
(2000) 09 AHC CK 0078
In the Allahabad High Court
Case No : F.A.F.O. No. 106 of 1990

State of U.P.

APPELLANT

Vs

Jai Prakash Bhagwati Prakash

RESPONDENT

Date of Decision : 08-09-2000

Acts Referred:

Arbitration Act, 1940 — Section 20, 8
Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1

Citation : (2001) 1 AWC 100

Hon'ble Judges : Sudhir Narain, J; Krishna Kumar, J

Bench : Division Bench

Advocate : M.S. Negi, C.S.C, for the Appellant; Janardan Sahai, P. P. Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Narain, J.—This appeal is directed against the order of the Court below appointing the arbitrator on an application being filed by the applicant-respondent u/s 8/20 of the Arbitration Act. 1940 (in short the Act).

2. The appellant invited tender for construction of Katiyari Siphon in kilometers 28.425 of E.G.C., district Bijnor. The respondent submitted its tender. It was accepted to the appellant. The parties executed a written agreement on 23.3.1984. The agreement contained an arbitration clause and was incorporated in clause 44C of the agreement which reads as under :

"Every dispute, difference or question which may at any time arise between the parties hereto or any person claiming under them touching or arising out or in respect of this deed of the subject matter thereof shall be referred to the arbitration of Additional Chief Engineer of the project or any person nominated by him. It will be no objection to any such appointment that the arbitrator so appointed is a Government servant, that he had to deal with the matters to which the contract relates and that in the course of his duties as Government servant he had expressed views on all or any of the matters in dispute or

difference. In the event of the arbitrator to whom the matter originally referred being transferred or vacating his office or being unable to act for any reason Additional Chief Engineer of the project shall either enter upon the reference himself or appoint another person to act as arbitrator. Such person shall be entitled to proceed with the reference from the stage it was left by his predecessor. It is also a term of this contract that no person other than a person appointed as aforesaid should act as arbitrator and if for any reason that is not possible the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50,000 (Rupees fifty thousand only) and above the arbitrator shall give reason for the award."

3. The appellant raised a dispute in regard to the payment made by it. The respondent referred the matter to the Additional Chief Engineer regarding its claim of balance dues on 15.9.1988. The Additional Chief Engineer did not proceed with the matter. The respondent, after waiting for about 6 months, gave a notice to the Additional Chief Engineer on 31.12.1988 for adjudication of the dispute between the parties by arbitration within one month but he neither entered upon the reference nor passed any order. The respondent firm after expiry of one month from the date of the service of the said notice, presented an application before the Court u/s 8/20 of the Act for appointment of an arbitrator.

4. The appellant contested the application. It took the plea that on 7.4.1989, the Additional Chief Engineer had appointed Sri P. N. Goel, Superintending Engineer as sole arbitrator for deciding the dispute between the parties. The arbitrator issued notice to the respondent on 7.6.1989 and another notice on 15.7.1989 but as no one appeared on behalf of the respondent, its claim petition was dismissed. The court below, after considering the various contentions raised by the parties, allowed the application of the respondent vide order dated 22.12.1989 and appointed the arbitrator by a separate order on 1.1.1990. The appellant has challenged only the order dated 22.12.1989 in this appeal.

5. The first submission of the learned counsel for the appellant is that the Additional Chief Engineer under the arbitration clause was empowered to decide the dispute himself or appoint another person to act as arbitrator and he having appointed Sri P. N. Goel, the Superintending Engineer as arbitrator and the respondent having not appeared before him, the application filed by the respondent was not maintainable u/s 8/20 of the Act.

6. There is no dispute that the respondent had submitted its claim before the Additional Chief Engineer on 15.9.1988 and for about six months, he did not pass any order. The respondent gave a notice to him on 31.12.1988 to decide the dispute, still he did not pass any order. Respondent filed application u/s 8/20 of the Act in March, 1989 and it was only thereafter, he had appointed Sri P. N. Goel. Superintending Engineer as Arbitrator.

7. Where a matter is to be referred to an arbitrator named in the arbitration clause and the matter is referred to him but if such an arbitrator does not enter

into the reference or does not appoint an arbitrator who under the powers conferred on him under the arbitration clause, the Court can appoint an arbitrator u/s 8 of the Act. In the case of *Nandyal Coop. Spinning Mills Ltd. Vs. K.V. Mohan Rao*, , the arbitration clause provided that the matter shall be referred to the sole arbitration of the person appointed by the administrative head of owner and no person other than a person appointed by such administrative head as aforesaid should act as arbitrator and if for any reason. It is not possible, the matter is not to be referred to the arbitration at all. In this case, a request was made to the administrative head of owner to appoint an arbitrator within 15 days from the date of the receipt of the notice but he did not appoint any arbitrator within the time given to him, the claimant applied for appointment of the arbitrator in the Court. One of the contentions raised was that subsequently the administrative head had appointed an arbitrator, the Supreme Court held that the said administrative head was not entitled to appoint an arbitrator after the time given in the notice expired and the Court was empowered to act u/s 8(1)(a) of the Act. The Court 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."

