

(1980) 01 DEL CK 0014
In the Delhi High Court
Case No : First Appeal No. 17 of 1978

Om Parkash and Another		APPELLANT
	Vs	
Goodwill India Ltd. and Another		RESPONDENT

Date of Decision : 18-01-1980

Acts Referred:

Citation : (1980) 17 DLT 372

Hon'ble Judges : Prakash Narain, J

Bench : Single Bench

Advocate : Daljit Singh, for the Appellant;

Judgement

Prakash Narain, J.

(1) This appeal raises a question of law which, as at present advised, I find is not fully covered by precedent. Whether Section 8 or Section 20 of the Arbitration Act has to be availed by the first respondent in the circumstances of the case is the question to be decided. Briefly stated, the facts of the case are these.

(2) The first respondent hereinafter to be referred to as the Company, and the appellant and the second respondent hereinafter to be referred to as the hiring parties, entered into a hire-purchase agreement. One of the terms and conditions of the agreement, which constitutes the arbitration agreement between the parties, reads as under : "Clause VI- (a) All disputes, differences, and or claims, arising out of this Hire Purchase Agreement, "-shall be settled by arbitration, in accordance with the provisions of the Indian Arbitration Act 1940) or any statutory amendments thereof and shall be referred to the sole arbitration of Shri Clnit Ram Mittal, Advocate Delhi or in case of his death, refusal, neglect, incapability to act as an arbitrator to the sole arbitration of Shri Raj Paul Sagar Advocate, Delhi. The reference to the Arbitrator shall be within the Clauses Terms And Conditions of this Agreement. The award given by the Arbitrator shall be final and binding on all the Parties concerned. (b) It has been expressly explained by the owners to the Hirer and to the Guarantor, that either of this

aforementioned Arbitrators are usually appointed by the owners in the hire purchase agreements accepted by them, and inspired by the information supplied to them, the said Hirer and Guarantor have willingly agreed to the nomination of the said Arbitrator/s, and they shall not raise any objection against the appointment of any one of the Arbitrator/s on the ground that the Arbitrator/s is/are connected in any manner, with the owners. (e) Any party desirous of making a reference to the Arbitrator, shall give fifteen days' Registered Ack. Due Notice of his intention to do so, to the other party at his usual place of business or residence, or the place of their last notified address, and the Notice shall be deemed to have been served when it would ordinarily have been delivered by post. The Notice sent by the Arbitrator, to the Parties, by Registered Post, at the addresses mentioned in the Hire Purchase Agreement, will be considered sufficient service on the Parties, whether such Notice is received by them or not, or is refused, or is returned undelivered."

(3) Disputes having allegedly arisen between the parties to the said agreement, the Company filed an application u/s 20 of the Arbitration Act in the Civil Courts at Delhi on April 28, 1976. The application was resisted by the hiring parties. By an order dated June 1, 1977 the Additional District Judge, Delhi, ordered the arbitration agreement to be filed and made a reference of the disputes and differences between the parties to the arbitration of Shri Chet Ram Mittal, Advocate. The arbitrator thereafter entered on the reference on October 28, 1977. The Company filed its statement of claim before the arbitrator along with certain documents. After some sittings had been held by the arbitrator he found himself incapable of acting as such any further due to ill-health. Accordingly, the arbitrator declined to proceed further with the arbitration proceedings. This led the Company to file an application u/s 20(4) read with Section 8 of the Arbitration Act before the Additional District Judge who had earlier ordered the arbitration agreement to be filed and had made the reference. The application from Shri Chet Ram Mittal, Advocate, along with the papers filed before him were also submitted with the said application by the Company. By this application it was submitted that inasmuch as Shri Chet Ram Mittal, Advocate, was incapable of acting and had refused to act as an arbitrator any further and as the arbitration agreement did not show that it was intended that the vacancy so caused should not be supplied and that indeed, the arbitration agreement in terms postulated reference to the alternate named arbitrator, the reference may be made to Shri Raj Paul Sagar, Advocate, the named alternate arbitrator, in accordance with law. Notice of this application was given to the hiring parties, who once again objected. It was contended that Sub-section (4) of Section 20 of the Arbitration Act was not attracted in the circumstances of the case, that the arbitration agreement stood exhausted, and that, if at all, the proper procedure which the Company should have adopted was to have a notice u/s 8 of the Arbitration Act issued to the hiring parties for supplying the vacancy and inasmuch as no such notice has been given, the application moved in court was liable to be dismissed. The Additional District Judge after hearing the parties has

come to the conclusion that Section 8 was not attracted at all and that in the circumstances of the case he had jurisdiction to make a reference to Shri Raj Paul Sagar, Advocate, the alternate arbitrator. Aggrieved by this decision, the hiring parties have come up in appeal u/s 39 of the Arbitration Act.

