

(1979) 01 DEL CK 0005

In the Delhi High Court

Case No : Suit Appeal No. 54A of 1976

R.B. Basakha Singh and Sons

APPELLANT

Vs

Indian Drugs and Pharmaceutical Ltd.

RESPONDENT

Date of Decision : 05-01-1979

Acts Referred:

Citation : (1979) RLR 239

Hon'ble Judges : Sultan Singh, J

Bench : Single Bench

Advocate : B.K. Singh, Amarjit Singh, R.K. Makhija and Alakh Kumar, for the Appellant;

Judgement

Justice Sultan Singh, J.

(1) This is a petition u/s 20 of the Arbitration Act requiring the respondent to file the agreement and to refer the disputes to an arbitrator. The respondent accepted the tender of the petitioner for the construction of 232 quarters at Antibiotics Plant Township, Rishikesh (U.P.). and formal contract was executed on 22nd May, 1972, which contains the following arbitration clause ;-- "It is also a term of this contract that no person other than a person appointed by the Chairman and Managing Director, as aforesaid, shall act as Arbitrator, and, and, if for any reason, that is not possible, the matter is not to be referred to arbitration at all all."

(2) It is admitted by the parties that on 7.8.75, a supplementary deed was executed between them, whereby it was agreed to substitute the words "Managing Director" in the original agreement,

(3) The petitioner alleges that the work under the contract was completed, that it submitted several claims for Rs. 1,35,763.81 detailed in its letter dated 22.4.75 to the respondent and requested the respondent to appoint an arbitrator; that the respondent by letter dated 14.11.75 informed the petitioner that no arbitrator could be appointed in this regard.

(4) The respondent in its written statement has submitted that this court has no jurisdiction as courts at Dehradun alone have jurisdiction to try the matter in question ; that no arbitrator can be appointed as the Managing Director of the respondent-company has refused to appoint an arbitrator; that under clause 25 of the Contract, court cannot force its own arbitrator upon the parties ; that there is no ground for filing the arbitration agreement and referring the disputes to arbitration ; and that the petition u/s 20 of the Arbitration Act has not been instituted by a duly authorised person. The petitioner filed its rejoinder and the following Issues were framed : "1 Whether this court has no jurisdiction to entertain the petition ? 2. Whether in view of the refusal by the Managing Director of the respondent to appoint an arbitrator, the court cannot appoint an arbitrator ? 3. Whether there is any ground for refusing to file the arbitration agreement and referring the disputes to arbitration ? 4. Whether the petition has been instituted by a properly authorised person.

(5) It is well settled that parties by agreement cannot confer jurisdiction on any court which it did not otherwise possess. But where two courts have jurisdiction to try a proceeding or suit the parties may agree that the disputes between them shall be tried in one of such courts. It is admitted that the courts at Dehradun have jurisdiction in the matter u/s 20 CPC as the construction of the building in question was done within the jurisdiction of that court. Clause 3 of the Special Conditions of .the Contract is as under: "Except as provided in clause 25 of the bond, all the disputes arising out of the contract bond, Dehradun Courts alone will have the jurisdiction".

(6) The case, Hakam Sing Vs. Gammon (India) Ltd., , before the Supreme Court related to a petition u/s 20 of the Arbitration Act; wherein the contract provided that the court of law in the city of Bombay alone shall have jurisdiction to adjudicate upon the disputes between the parties. It was held that since courts at Bombay had jurisdiction u/s 20 CPC the agreement between the parties that the Courts in Bombay alone shall have jurisdiction to try the proceedings was binding between them and that such agreement does not contravene Section 28 of the Contract Act. The next contention of petitioner is that clause 3 of Special Conditions of the Contract applies to those disputes only which are not covered by Clause 25. I do not agree. Clause 3 of Special Conditions refers , jurisdiction of Court while clause 25 of the Contract has no reference to jurisdiction of Court. Moreover, trial of a petition u/s 20 of the Arbitration Act is not a dispute and is not mentioned in clause 25. Thus clause 3 of Special Conditions excludes jurisdiction of all courts of disputes arising between the petitioner and the respondent. I, Therefore hold that Dehradun Courts alone have jurisdiction in this matter and this Court has no jurisdiction.

(7) Issue No, 2. For the decision of this issue the following words in clause 25 of the contract are important: "It is also a term of this contract that no? person other than appointed by the Chairman and Managing Director, as aforesaid; shall act as Arbitrator; and if for any reason, that is not possible, the matter is not to

be referred to arbitration at all,

(8) The respondent by letter dated 22.4.1975, required the Chairman of the respondent to appoint an arbitrator to decide the disputes mentioned in letter dated 22-4-75. The Chairman by his letter dated 14-11-75 informed the petitioner that no arbitrator could be appointed in this regard. Thus on the refusal to appoint an arbitrator, no other person can be appointed as an arbitrator in view of clause 25.

