

(1978) 04 PAT CK 0013
In the Patna High Court
Case No : Civil Revision No. 480 of 1975

Union of India (UOI)

APPELLANT

Vs

Harpal Dass Madhyani

RESPONDENT

Date of Decision : 07-04-1978

Acts Referred:

Arbitration Act, 1940 — Section 8

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 3, 115

Citation : AIR 1979 Patna 18 : (1978) 26 BLJR 392

Hon'ble Judges : Madan Mohan Prasad, J

Bench : Single Bench

Advocate : P.K. Bose, for the Appellant; B.P. Rajgarhia and S.K. Sharan, for the Respondent

Judgement

Madan Mohan Prasad, J.—This application in revision is directed against an order by which the court below has appointed arbitrators u/s 8 of the Arbitration Act, 1940 (hereinafter to be referred to as the Act").

2. It appears that there was a eon-tract between the petitioner and the opposite party by which the latter undertook to make some constructions. As a result, an agreement was entered into on the 22nd of March, 1972. Some further work was, however, found necessary to be done and the opposite party was asked to do that work as well. For such extra work he submitted a bill at the rate prescribed by the original agreement. After negotiation he reduced it by 2% and claimed a sum of Rupees 76,908.12, out of which the petitioner paid a sum of Rs. 26,596.49 paise, with the result that there remained due an amount of Rs. 50,311,63 paise. The petitioner refuted the claim on the ground that the opposite party was entitled to receive payment for the extra work at the rate prescribed in the subsequent agreement and not at the one prescribed by the original. It is said that according to the agreement a dispute or differences regarding the claim of the contractor is to be referred to arbitration. In view of the dispute aforesaid, therefore, the opposite party sent a notice dated the 12th

of Oct. 1973 to the General Manager of the Railway, asking for nomination of arbitrators for deciding the dispute. There was no reply to this notice. Therefore, again on the 26th of April, 1974, the petitioner sent another notice through a lawyer. The petitioner, however, rejected the claim for arbitration on the ground that there was no dispute at all. Hence the opposite party filed an application u/s 8 of the Act.

3. The petitioner, however, contended before the learned Subordinate Judge (1) that there was no dispute, (2) that the court had thus no jurisdiction to entertain the petition u/s 8 of the Act, (3) that the petition was barred by limitation and (4) that the Union of India not having been impleaded the petition was not maintainable. The learned Subordinate Judge held that the petition was maintainable, it was not barred by time and that a dispute existed which could be referred to arbitration, and accordingly he appointed two arbitrators directing them to submit their award within three months. Hence this application.

4. Counsel for the petitioner has virtually raised the same points as were raised before the court below. Further he has urged that the order of the learned Subordinate Judge appointing the arbitrators is wrong also on the ground that the claim being for an amount of Rs. 50,311.63 paise, only one arbitrator could be appointed.

5. The points thus which arise for consideration are (1) whether a dispute between the parties exists, (2) whether The application u/s 8 of the Act is barred by limitation, (3) whether the aforesaid petition is maintainable in the absence of Union of India being a party, and (4) whether the order of the court below appointing two arbitrators is correct.

6. It is not necessary to say much with regard to the first contention of learned counsel in order to reject it. Whether or not a dispute exists is a question of fact. On that question there is a finding of the court below. This court will not interfere with it in revision. In *Balika Devi and Another Vs. Kedar Nath Puri*, it was held that the question whether there is a dispute or not is a question of fact and it cannot be agitated in revision. This decision was relied on in a subsequent case of *Union of India (UOI) Vs. Gorakh Mohan Das and Another*, . Apart from that, it is so obvious that a dispute exists that it is impossible to accept the contention of learned counsel. The dispute between the parties obviously is whether the payment for the extra work done is to be made at the rate prescribed in the original agreement or the one in the subsequent agreement. The parties have joined issues in this respect. There is thus no scope for the argument made by the petitioner.

7. Turning now to the question whether the dispute could be referred to arbitration, Clause 63 (1) of "General Conditions of Contract" in Regulation for Tenders & Contracts of North-East Frontier Railway, which admittedly governs the matter, provides as follows:--

"63 (1) In the event of any dispute or difference between the parties hereto as to

the construction or operation of this contract, or the respective rights and of the parties on any matter in question, dispute or difference on any account, liabilities or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within a reasonable time, then and in any such case, but except in any of the "excepted matters" referred to in Clause 62 of these conditions the Contractor, after 90 days of his presenting his final claim on disputed matters may demand in writing that the dispute or difference be referred to arbitration. Such demand for arbitration shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other, shall be referred to arbitration.

