

(1983) 01 GUJ CK 0018

In the Gujarat High Court

Case No : A.F.O. No's. 157 and 158 of 1982 with Civil Application No's. 1934 and 1935 of 1982

The Sindhy Resettlement Corporation Ltd.

APPELLANT

Vs

Ambavi Raghu

RESPONDENT

Date of Decision : 28-01-1983

Acts Referred:

Arbitration Act, 1940 — Section 20, 20(4), 8

Citation : AIR 1983 Guj 233 : (1983) 2 GLR 1035

Hon'ble Judges : B.K. Mehta, J

Bench : Single Bench

Advocate : B.R. Shah, for the Appellant; J.D. Aimera, for the Respondent

Judgement

B.K. Mehta, J.—The respondent who is the original plaintiff of Special Civil Suits Nos. 218 and 219 of 1979 on the file of the learned Civil Judge (S. D.) Kutch at Bhuj made an application to file in the Court the arbitration agreement contained in the contract of construction entered into between the respondent-plaintiff and the appellant-Corporation which was the defendant in the said suits and also praying for appointment of Arbitrator. It is not necessary to trace the entire history of litigation but suffice it to say that the alleged arbitration agreement contained in the supply contract enjoined the parties to refer every dispute, difference or question which may at any time arise between the parties hereto, or their breaches which may touch or arise out of or in respect of the said contract to the sole arbitration of the Chief Engineer of the appellant-Corporation. It is common ground that the post of Chief Engineer was vacant at the relevant time. One of the objections raised on behalf of the appellant-Corporation was that since the arbitration agreement provided for sole arbitration of a named officer whose office was vacant, the arbitration agreement fails since there is no intention to substitute any other person in the place of the named arbitrator. The objection did not find favour with the learned Judge, who by his common order of 7-12-1981, directed the appellant-Corporation to refer to Chief Engineer or to the person who is in charge of Chief Engineer, the dispute if there

is no permanent incumbent on the post, and if there is no one occupying the post permanently or in charge thereof, the learned Judge directed the parties to submit few names for appointment of an arbitrator or to submit the name of a person who can act as a sole arbitrator. It is this order made in the two suits which is the subject-matter of these two appeals before me.

2. I do not think that there are any justifying grounds for me to interfere with the order in question except the formal modification which is required in the order itself, as a result of the passage of time and for the reasons I am presently indicating.

3. As far as the question of merits is concerned, it is difficult to agree with the learned Advocate appearing for the appellant-Corporation that the parties did not intend to supply the vacancy. A strenuous attempt was made by the learned Advocate for the appellant-Corporation to urge that the learned Judge was clearly in error of law in ordering the reference to the Chief Engineer or to any other person holding the charge thereof or to submit the name of an agreed arbitrator or to submit the names so as to enable the court to appoint one out of them as arbitrator, inasmuch as the learned Judge failed to appreciate that the substantive power to fill in vacancy is to be found in Section 8. Arbitration Act and the Court cannot, in exercise of its jurisdiction u/s 20, fill in the vacancy unless the Court is able to spell out the intention of the parties in the arbitration agreement that such vacancy is to be filled in. It is not necessary for me to go into the larger question whether the Court has power u/s 20(4), Arbitration Act, dehors its power u/s 8 to fill in the vacancy which view has found favour with the two High Courts in two decisions viz.. K.C. Chatterjee Vs. The Durgapur Projects Ltd., and Regional Institute of Technology and Others Vs. Hindustan Building Corporation, . In Durgapur Projects Ltd.'s case (supra), the Calcutta High Court was confronted with a similar situation where in the arbitration clause between the contractor and the company disputes were to be referred to arbitration of Chief Engineer of the Company and when dispute arose the post of Chief Engineer was lying vacant. The Division Bench of the Calcutta High Court comprising of A. C. Gupta and A. K. Mookerji JJ., following the earlier decisions of the Calcutta High Court in Governor General in Council Vs. Associated Live-stock Farm (India) Ltd., and Hindustan Steel Ltd. Vs. Ingeniurs and Contractors, held that the arbitration agreement did not indicate that the parties intended that in such circumstances the agreement would come to an end, and therefore, it was established on authority that there was no bar to the Court appointing arbitrator in such a case.

4. The contention of the learned Advocate for the appellant-Corporation is not well founded for the obvious reason that in absence of negative intention specifically expressed in a given arbitration agreement that the parties did not intend to fill in the vacancy, the Court is under an obligation to refer the matter to arbitration since the parties are deemed to have intended in absence of such a negative agreement to resolve their dispute or differences arising between them

by reference to arbitration. In Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc., , the Supreme Court held that the language of the provision in Section 8 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". The Supreme Court made it clear that if the agreement is silent as regards supplying the vacancy, the law presumes that the parties intended to supply the vacancy. This principle of the Supreme Court has been reiterated by the Supreme Court in its latter decision in Union of India v. Raghunath Singh & Co.. AIR 1989 SC 103. In the present agreement there is absence of negative intention as required by Section 8 to hold that the arbitration agreement failed and should not be enforced upon. The learned Judge was therefore, perfectly justified in rejecting the objection of the appellant-Corporation. However, the order which he has made requires some modification which is made in the following terms :

The defendant-Corporation shall file the arbitration agreement in the court within two weeks from the date of the receipt of the Writ by the trial Court and the matter in dispute between the parties shall thereafter be referred to the sole arbitration of Chief Engineer, if there is any, failing which the parties shall submit the names each so as to enable the Court to appoint the arbitrator to whom the matter in dispute shall stand referred. Such names to be furnished within two weeks from the filing of the arbitration agreement in the Court in case the post of Chief Engineer is vacant.

5. In that view of the matter the appeals stand dismissed with no order as to costs.

6. Interim relief granted in civil applications stand vacated with no order as to costs.