(9) The learned counsel for the petitioner contends that this court has jurisdiction to appoint an arbitrator u/s 20(4) of the Arbitration Act, which reads(...)Under this provision reference can be made to an arbitrator appointed by the parties and in the alternative to an arbitrator appointed by Court in cases where parties cannot agree upon an arbitrator. In the present case only the Managing Director of the respondent is authorised to appoint an arbitrator and the petitioner has no choice in selecting an arbitrator. The arbitrator is appointed by one of the parties only. Exclusive discretion is given to the Managing Director of the respondent to appoint an arbitrator, and if he refuses to appoint, there cannot be any arbitrator. Thus under clause 25 if it is not possible to appoint an arbitrator, the matter is not to be referred at all to arbitration, i.e., the court cannot impose its own arbitrator upon the parties. In other words the jurisdiction of the Court to appoint an arbitrator u/s 20(4) of the Arbitration Act has been excluded by agreement between the parties. Reference is invited to Kishan Chand v. Union of India, and B.K. Kapoor v. Union of India 1974 Raj LR 553. The Division Bench of this Court has held that the Court cannot appoint an arbitrator if the agreement excludes such a power of the Court. According to the above phrase in clause 25 of Contract, the power of the court to appoint an arbitrator has been excluded. I, Therefore, hold that in view of the refusal, 243 this Court cannot appoint an arbitrator and refer the matter as claimed by the petitioner. .

(10) Issue no. 3. The learned counsel for the petitioner u/s 20 of the Arbitration Act has not disclosed the disputes, which are to be referred to and in the absence of pleas no arbitrator can be appointed. The argument is that without disputes there cannot be any reference to arbitration. The learned counsel for the petitioner, on the other hand, has stated that a notice dated 22.4.75 was served upon the Chairman and Managing Director of the respondent together with the items of disputes requiring it to appoint an arbitrator and refer the same to him. His contention is that he has filed a copy of this notice along with other documents in this case and, as such, it is a part and parcel of the petition and, Therefore, it should be held that he has mentioned the disputes in the petition itself. I may mention that documents have been filed by the petitioner including the notice dated 22nd April, 1975, wherein the items of disputes are mentioned, but documents Filed by a party are not part of the pleadings. Without pleadings the petitioner is not entitled to allege what are the disputes which it seeks to refer to the arbitrator. I, Therefore, hold that in the absence of allegations of disputes in the petition, no reference can be made to the Arbitrator.

(11) Section 20(1) of the Arbitration Act requires that when differences have arisen between the parties to the agreement then the same may be a subject-matter of a petition u/s 20 of the Act. The Court has to determine whether the differences arising between the parties are covered by the agreement. I am, thus, of the view that pleading of disputes or differences is necessary in a petition u/s 20 of the Arbitration Act. In the absence of such a pleading, the application cannot be said to be in accordance with law, I, Therefore, hold that non-pleading of the disputes in petition u/s 20 of Arbitration Act is a sufficient ground for dismissal of the application.

(12) Issue 4. Petition u/s 20 of the Arbitration Act was filed on 12-1-76. A copy of the resolution dated 26-12-75 alleged to have been passed by the Board of Directors of the petitioner company has been filed as Exhibit P.I. In the petition u/s 20 of the Arbitration Act, no specific resolution was mentioned by the petitioner as no date of resolution was given therein. The petition is dated 17.12.75 Exhibit P.I a copy of the alleged resolution dated 26.12.75 was also filed by the petitioner, but (he same was not a correct copy of the minutes recorded in the Minutes Book. In Exhibit P-I the presence of Smt. Amarjit Kaur is not mentioned. It appears that Exhibit P-I was drafted prior to the alleged holding of the meeting of the Board of Directors of the petitioner-company on 26-12-75 Mr. Daya Singh, Governing Director of the petitioner company has appeared as Public Witness . and he has deposed that he and his wife Smt. Amarjit Kaur attended the meeting held on 26-12-75 and passed the resolution, copy of which is Exhibit P.2. In view of his unrebutted statement resolution Exhibit P.2 is held to be proved and proper. The present petition thus has been sign&d and instituted by a duly authorised person. I hold, accordingly. 13. If the contention of the learned counsel for the petitioner as discussed above is accepted then this Court has jurisdiction and clause 3 of the Special Conditions of contract will not be applicable. Assuming that this Court has jurisdiction, as contended by the learned counsel for the petitioner, the present petition is liable to be dismissed in view of my finding on issue No. 2. I accordingly ,dismiss this petition with costs. Counsel fee Rs. 300.00.