

(2004) 10 DEL CK 0155

In the Delhi High Court

Case No : AA No. 270 of 2002, CS (OS) 2042 of 1999 and CCP 125/99 and 3 of 2000

Sh. Rajinder Jain

APPELLANT

Vs

Sh. Rakesh Jain
 Sh. Rakesh Jain Vs Sh. Rajinder Jain

 Jaina Properties Pvt. Ltd. Vs Jaina Properties and
Finance Ltd.

RESPONDENT

Date of Decision : 12-10-2004

Acts Referred:

Arbitration Act, 1940 — Section 12(2), 8, 8(1)

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2004) 114 DLT 723

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : A.S. Chandhiok and Munish Malhotra, in A.A. No. 270/2002 and N.K. Kaul and Gaurav Duggal, for the Appellant; N.K. Kaul and Gaurav Duggal in AA No. 270/2002 and in CS(OS) 403/2004 and A.S. Chandhiok and Munish Malhotra, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—The question that arises in these Petitions is whether the Court possesses the power to appoint an Arbitrator in respect of the disputes subsisting between the parties/brothers. Mr. Chandhiok, learned Senior Counsel for the Petitioner submits that the Court continues to retain the power to make an appointment even in the face of the refusal by the named Arbitrator, Manubhawati the mother of the parties, to discharge these functions. Mr. Kaul, learned Senior Counsel for the respondent however, contend to the contrary that the Arbitration Clause contemplates adjudication of disputes only by the mother of the parties hereto. On her failure to perform this duty the compact to have disputes settled through arbitration perishes completely.

2. The Arbitration Clause reads thus:

XIII. That in the event of any dispute arising out of this settlement, in that eventuality in case the dispute pertains to Shri Rajender Kumar Jain, the party of the second part, then in that eventuality it shall be settled by Smt. Manubhawati Jain, the other of the parties and in case the dispute pertaining to Shri Rajender Kumar Jain arises after the death of Smt. Manubhawati Jain, then in that eventuality the said dispute will be settled by Shri Rakesh Kumar Jain. In case the dispute is not pertaining to Shri Rajender Kumar Jain, the party of the second part, then the same shall be settled by Shri Rajender Kumar Jain alone being the head of the family, whose decision shall be final and binding on all concerned. This provision is mutually agreed by all the parties while keeping in mind that the family dispute should always remain in the family itself, and no third person is brought to settle the dispute of the family.

3. Learned Senior Counsel for the parties have relied on the same observations in State of West Bengal Vs. M/s. Naional Builders, but, however, to advance the polar propositions propounded by them. In National Builders" case (supra) the Arbitration Clause stipulated that ""except where otherwise provided in the contract all questions and disputes shall be referred to the sole arbitration of the Chief Engineer of the department. Should the Chief Engineer before any reason unwilling or unable to act as such arbitrator, such questions and disputes shall be referred to an arbitrator to be appointed by the Chief Engineer"". The power of nomination was exercised by the Chief Engineer. One of the arties approached the Additional District Judge u/s 12(2) of the Arbitration Act, 1940 for revoking the authority of the Arbitrator. The prayer was granted. Eventually the case came up for consideration before the Supreme Court. To propositions can be extracted from a study of the judgment - firstly, that if the Arbitrator refused to extend the time and brought the proceedings to an end leaving it to the parties to decide their future course of action, it was open for the Courts to infer that he had refused to act. The second proposition is what is sought to be canvassed by the learned counsel for the Respondent in these proceedings, and it would be best to reproduce, verbatim, the observations of the Apex Court:

More important issue than this that was urged was that since clause 25 of the agreement empowered the Chief Engineer to nominate any other person to act as arbitrator the intention was to fill the vacancy in the same manner as provided in the agreement.

This raises an important issue as to whether the power of the Chief Engineer to arbitrate himself or to nominate any other person as arbitrator exhausted or revived after the earlier arbitrator nominated by him refused to act. In other words does the power to appoint a sole arbitrator under the agreement come to an end with such appointment or every time an arbitrator refuses to act the parties are to take recourse to appoint another arbitrator as provided in the agreement itself. Settlement of dispute between the parties through medium of an independent person in whom both parties repose confidence is the basic foundation on which the entire law of arbitration is founded. When the

agreement provides that dispute between parties shall be referred to the person named in an agreement it is an appointment by consent. But where the arbitrator so appointed refuses to act the next appointment could again be made either as agreed between the parties and provided for in the arbitration clause or by consensus. But where either is absent no party to the arbitration agreement can be forced to undergo same procedure, for the simple reason that the arbitrator having re used to act he cannot be asked to arbitrate again. In law the result of such refusal is that the agreement clause cannot operate. It, Therefore, follows that in a case where the arbitration clause provides for appointment of a sole arbitrator and he had refused to act then the agreement clause stands exhausted. And it is for the Court to intervene and appoint another arbitrator under S.8(1)(b), 'if arbitration agreement does not show that it was intended that the vacancy shall not be supplied'. That is the agreement should not debar any further arbitration. If it is provided in the agreement that if the arbitrator appointed in accordance with the agreement refuses to act then the disputes shall be resolved by another arbitrator. There is an end of the matter. But if the agreement does not show this then the next arbitrator can be appointed by the Court only. The expression used in the sub-section is clear indication that the Court is precluded from exercising its power only if the parties intended that the vacancy should not be filled. In other words the Court shall exercise jurisdiction to appoint another arbitrator except where it is specifically debarred from doing so. The word 'show' used in the clause appears to be significant. It in fact furnishes key to the construction of the expression. Mere neglect or refusal to act alone is not sufficient to empower the Court to intervene. The agreement just not further show that the parties intended that the vacancy shall not be supplied. To put it affirmatively in absence of clear words or explicit language to the contrary the Court may appoint another arbitrator. The true effect of the word is that it extends jurisdiction of the Court to exercise power, if the agreement does not specifically debar it from doing so. To put it simply the Court's power to interfere and appoint an arbitrator comes into operation if the arbitrator refuses to act and the agreement does not show that the parties did not intend that the vacancy shall not be supplied. In *Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc.*, it was held by this court, '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 party 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 S.8(1)(b) what is required is not the intention of the parties to supply the vacancy but their intention is not to supply the vacancy'. In *Chander Bhan Harbhajan Lal Vs. State of Punjab*, it was held that where a committee of arbitrators nominated by the Government becomes incapable of acting as such it was within the competence of the Court to proceed to appoint a new Committee". In *Union of India Vs. R.B. Ch. Raghunath Singh and Co.*, the arbitration clause provided for settlement of dispute and differences by the Chief Commissioner/Director of Storage, Ministry of Food, Government of India and his decision was to be final and binding. The post

