
(2000) 09 DEL CK 0076

In the Delhi High Court

Case No : A.A. 98 of 1997

SRF Finance Limited

APPELLANT

Vs

Friends Globe Travels and Others

RESPONDENT

Date of Decision : 04-09-2000

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11, 8

Citation : (2001) 1 ARBLR 185

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Mr. M.S. Viniak, for the Appellant; Ms. Gurmeet Bindra, for the Respondent

Judgement

Vikramajit Sen, J.—The question to be determined in the present petition u/s 8 read with Section 11 of the Arbitration and Conciliation Act, 1996 is whether the Arbitration Clause between the parties stands exhausted and ineffectual, consequent upon the refusal of the named Arbitrator to act in terms thereof. The contract between the parties was for the hire of certain vehicles, the ownership of which vested with the Petitioner. It was only the payment of all the installments by the Respondent to the Petitioner that the former could exercise the option to purchase the vehicle on further payment of its residual price.

2. The agreement inter alia, contains the following term, which both parties agree, is the Arbitration Clause:

"15. Any disputes or differences of any nature whatsoever or regarding any rights, liabilities, acts, omissions, or on account of any other parties hereto arising out of or in relation to this agreement shall be referred to the sole arbitration of Mr. S.K. Sen, Director of the owner, or any other person/officer of the owner nominated by him. The hirer shall not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator on the ground that the arbitrator is an officer of the owner or he has to deal with the matters to which the contract/agreement relates or that in the course of his duties as an

officer of the owner he had expressed views on all or any other matters in dispute or difference in the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason whatsoever, Mr. S.K. Sen, Director as aforesaid at the time of such transfer or vacating such office or being unable to act for any reason whatsoever of such person to whom the matter was originally referred to, shall designate another person to act as arbitrator in accordance with the terms of the said agreement. Such person shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this contract that no person other than Mr. S.K. Sen, Director, or a person nominated by him as aforesaid shall act as arbitrator hereunder. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to the agreement subject to the provision of the Arbitration Act, 1940 or any statutory modification or reenactment thereof and the rules made there under for the time being in force shall apply to the arbitration proceedings under this clause. The award shall be made in writing within four months after entering upon the reference or within such extended time as agreed upon by the parties.

The arbitrator shall have power to order and direct either of the parties to abide by, observe and perform all such directions as the arbitrator may think fit having regard to the matter in difference, i.e. dispute before him. The arbitrator shall have all necessary powers and may take such evidence oral and/or documentary, as the arbitrator in his absolute discretion thinks fit and shall be entitled to exercise all powers under the Indian Arbitration Act, 1940 including admission of any affidavit as evidence concerning the matter in difference, i.e. dispute before him.

The arbitrator shall be at liberty to appoint, if necessary, any accountant or engineer or other technical person to assist him, and act by the opinion so taken.

The parties hereby agree that the Courts situated at Delhi alone shall have jurisdiction to entertain any application or other proceedings in respect of anything arising under this agreement and any award or awards made by the sole arbitrator hereunder shall be filled in the concerned Courts situated at Delhi only. Provided however that if the owner apprehends that the Hirer may alienate or charge or dispose of the vehicle/s or may cause damage to the vehicle/s, the owner is at liberty to seek redress in any Court of Law".

3. As the named Arbitrator had resigned from the service of the Petitioner, by his letter dated 31.12.1996 he conveyed to the Petitioner that he "will not be interested in being an Arbitrator for any of the disputes".

4. The contention of Ms. Gurmeet Bindra, learned counsel for the Respondent is that the Arbitration Clause stood exhausted, and the only remedy left to the Petitioner is to take recourse to a civil action. She relied on the decision rendered in State of West Bengal Vs. M/s. Naional Builders, . In this case 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 be for 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 nominee corporation was exercised by the Chief Engineer. One of the parties 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. Two 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 :

"5. 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 refused 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 de- barred 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 must 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 ex- tends jurisdiction of the Court to exercise power, if the agree- ment 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 arose whether the Court could appoint point 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 arbitra- corporation agreement did not show that the parties did not intend to supply the vacancy. It is thus settled that even where an author- ity 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".