8. In *G. Ramachandra Reddy and Co. Vs. Chief Engineer, Madras Zone, Military Engineering Service*, , the Supreme Court emphasised that when the notice is given to the opposite contracting party to appoint an arbitrator in terms of the contract and if no action is taken to act upon the contract, that gives right to other party to invoke Jurisdiction of Court u/s 20 for appointment of arbitrator. This decision has been referred to and followed in *Union of India and others Vs. M/s. Seth Constructions Company*, and the *The Central Warehousing Corporation and Others Vs. Varghese K. Pulayath and Others*,

9. In *Excalcer v. State of West Bengal* 1980 Col 86, the Court was considering a case of similar circumstances where under the arbitration clause the Chief Engineer was to act as arbitrator or appoint another person as arbitrator and he having failed to do so, the petitioner therein had filed application for appointment of the arbitrator, the Court held that where a party called upon the arbitrator so named under the arbitration clause to enter upon the reference as the sole arbitrator but he kept silence for near about 5 months. It implied that he accepted his position as an arbitrator. The fact that he did not take any step to enter upon the reference raised, the statutory presumption of negligence and refusal to act as an arbitrator within the meaning of Section 8 of the Act. In such

situation, a party would be entitled to move the Court for appointment of arbitrator and it would not be necessary for the party to first move the Chief Engineer to nominate an arbitrator before filing an application u/s 8 of the Act.

10. The respondent having submitted the claim petition before the Additional Chief Engineer in accordance with clause 44C of the arbitration clause, it shall be taken that a reference was made to him and he having neglected to decide the dispute, the Court could appoint an arbitrator u/s 8 of the Act.

11. It is next contended that it was open to the Additional Chief Engineer to enter upon the reference himself or appoint a person as an arbitrator. The Additional Chief Engineer could have appointed another person to act as arbitrator. Once the claim petition was filed before him on 15.9.1988 but as he kept the matter pending with him for more than 6 months, respondent gave notice to him on 31.12.1988 but inspite of the service of the notice, he did not appoint another person as an arbitrator. It was only on 7.4.1989 that he appointed Sri P. N. Goel, the Superintending Engineer as an arbitrator after respondent had filed application u/s 8/20 of the Act before the Court. The Additional Chief Engineer shall be taken to have entered upon the reference after claim petition was submitted before him and he himself having entered into a reference, he could not appoint another person as an arbitrator.

12. Secondly, under the arbitration clause the Additional Chief Engineer could have appointed another person either he was transferred or vacated his office or was unable to act for any reason. The Additional Chief Engineer did not give any reason as to why he shall not act as an arbitrator and in absence of any reason, he could not have appointed any person as an arbitrator. Moreover, Sri P. N. Goel, is alleged to have entered into reference and gave notice to the respondent. The appellant has not shown that it, in fact, the arbitrator served a notice on the respondent and hurriedly dismissed the claim petition of the respondent in default.

13. The third submission of the learned counsel for the appellant is that under the agreement, no other person can be appointed as an arbitrator other than the person referred to under the arbitration clause. He has placed reliance upon the decision Food Corporation of India and Another Vs. A. Mohammed Yunus, , wherein it was held that the Court had no jurisdiction to appoint any person as an arbitrator except in accordance with the terms of arbitration clause. In this case, the arbitration clause provided that the dispute shall be referred to any person appointed by the Food Corporation of India as an arbitrator. The Court held that the claimant could have asked for appointment only of a person to be appointed by the Food Corporation of India. In Nandyal Co-op, Spinning Mills Ltd. (supra), similar contention was raised that where the administrative head was to appoint an arbitrator and if he failed to do so, under the arbitration clause, it was provided that no person other than a person appointed by such administrative head should act as arbitrator and if for any reason it is not possible, the matter is not referred to the arbitration at all. The Court held that the power of the Court

was not taken away to appoint the arbitrator u/s 8 of the Act. Respondent had submitted the claim petition before the Additional Chief Engineer and as in the case of Excalcer (supra], it will be taken that he had entered into a reference by keeping the matter with him for many months and if he neglected to decide the dispute, it was open to the Court to appoint an arbitrator u/s 8 of the Act.

14. The last submission of the learned counsel for the appellant is that the Court could not have appointed arbitrator u/s 20 of the Act. The Court had passed an order on 1.1.1990 inviting both the parties to submit the names of two persons for appointment as arbitrator and after considering the names submitted by the parties, the Court had appointed Sri L. M. Sarkar, Chief Engineer (retired). Irrigation Department. That order has not been challenged in the present appeal.

15. On a consideration of the entire material on record, we do not find any merit in the appeal. It is, accordingly, dismissed.