(4) It is unfortunate that no one appeared on behalf of the Company and I have not had the benefit of hearing its counsel. The second respondent was not represented by a counsel but inasmuch as his interest coincides with the interest of the appellant, I have heard Mr. Daljit Singh who has argued the case on behalf of the appellants with his usual ability.

(5) Chapters II, III and IV of the Arbitration Act deal with arbitrations in three different situations. Chapter II is concerned with reference to arbitration without intervention of the Court. Chapter III deals with how references are to be made with the intervention of the Court before the institution of a suit but on differences and disputes arising between the parties to an agreement and to which disputes and differences the agreement applies. Chapter IV deals with reference to arbitration in pending suits. Section 8 of the Arbitration Act falls in Chapter II and Section 20 falls in Chapter III. They operate in separate fields. Reading the provisions of Chapter II and Chapter III together it is obvious that parties to an arbitration agreement have the option either to take advantage of the provisions of Chapter II or take advantage of the provisions of Chapter III. Indeed, a careful reading of the provisions of Sub-section (1) of Section 20 makes it clear that any person who is a party to an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court. The question that, however, arises in the present case is somewhat more complex. As noticed earlier, the arbitration agreement was ordered to be filed at the instance of the Company by the order dated June 1, 1977. A reference was made to Shri Chet Ram Mittal, Advocate, and he did enter on the reference. The appointed arbitrator then refused to act further and returned the papers. In such a situation whether the aid of Section 20 was again to be taken or whether procedure prescribed by Section 8 had to be followed is the question. Section 8 reads as under : "8. Power 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 the 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 acting, 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 or in supplying the vacancy. (2) If the appointment is not made within fifteen clear days after the 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 the consent of all parties." Section 20 reads as under "20. Application to file in Court arbitration agreement. (1) Where any person have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court. (2) The application shall be in writing and shall be numbered and registered as suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or if otherwise between the applicant as plaintiff and the other parties as defendants. (3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed. (4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. (5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable."

(6) Mr. Daljit Singh contends that Sub-section (4) of Section 20 would have no application as the arbitration agreement was already filed and an order of reference had already been made as far back as on June 1, 1977. He contends that if thereafter a vacancy occurred, then under Clause (b) of Sub-section (1) of Section 8 the Company was bound to call upon the hiring parties to concur in the appointment of an arbitrator. Inasmuch as admittedly the Company did not do so, no application u/s 8 or Section 20(4) was competent. He relies on a Full Bench decision of the Allahabad High Court in Mangal Prasad Vs. Lachhman Prasad, . Learned counsel has also invited my attention to a Single Bench decision of the Punjab High Court in Shri Dewan Chand v. The State of Punjab and another ILR 1966 (1) P&H 391. The contention of the learned counsel is two fold. First, that, if at all, the only right of the Company was to have recourse to Section 8(1)(b) of the Arbitration Act. Secondly, that the arbitration agreement stood exhausted on a reference being made to Shri Chet Ram Mittal, Advocate. It is on the first of these two points that the learned counsel has cited the two decisions above referred to.

(7) Before I advert to the Full Bench decision of the Allahabad High Court I may

first deal with the judgment of the Punjab High Court. In this case the sole question for determination was whether there was a valid arbitration agreement between the parties to refer their disputes to a named arbitrator, if the name of the arbitrator therein had been scored out, before the agreement is completed. The agreement was executed between the State of Punjab and M/s Dewan Chand Jagdish Rai. One of the clauses of the agreement purported to constitute the arbitration agreement between the parties. On disputes having arisen between the parties the Superintending Engineer asked Shri Dewan Ghand, representing the firm, whether he was agreeable for arbitration of the disputes between him and the Government by the Superintending Engineer. On the contractor declining, the State of Punjab moved an application u/s 8(2) of the Arbitration Act alleging that a notice had been served by the State on the contractor u/s 8(1) of the Act for giving his consent to get the case decided through arbitration of the Superintending Engineer but the contractor had not concurred in the appointment. One of the points, Therefore, that came up for determination was whether the requirements of Section 8 have been fulfilled .It was held that no application u/s 8(2) of the Arbitration Act could be filed without serving a notice u/s 8(1) of the Act and there was no evidence of any notice having been served by the State on the contractor. It was further held that in view of the fact that the name of the arbitrator was not filled, there was no valid arbitration agreement between the parties. The question as to whether Section 20 was attracted was neither raised nor commented upon. Therefore, this decision is only authority and, if I may say so with respect, good authority for the proposition that Section 8(2) cannot be availed of unless the party moving the Court has first given notice postulated by Section 8(1) of the Arbitration Act. In the case in hand no notice u/s 8(1) is either alleged to have been given by the Company to the hiring parties nor has any notice been proved on record. Therefore, the application of the Company u/s 8 of the Arbitration Act was not maintainable.

