
(2009) 03 DEL CK 0304
In the Delhi High Court
Case No : FAO (OS) 68 of 2000

Orrisa Industries Ltd.

APPELLANT

Vs

Cement Corporation of India Ltd.

RESPONDENT

Date of Decision : 25-03-2009

Acts Referred:

Arbitration Act, 1940 — Section 20, 8, 8(1)

Citation : (2009) 03 DEL CK 0304

Hon'ble Judges : Vipin Sanghi, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : Shubhra Goyal, for the Appellant; Alakh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—This appeal challenges the judgment of the learned Single Judge dated 6.10.1999 dismissing the objections preferred by the appellant before this Court. The main plea advanced by the learned Counsel for the appellant MS. Shubhra Goyal is that in view of the judgment of the Hon'ble Supreme Court in Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc., , the appointment of the second Arbitrator in substitution of the original Arbitrator Sh. T.D. Kharia (who resigned upon retirement from service) could not have been made without consent of the appellant, which was not sought, and the Chairman-cum-Managing Director did not even have the power to substitute the originally appointed Arbitrator. It is also urged that in such a situation the power to appoint a substitute Arbitrator is vested only in the Court by virtue of the interpretation of Section 8 of the Arbitration Act 1940. She submits that the appointing authority became functus officio having made the initial appointment of the Arbitrator and that power of appointment could be exercised only once. The relevant portion of Section 8(1) of the Arbitration Act 1940 reads as under:

8(1). Power of Court to appoint arbitrator or umpire.

In any of the following cases-

(a) where an arbitration agreement provides that the reference shall be two or more arbitrators to be appointed by 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;

(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. The relevant para 4 and 5 of the aforesaid judgment reads as under:

4. Section 20 is merely a machinery provision. The substantive rights of the parties are found in Section 8(1)(b). Before Section 8(1)(b) can come into operation it must be shown that (1) there is an agreement between the parties to refer the dispute to arbitration; (2) that they must have appointed an arbitrator or arbitrators or umpire to resolve their dispute; (3) anyone or more of those arbitrators or umpire must have neglected or refused to act or is incapable of acting or has died; (4) the arbitration agreement must not show that it was intended that the vacancy should not be filled and (5) the parties or the arbitrators as the case may be had not supplied the vacancy.

5. In the cases before us it is admitted that there is an agreement to refer the dispute to arbitration. It is also admitted that the parties had designated the Judicial Commissioner of Himachal Pradesh as the arbitrator for resolving any dispute that may arise between them in respect of the agreement. The Judicial Commissioner had refused to act as the arbitrator. The parties have not supplied that vacancy. Therefore the only question is whether the agreement read as a whole shows either explicitly or implicitly that the parties intended that the vacancy should not be supplied. It may be noted that the language of the provision is not "that the parties intended to supply the vacancy" but on the other hand it is that "the parties did not intend to supply the vacancy". In other words 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. We have now to see whether the agreements before us indicate such an intention.

3. In our view while at first glance the plea raised by the learned Counsel for the appellant appears to be attractive, upon a careful perusal of the judgment we find that the judgment of the learned Single Judge is correctly based upon the interpretation of Section 8(1)(b). The parties in the cited case had not supplied

the vacancy after the parties had designated the Judicial Commissioner of Himachal Pradesh as the Arbitrator, who had refused to act as such. Therefore, based upon the fact that the agreement required both the parties to agree to appoint an arbitrator and none of the parties had done so, the Court held that one party could not have supplied the vacancy and that Section 8(1)(b) of the Arbitration Act 1940 would apply. In the present case such is not the situation as the Chairman-cum-Managing Director of the respondent is the appointing authority and he had indeed supplied the vacancy as required by Clause 18.1 which reads as follows:

18.1 In the event of any question, dispute, breach of or difference arising in respect of the meaning and scope of terms and conditions herein or in connection with any matter under this agreement (except for those matters which are to be decided as per provision made in these terms and conditions), the same shall be referred to the Sole Arbitrator by an officer of the Cement Corporation of India Ltd., New Delhi appointed by its Chairman-cum-Managing Director. There will be no objection if the arbitrator is an employee of the Corporation and he had at any time in discharge of his duties as an employee has expressed views on all or any of the matters in dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

4. In our view since the vacancy having been supplied, therefore, the aforesaid judgment is not applicable to the present case. We are also of the view that the fact that the appellant participated in the arbitration throughout, but did not take such plea before the Arbitrator, and only upon the award going against it has raised such a plea cannot be now permitted (at the stage of objections before the Court) to raise such a plea. The said plea is accordingly rejected.

5. The other plea raised by the learned Counsel for the appellant is that no extension of time was given to the Arbitrator and under the 1940 Act, the term of the Arbitrator, unless extended, expired at the end of four months of his entering upon the reference. In our view, this objection has rightly been rejected by the learned Single Judge. The Arbitrator Mr. Yashpal had entered upon the reference on 10.06.1993 and the award was given on 10.09.1993. Moreover, the fact that the appellant without objection participated in the proceedings shows that not only did the appellant acquiesce in the appointment of the fresh Arbitrator Sh. Yashpal but also in his functioning as the Arbitrator without any objection under Clause 3 of the first schedule to the Arbitration Act, 1940.

6. We consequently find no merit in the appeal. Accordingly the same stands dismissed.