"6. 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 has refused to act. The appointment of next arbitrator could only be in accordance with S. 8(1)(b) of the Act".

"7. For these reasons the appeal fails and is dismissed with costs".

5. This precedent is of no assistance to the Respondent. It sets down that in the event of the refusal of the named arbitrator or his nominee to act in terms of the Arbitration Clause, neither of these persons can once again assume and exercise the power vested in them by virtue of the Clause. It is necessary to emphasise that the Court reaffirmed the power of the Court to step in u/s 8(1)(b) of the Act. This was obviously because, on scrutinising the Arbitration Clause, the Court reached the conclusion that it was not envisaged therein that the disputes would not be arbitrable if these persons declined the engagement or failed to complete it for whatever reasons.

6. It would be relevant to refer to another decision of the Supreme Court rendered in *Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao*, . In paragraph 11 this is what was observed:

"It would thus be clear that if no arbitrator had been appointed in terms of the contract within 15 days from the date of receipt of the notice, the administrative head of the appellant had abdicated himself of the power to appoint arbitrator under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a). The contention of Shri Rao, Therefore, that since the agreement postulated preference to arbitrator

appointed by the administrative head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. It is seen that under the contract the respondent contracted out from adjudication of his claim by a civil court. Had the contract provided for appointment of a named arbitrator and the named person was not appointed, certainly the only remedy left to the contracting party was the right to suit. That is not the case on hand. The contract did not expressly provide for the appointment of a named arbitrator. Instead power has been given to the administrative head of the appellant to appoint sole arbitrator. When he failed to do so within the stipulated period of 15 days enjoined u/s 8(1)(a), then the respondent has been given right under Clause 65.2 to avail the remedy u/s 8(1)(a) and request the court to appoint an arbitrator. If the contention of Shri Rao is given acceptance, it would amount to putting a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself".

7. Similar views have also been expressed in *Union of India Vs. R.B. Ch. Raghunath Singh and Co.*, . In view of the repeated pronouncements of the Apex Court I shall only record that the cases of *Meryfur Industries Ltd. Vs. Union of India*, and *Smt. Satya Sahu and others Vs. M/s. Vidarbha Distillers and others*, were also cited. It would also be advantageous to make a mention of *East India Construction Co. (P) Ltd. Vs. Union of India (UOI)*, , which has returned similar observations.

8. I shall now return to the Arbitration Clause subsisting between the parties in the present case in order to determine whether it prohibited arbitration in case the persons mentioned therein failed to publish an Award. In my view the inference that the parties intended that their disputes should be decided only by the named person/s and not by any other person, cannot reasonably be drawn where the party canvassing that the arbitration clause stood exhausted did not personally know the named arbitrator. This to my mind is a common sense approach to the question. For the reason that a party may have agreed to submit its disputes for resolution only to a named person if there was reason, by way of personal knowledge, for that person to repose its trust or confidence in such an arbitrator. This inference can scarcely extend to a nominee. The named arbitrator was an officer of the Petitioner. The Petitioner is not the party predicated that the Arbitration Clause had exhausted its efficacy. He could be heard to say that he had agreed to arbitration because he reposed faith in the capabilities of his officer to properly decide the disputes. This is not the case. The fact that the language of the Statute is in the double negative illustrates that exhaustion of the Arbitration Clause would be an exception and not the rule.

9. In these circumstances I am of the view that the Arbitration Clause did not contemplate that if the named arbitrators failed to enter upon the reference, the agreement to refer the disputes to arbitration would stand nullified. I accordingly appoint Mr. Shashivansh Bahadur as the Arbitrator. He shall be entitled to receive a fee of Rs. 3000/- per hearing subject to a maximum of Rs. 30,000/- for the

entire arbitration to be shared equally by the parties. He shall give notice to them on entering upon the Reference

10. The Petition is allowed. The Respondent shall pay a sum of Rs. 3000/- as costs of the present proceedings.