(8) I now come to the decision of the Allahabad High Court. This Full Bench decision is not a unanimous decision of the three Judges Constituting the Bench. It is a majority judgment rendered by M.C. Desai, C.J. with S.N. Katju, J. concurring and N.U. Beg, J. dissenting. The question referred to the full Bench by a Division Bench of that court was as under :

"WHETHER an application u/s 20 of the Indian Arbitration Act can be made in a case like the present one where the arbitrator had started to function and had entered upon the reference but at a later stage could not proceed with the same?"

The appellant had filed a suit for partition in the Court of Civil Judge, Bahraich. Thereafter the respondent filed an application u/s 20 of the Arbitration Act in the Court of the Civil Judge, Malihabad. The appellant in opposition to the application u/s 20 pleaded that he had signed the agreement under pressure, that the agreement became null .and void because no award was made within four

months, that the arbitrator was in collusion with the respondent that the application was barred by time, that it was not maintainable because the arbitrator had already proceeded with the reference and that the agreement was not the one contemplated by Section 20. In reply to the objections of the appellant, the respondent inter alia, pleaded that he had moved an application u/s 34 of the Arbitration Act for stay of the suit filed by the appellant and admitted that the arbitrator had nearly completed the proceedings and could make an award within a fortnight. The Civil Judge, Malihabad ordered the arbitrator who was proceeding with the reference made prior to the filing of the application u/s 20 to file the agreement and other papers in Court. Thereafter he allowed the application u/s 20 of the Arbitration Act. The appellant filed an appeal to the High Court which came up before a Division Bench and was then referred to the Full Bench. In the meantime the Civil Judge, Bahraich, dismissed the application u/s 34 of the Act moved by the respondent. It was in these circumstances and on a construction of Sub-section (1) of Section 20 of the Arbitration Act that the majority took the view that an application u/s 20(1) had to be made before the arbitrator had entered upon the reference. If he had already entered upon the reference there would be no necessity of the Courts ordering the differences between the parties to be referred to the arbitrator. If the arbitrator after entering on the reference neglects or refuses to act or proceed further or fails to use all reasonable dispatch in proceeding with the reference, he can be removed u/s 8(1) or Section 11 of the Arbitration Act. It was further observed that Section 20(1) pre-supposes that the agreement is with one party or the other who can be ordered by the Court to file it. This would be the position when the arbitrator has not entered upon the reference. "When he has entered upon the reference, there is no scope for making such an order as the agreement is with the arbitrator who is not under the Court's jurisdiction. The remedy provided by Section 20(1) is an alternative to that provided by Chapter II which means that Chapter II also applies to a case in which a difference arises after the agreement had been entered into. It was observed, "It cannot be disputed that the Act governs an arbitration agreement preceding a difference and also an arbitration agreement following a difference and if Chapter II does not exclusively deal with a difference preceding an agreement it cannot be said that Section 20(1) exclusively deals with a difference arising after an agreement." The learned Chief Justice referring to the decision of the Supreme Court in *Thawardas Pherumal v. Union of India* AIR 1955 S.G. 458, observed that that case, "is an authority only for the proposition that if one party is not prepared to submit a difference to arbitration in spite of there being an agreement for arbitration, the other party must have recourse to Section 20 and then the former party would be compelled to submit the difference under Sub-section (4). It does not follow that an application u/s 20 is necessary when an arbitrator after having acted upon the reference finds himself unable to make an award because one party does not co-operate with him. Clearly the Supreme Court assumed a case in which the difference had not been referred to the arbitrator at all and he had not entered upon the reference; what should be a party's remedy if the arbitrator found

