipur and the General Manager in his turn shall within a reasonable time, make and notify his decisions thereon in writing and the decisions should be final and binding upon the contractor. However, if the Contractor is dissatisfied with the decision of the General Manager, Telecommunication, District Jaipur on any matter in question, the dispute or difference on any account or if the General Manager, Telecommunication fails to make a decision within a reasonable time, then and in any such case, but except in any of the excepted matters, the petitioner may within reasonable time but not exceeding 21 days of the communication of such decision, take steps to refer the matter in question, dispute or difference to arbitration under clause 20 of the agreement. The work under the contract should unless otherwise directed by the arbitrator be continued by the petitioner during the arbitration proceedings subject to other rights and remedies of the General Manager, Telecommunication, District Jaipur as provided in the contract. Except in respect of excepted matters referred to in clause 19 of the agreement all questions, issues, disputes and differences between the parties or pertaining to any interpretation thereof or the right or liability of any party or as to any act or omission of either party whether arising during the course of the work or after the completion or abandonment thereof, its termination, expiry or otherwise relating to the contract, should be referred by any aggrieved party to the sole arbitration of the Member (T.O.), Directorate of Telecommunication, New Delhi or his nominee. The arbitrator to whom the matter was originally referred, on his being transferred or vacating his office or being unable to act, for any reason, the Member (T.O.), Directorate of Telecommunication, New Delhi shall designate any other person to act as arbitrator in accordance with the terms of the contract and such persons shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. The award of the arbitrator so appointed shall be final, conclusive and binding on all the parties to the contract and provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof and the rules made thereunder, shall apply to the arbitration proceedings under this clause. The award shall be made in writing and published by the arbitrator within six months after entering upon the reference or within such extended time not exceeding further four months as the sole arbitrator shall by a writing under his

own hand extends. The arbitrator shall have power to order and direct either of the parties to abide by, observe and perform all such directions as the arbitrator may think fit, having regard to the matter in difference i.e. the dispute before him.

3. On an application u/s 20 of the Arbitration Act being filed by the plaintiff petitioner, the learned District Judge by his order dated July 6, 1990 appointed the Member (T.O.), Telecommunication, New Delhi as arbitrator and it was directed that the award should be given within a period of four months. It is alleged by the petitioner that the arbitrator appointed by the court did not act as arbitrator appointed another person Shri A.K. Nagpal, the District Manager, Telephones, Ambala as arbitrator. It was submitted that the said Shri A.K. Nagpal was not entitled to act as arbitrator, inasmuch as he was not appointed as such by the court. Even though Shri Nagpal was appointed in November, 1990, he directed both the parties to file their respective claims. The petitioner filed his claim and it is submitted before me that he did so without knowing the exact position of law that Shri Nagpal was not entitled to act as Arbitrator. The Department however did not file its claim till August 10, 1992. Ultimately Shri A.K.Nagpal passed an order dated August 10, 1992 that the department not having filed its claim despite a number of adjournments and the period of four months having already expired, he treated the matter as closed and refused to act any further. The petitioner was aggrieved at the attitude of Shri Nagpal because he was unreasonably indulgent to the department. Instead of passing the award he refused to act on the ground that the period of four months had already expired.

4. It is submitted before me that the manner in which the arbitrator conducted himself in the proceedings amounted to neglect and refusal to act. The petitioner however filed an application before the learned District Judge u/s 8 of the Arbitration Act for appointment of an independent arbitrator in such circumstances. The learned District Judge however directed the department to give three names of other officers of the Department working at Jaipur and such names were supplied. On behalf of the petitioner a request was made that some independent person, either a retired Judge of the High Court or retired District Judge might be appointed to act as arbitrator so as that the dispute could be resolved by an independent person. The petitioner expressed his apprehension that he would not get proper justice from the officer of the Department, more so when it was manifest enough from the attitude of the departmental officers as to how far the delaying tactics could go.

5. The learned District Judge however by passing the impugned order has again appointed the selfame officer, namely, Member (T.O.), Telecommunication, New Delhi as Arbitrator with the further direction that he should give the award within four months. The petitioner submits that subsequent to the said order no notice was received by him from the said Arbitrator.