The reasonable time as the case may be demand (sic) in writing that such matter in question, dispute or difference be referred to arbitration. Such demand for arbitration shall be delivered to the Railway by the Contactor and shall specify the matters which are in question, dispute or difference and only such dispute or difference of which the demand has been made and no other shall be referred to arbitration."

Admittedly it is not one of the disputed matters referred to in Clause 62, Reading the aforesaid condition of contract, it is obvious that the dispute in the present case could be referred to arbitration. The contention that the petition is not maintainable, there being no dispute, must, therefore, be rejected,

8. The second point is with regard to limitation. Counsel for the petitioner urged that the notice was given to the General Manager in the present case after three months. Upon this argument it is difficult to find how the question of limitation arises. The argument is obviously misconceived because it appears from Clause 63 (1) itself that notice to refer the dispute for arbitration has to be made "after 90 days of his presenting his final claim on disputed matters." To my regret, when this was pointed to Mr. Bose, he said that he had no option of giving up any point, however, useless it may be, if it had been taken in the court below. This contention has thus got to be rejected.

9. The next point raised is with regard to the non-impleading of the Union of India and consequently the petition being not maintainable on that account. There is no substance even in this contention. I had an occasion to consider a similar question in the case of the Chairman, Bihar State Electricity Board v. Hindu Agricultural Farm and Cold Storage (Civil Revision No. 460 of 1972, disposed of on the 6th of Feb. 1978). There I held that the test to be applied in such cases is to find out whether the suit in substance is directed against a body or any individual and that if the suit be really intended against the body concerned, though some officer of that body has been impleaded as a party, it should be considered a case of mere description of parties which can be corrected under Order 1, Rule 10 of the Civil P. C. In this connection I held further that it would be relevant to consider also as to whether the party concerned considers the suit to be directed against itself or against any officer

personally, and what was its conduct in the proceeding. In that case a suit had been instituted against the Chairman of the Bihar State Electricity Board. The contention was that the suit was against the Chairman and not against the Board. After going into the facts of that case, I had found that the dispute was intended to be against the Board, the Board had considered the case to be against itself and acted in that manner and, therefore, it amounted to a mere misdescription which could be corrected. There is no reason which has come to my mind since then to take a different view in the present case. In the instant case the application u/s 8 of the Act has been filed against the North Frontier Railway Administration and its General Manager.

The technical objection is that neither the General Manager nor the North Frontier Railway Administration should have been impleaded, but only the Union of India, which alone can sue and be sued, as the owner of the Railway concerned, should have been impleaded and which is a necessary party. That the Union of India is a necessary party is not disputed. Upon facts, however, I find, after reading the petition u/s 8 of the Act that the application is intended to refer a dispute between the Union of India as the owner of the Railway, and the opposite party. It appears that the Union of India also considered the suit to be directed against itself in spite of raising the objection that it had not been impleaded. The present application in revision itself has been filed by the Union of India. If it be taken that the petitioner was not a party to the application u/s 8 of the Act, it has no locus standi to file the present application. That apart, in the petition of revision itself it has been stated "that a rejoinder was filed by the petitioner (opposite party in the said miscellaneous case) and it was stated therein, amongst others, that the provision of Section 8 of the Act was not attracted in the case and the application was barred by limitation". It is obvious that according to the petitioner's own saying, it had filed the rejoinder in the court below. Further, it appears from the several petitions and rejoinders filed in the court below that although in the plaint the Union of India was not a party, the suit was described as between Bharat Sarkar and the opposite party. It appears that the show cause petition dated the 2nd of Dec. 1974 was filed by the General Manager. In the hazaris filed on behalf of the opposite party in the court below on 2-12-74, 4-1-75 and 16-1-75 the suit was described as between the present opposite party and "Bharat Sarkar". Similar was the description in hazaris filed by the present opposite party on 14-12-74 and 20-12-74. In the hazaris filed by the present petitioner on 21-12-74, 4-1-75 and 15-1-75 description of the suit was as between the present opposite party and the Union of India. On 12-2-75 a petition was filed on behalf of Bharat Sarkar. A list of documents was filed on behalf of Union of India on 18-2-75. These facts clearly bring out that the Union of India considered itself to be a party to the proceeding. It is too late in the day for it to say that the application u/s 8 of the Act should be thrown upon the ground that it has not been impleaded. It is thus obvious that in substance the application u/s 8 of the Act is against the Union of India itself. It is thus only a case of misdescription and the misdescription can be removed by the court below

under Order 1, R, 10 of the Civil P. C.