himself in the same position as Sri Baij Nath Prasad in the instant case was not discussed by the Supreme Court." The above observations were made in the context of the submission that the arbitrator was not permitted to go on with the reference. It was observed that if the appellant was not co-operating with the arbitrator-there was nothing to preclude the arbitrator from making ex parte award on the basis of evidence and material supplied to him by the respondent. Inasmuch as the arbitrator did not make an award, even though he could make it, it could be said that he neglected or refused to make it and action could be taken u/s 8 of the Arbitration Act. It was further observed that if the arbitrator was neglecting to decide the reference made to him by use of all reasonable dispatch, parties could have recourse to Section 11 and have him removed. It was in these circumstances that the majority took the view that an application u/s 20 as moved was incompetent. The majority answered the reference made to the Full Bench in the negative.

(9) Beg, J. dissented with the majority. Relying on an earlier Division Bench decision of that High Court the learned Judge spelt out the four conditions necessary to be fulfilled before an application u/s 20 can be entertained by a Court. According to him they are : "(1) That some persons should have entered into an arbitration agreement. (2) That the said arbitration agreement should have been entered into "before the institution of any suit with respect to the subject-matter of the agreement or any part of it". (3) That a difference should have arisen in respect of the subject-matter of agreement. (4) That the Court where the application is filed should have jurisdiction in the matter to which the agreement relates." The learned Judge then went on to observe that according to the contention of the appellant in addition to the above-mentioned four conditions, a fifth condition is also necessary for making an application u/s 20 of the Act entertainable, and that condition is that the application should be filed before the arbitrator has entered upon the arbitration proceedings. The majority had taken the view upholding this contention of the appellant. Beg, J. found himself unable to accept fifth condition as it is not so postulated by Section 20. The learned Additional District Judge has preferred the view taken by Beg, J. rather than follow the majority view. He has quoted relevant portions of the majority view as well as relevant parts of the opinion of Beg, J. He has adopted the reasoning of the learned Judge of the Allahabad High Court and held that Sub-section (4) of Section 20 has to be read without adding any words to it and that the fifth postulate of an application u/s 20 being made before the arbitrator enters on the reference is not warranted on a plain reading of the Section.

(10) Mr. Daljit Singh relies on the opinion of the majority in the Allahabad decision to contend that once reference had been made to Shri Chet Ram Mittal, Advocate, Sub-section (4) of Section 20 could not be availed of. He further contends that Sub-section (5) in terms lays down that once a reference is made to a named arbitrator, thereafter the arbitration shall proceed in accordance with and shall be governed by the other provisions of the Act. In other words, he submits, once a reference had been made to Shri Chet Ram Mittal, advocate, and

he had entered upon the reference, if he failed or neglected to proceed with the reference he could either be got removed u/s 11 of the Act or if the arbitrator resigned, as he did in the present case, and was found incapable of proceeding with the reference recourse had to be taken to Section 8 of the Act.

(11) In my opinion, neither the majority judgment nor the judgment of Beg, J. is really helpful in resolving the tangle in which the Company finds itself. I agree with the finding of the Additional District Judge that Section 8 is not at all attracted, though for somewhat different reasons. Clause (a) of Sub-section (1) of Section 8 is obviously not attracted. Indeed, learned counsel submits that it is Clause (b) of Sub-section (1) of Section 8 that would be attracted. I have already read the clause earlier. In my opinion, Clause (b) would only be attracted if:- (a) an appointed arbitrator or umpire neglects or refuses to act or is incapable of acting or dies, (b) in any of the above events a vacancy occurs, (c) it was intended that the vacancy would be filled either expressly or by implication) and (d) the parties or the arbitrators, as the case may be, do not supply the vacancy despite being called upon to do so by a written notice.