6. It was submitted by the plaintiff petitioner that the learned District Judge

failed to appoint an independent Arbitrator even though he came to the conclusion that the arbitrator appointed by the court has not acted as per directions of the court and delegated his functions to some one else, which he was not competent to do. Even the person to whom the authority was delegated by the Member (T.O.), Directorate of Telecommunication, New Delhi i.e. the Arbitrator as appointed by the court, the said delegate did not act in a proper manner. The entire proceedings as conducted by Shri Nagpal would reveal that he resorted to conduct the proceedings in such a manner which amounted to neglect and refusal to act within the meaning of Section 8 of the Arbitration Act. It was submitted in such circumstances that it was only apposite on the part of the learned District Judge to have appointed an independent person. An apprehension was also expressed before the learned District Judge that the officer of the Department would not be able to render justice in the matter since the officers were interested in harassing the petitioner and protracting the proceedings and further delay would defeat the cause of justice.

7. It was further submitted by the petitioner that the opposite party being a Department of Union Government itself was bound by Government of decisions based on recommendations of the Parliamentary Committee on public undertakings. The recommendations of the Parliamentary Committee as approved by the Parliament and as adopted by the Government revealed that the Committee noted with concern the different instances in some of the public undertakings where persons who had themselves dealt with the case and took adverse view against disputants were ultimately appointed arbitrators in the same case. It was equally unfair to appoint an officer of the same undertaking as an arbitrator. The committee did not approve appointment of arbitrator unilaterally without consulting the other party involved. It was further submitted that the approach of the learned District Judge was perverse. When a duty was cast upon the court to appoint an arbitrator who was an independent person, the court ought not to have done the selfsame mistake in appointing the Member (T.O.), Directorate of Telecommunication, New Delhi over again, when the occupant of the same office shirked his responsibility and delegated the matter to some other person and the delegate did not do his function and rather acted in a neglectful and irresponsible manner which amounted to neglect and refusal to act. Mr. Dhanker also brought to my attention the fact that the post of Member (T.O.), Telecommunication has now been abolished. It was further submitted before me by Mr. Dhanker that the arbitration clause exhausted itself on the face of refusal of the arbitrator to act and that being so, there was every scope for the petitioner in making an appropriate application u/s 20 of the Arbitration Act in 1990. That apart, twice the same Member (T.O.) Telecommunication being appointed as Arbitrator and he having not initiated the proceedings and having delegated the authority, contrary to the court's direction to some one else and the delegatee having not acted in accordance with law, it was not a fit case for the selfsame Member (T.O.) being directed to act as Arbitrator over again as was so done by the District Judge on an erroneous appreciation of fact and law

peculiar to this case. Mr. Dhanker appearing for the petitioner cited before me the decision in State of West Bengal Vs. M/s. Naional Builders, It was held in this reported case that even if an authority is named by office to be the sole arbitrator but if he refused to act, then the jurisdiction to appoint another arbitrator vests in the court. In the facts of the reported decision the arbitration clause of the agreement did not indicate that the parties did not intend to supply the vacancy where the court could assume jurisdiction u/s 8(1)(b) to appoint another arbitrator. The basis for assuming such jurisdiction is that the arbitration clause is tendered inoperative. Where the agreement provides for appointment of a specific person either by name or by designation and that person refuses to act, then the question of appointing him again cannot arise. Refusal by such a person results in the agreement clause ceasing to operate. When two parties agree for appointment of either A or B by name or designation and the person so named refuses to act, then the agreement shall be deemed to have exhausted itself. The person so appointed having refused to act, he cannot be asked again to arbitrate. That will be contrary to the very basis of arbitration since no one can be forced to act against his free will. It would also be contrary to the agreement and if there is no agreement to appoint another person, the same result follows where the arbitration clause empowers the sole arbitrator either to abritrate himself or to nominate any one else, as was the case here. The person named by the sole arbitrator stands substituted in his place. He does not have any independent person. The power and authority exercised by him is the same as the authority which nominated him. Therefore, once the nominee refuses to act it shall be deemed that the arbitrator mentioned in the original arbitration clause has refused to act and, therefore, the clause would cease to operate. The appointment of next arbitrator could only be in accordance with Section 8(1)(b). Mr. Dhanker also placed reliance on the decision of the Supreme Court in G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service, In this decision it was held that when there was notice given to the opposite party to appoint arbitrator and there was failure to take action, it gives right to the other party to invoke jurisdiction of the court u/s 20 for the appointment of an arbitrator. The Court should endeavour that the contract should always be given effect to, though the contracting party had failed to act according to contract. It is to be seen whether the contractor provided for appointment of a named arbitrator and if so, the parties normally would be bound by the terms of the contract. The court would not be justified to appoint any other arbitrator unless the arbitrator refused or neglected to enter upon the reference. In the absence of any named arbitrator it would be open to the contracting parties to agree for an appointment of an arbitrator by agreement even after proceedings were led in the court u/s 20 of the Act. In the absence of any such agreement the court gets jurisdiction and power to appoint an arbitrator. Thus, when the 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. When no agreement was reached even in the court between the parties, the court gets jurisdiction

