
(1987) 04 AP CK 0026
In the Andhra Pradesh High Court

National Projects Construction Corporation Ltd.	APPELLANT
Vs	
Uma Constructions	RESPONDENT

Date of Decision : 10-04-1987

Acts Referred:

Arbitration Act, 1940 — Section 11, 8(1)

Citation : (1987) 04 AP CK 0026

Hon'ble Judges : Rama Rao, J

Bench : Single Bench

Advocate : C. Poornaiah, for the Appellant; E. Manohar, for the Respondent

Judgement

Rama Rao, J.

1. This revision petition is against the order appointing an arbitrator u/s 11 of the Arbitration Act. The first respondent in this revision petition filed an application for appointment of an arbitrator on the ground that the second respondent who is appointed as an arbitrator by the managing director of the company pursuant to clause 4 of the agreement between the parties is not diligent and has not entered upon the reference. During the pendency of the application and on receipt of the court summons, the second respondent resigned on March 9, 1984. Thereafter, the managing director appointed the third respondent as arbitrator by proceedings dated May 25, 1984. The third respondent who was appointed as the arbitrator by the managing director was brought on record on June 30, 1984. The plea of the first respondent in the court below is that the application for appointment of the arbitrator has become infructuous in view of the appointment made by the managing director pursuant to the power vested in him under clause 4 of the agreement.

2. The court below held that the appointment of a corporation official as arbitrator by the managing director is invalid and appointed an arbitrator.

3. Learned counsel for the petitioner, Sri C. Poornaiah, contends that the managing director alone is empowered to appoint the arbitrator under clause 4 of

the agreement and on appointment of an arbitrator by the managing director, the proceedings initiated u/s 11 of the Arbitration Act have become infructuous and that the appointment of arbitrator by the court is illegal.

4. The learned Advocate-General seeking to explain the judgment of the court below contends that the managing director is empowered to appoint an arbitrator in the event of the latter vacating his office or being unable to act in view of any disability and when the arbitrator did not enter upon reference, the court is justified in appointing the arbitrator u/s 11.

5. To appreciate the rival contentions, it is necessary to get at the purport of the provisions of the agreement. Clause 4 of the agreement provides that "the parties agreed for the sole arbitration of the person appointed by the managing director of the National Projects Construction Corporation Ltd. and such arbitrator may also be a Corporation Officer and in the event of such person vacating the office or being unable to act, the managing director has the power to appoint another person to act as an arbitrator.

6. Clause 4 empowers the managing director to appoint another arbitrator in the event of two contingencies, viz., vacating the office or being unable to act. The application is filed for removing the arbitrator on the ground that he has not entered upon the reference and on receipt of summons from the court, the arbitrator resigned. Therefore, this act of resignation after the summons was received cannot be considered as coming within the purview of "vacating the office". The other aspect that has been hotly contested is whether the arbitrator was unable to act. The expression "unable to act" should be considered as having close affinity to the disability that is attached to the person. Disability cannot be equated to negligence. The disability in the context should be considered as incapacity or inability stemming from personal disqualification. Negligence can be attributed in the event of absence of motivation and punctuality in performing the duty. The refusal is voluntary refraining or withdrawal. "Being unable to act" is a sequel to disqualification attached to the person and such disqualification bars the person from performing the work and this embargo should not be confused with negligence or refusal comprising one's lethargy and volition. Further, the language employed in clause 4 of the agreement does not bear close affinity to the expression used in section 11 or section 8(1)(b) of the Arbitration Act in the context of appointment of arbitrator for want of diligence or negligence or refusal to act. The expression used in section 11 and section 8(1)(b) are "use of all reasonable despatch in entering on reference and making award" and "neglects or refuses to act." The expression "unable to act" cannot be considered as synonymous with the expressions used in section 11 and section 8(1)(b) and, therefore, "unable to act" should receive a different connotation. Therefore, clause 4 intends to supply by appointment by managing director in the event of vacating or the disability of the arbitrator. In the absence of either of these situations, the managing director has no power to appoint another arbitrator. The erstwhile arbitrator resigned during the pendency of the application u/s 11 and

this cannot be considered as vacating the office and this position is not disputed. Therefore, the assumption of power by the managing director arises when the arbitrator is unable to act. The mere negligence or refusal cannot be considered as unable to act and, as such, the managing director has no power to appoint another arbitrator by invoking clause 4.

7. The court below erred in holding that the managing director cannot appoint an officer of the corporation as clause 4 specifically empowers the corporation to appoint an officer of the corporation. In view of the foregoing discussion, the managing director has no power to appoint another arbitrator under clause 4. The order of the court below is confirmed but not for the reasons set out in the order.

8. Revision petition dismissed. No costs.