(12) The notice postulated may be either to supply the vacancy by naming a person or in concurring in the appointments of person or persons named in the notice. It cannot be disputed that a written notice to concur in the appointment or appointments or in supplying the vacancy is a pre-condition to moving the Court u/s 8(2) of the Arbitration Act. The occasion to give such a notice would be when an appointed arbitrator or umpire neglects or refuses to act etc. as set out in Clause (b) of Sub-section (1) of Section 8. If an arbitrator is already named in the arbitration agreement there would be no occasion for any party to call upon the opposite party to concur in his appointment or in calling upon the other party to supply the vacancy. The occasion to supply a vacancy generally arises when there are two or more arbitrators and where an umpire is to be mentioned or - by the arbitrators. For example, if an arbitration agreement is to the effect that differences and disputes will be referred to the arbitrators, one to be appointed by each of the two parties to the agreement, and the umpire is to be nominated by the arbitrators, then if one of the arbitrators refuses etc. to act, the party whose nominee refuses to act may be called upon by notice to supply the vacancy. Similarly, if on a difference between the arbitrators the matter is pending before the umpire and he refuses to act, either of the parties may call upon the arbitrators to supply the vacancy. There may be an agreement where, for example, the umpire is to be appointed by the arbitrators with the concurrence of the parties to the agreement. If an umpire refuses to act, either of the parties may name a person as an umpire and call upon the arbitrators and the opposite party to concur in the appointment. The procedure prescribed by Section 8, Therefore, is a procedure to have disputes resolved by an unnamed arbitrators or umpire without intervention of the Court. A right is given to parties to approach the Court if out of Court efforts are abortive. Where an arbitrator is already named, the question of supplying a vacancy or concurring in an appointment does not arise.

(13) There may be an arbitration agreement in which an arbitrator is not named but it is provided that he will be appointed with the consent of both the parties to the agreement. In such a case on disputes arising under the agreement it is open to a party without going to Court to first take recourse to the procedure prescribed by Section 8 of the Arbitration Act. The party can name an arbitrator and call upon the other party to concur in the appointment. If the other party concurs, there is an end of the matter. If the other party suggests some other name, the first party may concur in that appointment and that will be the end of the matter. If the parties cannot concur, recourse has to be had to Section 20 of the Arbitration Act. It is not necessary for the party to have recourse to Section 8 prior to filing an application u/s 20 of the Arbitration Act. Indeed, a reading of Section 20(1) makes it clear. The remedies u/s 8(2) and Section 20(1) are alternate remedies where the arbitrator is not named (See Balika Devi and Another Vs. Kedar Nath Puri,).

(14) Having come to the conclusion that Section 8 is not attracted, the next point to be decided is whether an application could be moved under Sub-section (4) of Section 20 of the Arbitration Act. It is not necessary to deal with all the authorities cited at the Bar. The law is well-settled. When an application under Sub-section (1) of Section 20 of the Arbitration Act is heard by the court, the moment the court orders the filing of the arbitration agreement it has nothing more to do with it. The powers under Sub-sections (1) & (4) of Section 20 stand exhausted. The learned counsel for the appellant contends that once these powers are exhausted, the court cannot entertain any further application like the one moved in the present case. In my opinion, there is obviously a fallacy. After a court orders the filing of the arbitration agreement it will proceed to take action under Sub-section (4) of Section 20 of the Arbitration Act. Under Sub-section (4) the court discharges two distinct functions. One is judicial and the other ministerial. The judicial function is to direct filing of the arbitration agreement. Thus the judicial function under Sub-section (1) and Sub-section (4) of Section 20 comes to an end on the filing of the arbitration agreement. An appeal lies against this discharge of judicial function u/s 39 of the Act. Thereafter what follows is a ministerial act, i.e. making of the reference to the arbitrator or arbitrators. If the parties appoint the arbitrators, there is no difficulty and reference is made to those arbitrators. If the parties do not agree, the court may be required to make a decision as to who should be selected as an arbitrator. That selection may be an exercise of a judicial power or or even ministerial. If the reference is to be made only to a named arbitrator, it is a ministerial function and no appeal lies against such an order. It is inherent in the exercise of power u/s 20(4) of the Act that the judicial exercise of power should have a logical culmination in the ministerial act of making the reference to the named or agreed arbitrator or arbitrators. In the present case the alternate arbitrator being named, the court acted within its jurisdiction to make a reference to him when the first of the named arbitrators declined to act. The reference made to the alternate arbitrator was a ministerial act and no appeal was competent from such

an order. Subsection (4) of Section 20 instead of being an impediment to the exercise of ministerial power, in fact, postulates exercise of such power (See Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.,).

(15) In Union of India (UOI) Vs. Gorakh Mohan Das and Another, , a Bench of the Allahabad High Court took the same view as I have taken, though in some-what different circumstances. The rule of law that was really enunciated is that the appointment of arbitrator and reference to arbitration are distinct matters. No reference can be made to arbitral.on by invoking of Section 8 of the Arbitration Act.

(16) The result of the above discussion is that I hold the appeal to be incompetent and dismiss the same. As there was no representation on behalf of the respondents, there will be no order as to costs.