and power to appoint an arbitrator. Even if Section 8(a) per se does not apply, notice was an intimation to the opposite contracting party to act upon the terms of the contract and other party's non-availment entails the forfeiture of the power to appoint an arbitration in terms of the contract and gives right to the other party to invoke, the Court's jurisdiction u/s 20. In the facts of the reported decision the respondent Chief Engineer of the Military Engineering Service did not appoint an arbitrator even after the notice was received by him and he averred in his written statement that it was under his consideration. Even before the Court he did not state that he was willing to appoint an arbitrator. The Supreme Court in such circumstances held that the appointment of an arbitrator made by the court was proper in consonance with the principles laid down in *Union of India v. Prafulla Kumar*, (1983) 1 LLJ 304 holding that before appointing an arbitrator by the Court itself, it is desirable that the Court should consider the feasibility of appointing an arbitrator according to the terms of the contract. The court shall make an order of reference to the Arbitrator appointed by the parties under the agreement or otherwise if such arbitrator had not been appointed. When the parties could not agree to appoint an arbitrator, the Court may proceed to appoint an arbitrator by itself.

8. In *Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc.*, emphasis Was laid as to whether language of the provisions in the arbitration agreement gives out as to whether the parties intended to supply the vacancy or not. If the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. To take the case out of Section 8(1)(b) what is required is not the intention of the parties to supply the vacancy but their intention not to supply the vacancy. Applying this formula I do not think that there was any intention expressed by the parties not to supply any vacancy.

9. Mr. Gurjar cited before me the decision of the Supreme Court in *Bhupinder Singh Bindra Vs. Union of India and another*, where it was held that it was a settled law that court cannot interpose and interdict the appointment of an arbitrator, whom the parties have chosen under the terms of the contract unless legal misconduct of the arbitrator, fraud, disqualification etc. is pleaded and proved. It is not in the power of the party at his own will or pleasure to revoke the authority of the arbitrator appointed with his consent. There is no general power for the court to appoint an arbitrator unless the case falls within the relevant provisions of the Act nor will the court make an appointment where the arbitration agreement provides a method by which appointment is to be made. If the arbitration clause expressly provides appointment of the named officer by designation who was appointed in terms thereof and had entered upon the duties immediately, the revocation of such arbitrator's authority would amount to removal, which could only be done on specified grounds like misconduct or omission to enter upon duties within time. Both the parties by consent may revoke the authority of the arbitrator but that was not the case in the said reported decision. On the contrary it was held by the Supreme Court in the said

decision that the contract clearly indicates that the Superintending Engineer, Planning Circle, Chandigarh or any one acting as such at the time of reference within 180 days i.e. 6 months from the date of making final payment of the contractor was the designated officer chosen voluntarily by the parties as an arbitrator. Therefore, having consented for adjournments and dragged on the case for a considerable time, it was no longer open for the appellant to contend that the arbitrator neglected to make the award. Under those circumstances the Supreme Court held that it could not be held that there were any laches on the part of the arbitrator in giving the award. When the parties under the clauses of the contract have specifically chosen a named authority and not any other arbitrator, without the consent of the parties, the court had no jurisdiction to interpose into the contract and appoint an arbitrator u/s 8 or any other provision under the Act. In such circumstances it was held that the order appointing an independent arbitrator to adjudicate the dispute was not proper.

10. I have given the matter an anxious consideration. In the facts revealed I find that there was a clear intention expressed by the named arbitrator or his delegated authority not to act within the stipulated time. It was a clear case of neglect and refusal to act and that being so, the necessary criterion for the appointment of an independent arbitrator has sufficiently been made out. In such circumstances I would set aside the order impugned and direct the learned District Judge to appoint an independent arbitrator in accordance with law within a period of one month from this date. The revisional application accordingly stands allowed. There will be no order as to costs.