of Director of Storage was abolished and the Chief Commissioner refused to act. The question rose whether the Court could appoint an arbitrator in exercise of power under S.8(1)(b). It was claimed on behalf of the Union of India that where there was a named arbitrator even though he was named by office, it was not open to the Court to supply the vacancy in his place under S.8(1)(b) of the Act. The contention was repelled and it was held that the argument was without any substance as, 'The Court had no power to supply the vacancy under S.8(1)(b) only if the arbitration agreement did not show that the parties did not intend to supply the vacancy. If no such intention could be culled from the arbitration clause, the Court could supply the vacancy'. It is thus settled that eve where an authority is named by office to be the sole arbitrator but he refuses to act then the jurisdiction to appoint another arbitrator vests in the Court. Since Cl.25 of the agreement extracted earlier does not indicate that the parties did not intend to supply the vacancy the Court in our opinion rightly assumed jurisdiction u/ S.8(1)(b) to appoint another arbitrator.

Basis for assuming such jurisdiction, as stated earlier, is that the clause is rendered 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 '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 named having refused to act he cannot be asked again to arbitrate. That would be contrary to the very basis of arbitration that 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 only remedy is to approach the Court to exercise its statutory power and appoint another arbitrator. Same result follows where the arbitration clause empowers the sole arbitrator either to arbitrate himself or to nominate anyone else. It was urged that the principle of agreement clause coming to an end cannot apply where the sole arbitrator has been given power to nominate another person. According to the learned counsel once the nominee refused to act the Chief Engineer was again empowered to nominate another person in his place. In our opinion the submission is not well founded in law. A person nominated by the sole arbitrator stands substituted in his place. He does not have any independent personality. 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 arbitration clause has refused to act and, Therefore, the clause would cease to operate in the same manner as the Chief Engineer himself his refused to act. The appointment of next arbitrator could only be in accordance with S.8(1)(b) of the Act.

4. A learned Single Judge of this Court in Rakesh Khanna Vs. Vishwanath Khanna and Others, after discussing the above mentioned cases had held that the Court had no jurisdiction to supply the vacancy when the intentions of the parties in

the Agreement were clearly indicated that the vacancy should not be filled. The decision of the Apex Court had previously been considered by me in *S.R.F. Finance Limited vs. Friends Globe Travels and Ors.* 2000 VII AD (Delhi) 682. Mr. Chandhiok has also drawn my attention to the decision of the Chief Justice in *Smt. Satya Sahu and others Vs. M/s. Vidarbha Distillers and others*, but that decision must rest on the interpretation of the Arbitration Clause reproduced in paragraph 5 thereof.

5. As has been repeatedly digested, the analysis is that Court retains the powers to appoint an arbitrator even where the Arbitration Clause mentions a particular person by name, if however, on a proper construction thereof it is clear that the parties had agreed to settle their disputes through arbitration in a particular manner only the Court would be transgressing the agreement if it supplies the vacancy. On a perusal of the Arbitration Clause between the parties hereto it will be at once clear that the primary intention was to have disputes resolved within the family itself. Having arrived at this conclusion it appears to me to be inescapable that the intention of the parties was that resort would be had to arbitration only on that premise. I had enquired from learned counsel for the Petitioner whether any family member could be suggested by the Petitioner to which his immediate response was that the Court can appoint any person it chooses. The respondent who is named in Clause, cannot obviously be a judge in his own cause. If this Court were to appoint a third party it would be violating the resolve of the parties hereto to have their disputes settled within the family. In my opinion, Therefore, that cannot be achieved because of the refusal of the mother to act as an arbitrator between her two sons. The Arbitration Clause itself gets frustrated in totality.

6. Mr. Chandhiok has also contended that it is significant that the Legislature has not used the words in Section 8(b) of the Arbitration Act, 1940 "....the arbitration agreement does not show that it was not intended that the vacancy should not be supplied" as is to be found in the existing Section 11 of the Arbitration and Conciliation Act, 1996. Indeed, this is so but the present provisions do not stipulate that in all cases where an Arbitration Clause exists between the parties, the Court can fill a vacancy even though the parties have agreed between themselves that the arbitration should continue only in a given set of circumstances. In other words the negative component of Section 8(b) of the 1940 Act has not been substituted by a positive one in Section 11 of the 1996 Act. Compelling a person to take recourse to arbitration by any person even though he had consented to this form of redressal provided it was by a particular family member is like taking a horse to the trough and then forcing it to drink out of it. It is not that the parties are left without remedy; they must approach the Court in its ordinary civil jurisdiction as is their right.

7. I accordingly hold that the Petitions are without merit. Relief prayed for in the Petitions cannot be granted. The Petitions as well as the pending applications are dismissed.