10. This remains to consider the question as to whether the court below could appoint two arbitrators in the present case. In this respect reliance has been placed by both the counsel for the parties on Sub-clause (3) of Clause 63 of the aforesaid conditions of contract, the relevant portion whereof reads as follows:--

"3. (a) Matters in question, dispute on difference to be arbitrated upon shall be referred for decision to:--

(i) A sole arbitrator who shall be the General Manager or a person nominated by him in that behalf in cases where the claim in question is below Rs. 3,00,000 and in cases, where the issues involved are not of a complicated nature. The General Manager shall be the sole judge to decide whether or not the issues involved are of a complicated nature.

(ii) Two arbitrators, who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid down in Sub-clause (3) (b) for all claims of Rupees 3,00,000 and above and for all claims irrespective of the amount or value of such claims if the issues involved are of a complicated nature. The General Manager shall be the sole judge to decide whether the issues are of a complicated nature or not. In the event of the two arbitrators being divided in their opinions the matter under dispute will be referred to an Umpire to be appointed in the manner laid down in Sub-clause (3) (b) for his decision.

(iii) The Arbitrator/Arbitrators/Umpire so appointed as the case may be shall give the award on all matters referred to arbitration indicating therein breakup of the sums awarded separately on each individual items of disputes."

It is obvious that where the claim in question is below Rs. 3,00,000, there has (blurred) arbitrator who shall be the General Manager. The appointment of two arbitrators upon the contract aforesaid could be made only for claims of Rs. 3,00,000 and above. In the present case the claim was only for Rs. 50,311 and odd. The court below has thus erred in appointing two arbitrators under the second sub-clause of Clause 3 (a).

11. That brings me to the question as to whether any sole arbitrator other than the General Manager could be ap- pointed in the present case. As I have stated above, a notice was given to the General Manager to refer the matter to arbitration. In view of this notice it was for the General Manager to accept the claim and arbitrate into the matter or to nominate a person in that behalf. It is clear that the General Manager refused to do so. It would appear from the third sub-clause referred to above that the arbitrator so appointed is bound to give the award. It would thus be clear that in the present case the General Manager has refused to act as the arbitrator. The provision relevant to this matter is to be found in Sub-clause (3) (c) of Clause 63 which reads as follows :--

"If the sole Arbitrator appointed under Sub-clause (a) (i) or one or both of the Arbitrators appointed under Sub-clause (b) above resigns his appointment/resign

their appointments or vacates his office/vacate their offices or is/are unable or unwilling to act for any period whatsoever or dies/die, the General Manager may appoint a new Arbitrator/Arbitrators to act in his/their place in accordance with the provisions of Sub-clause (a) (i) or Sub-clause (b) above as the case may be (blurred) Arbitrator/ Arbitrators, as the case may be, shall be entitled to proceed on the reference from the stage at which it was left by the previous Arbitrator/ Arbitrators."

It would thus appear that if the sole arbitrator is unwilling to act for any reason whatsoever, the General Manager may appoint a new arbitrator to act in his place. The question, however, arises if the General Manager does not appoint his nominee nor does he act himself, what is the remedy.

12. Let us, therefore, turn to Section 8 of the Act itself which provides as follows :--

"8. (1) In any of the following cases-

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him; any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

Reading Clause (b) it is obvious that if any arbitrator neglects or refuses to act the aggrieved party may serve the arbitrator with a written notice and if the appointment is not made within 15 clear days after the service of the said notice, the court may appoint an arbitrator. There can be little doubt, therefore, that in the present case in view of the facts stated above, it was open to the court to appoint a sole arbitrator. In this connection I would refer to the case of Balika Devi and Another Vs. Kedar Nath Puri, which lays down the proposition that where one of the parties to the arbitration agreement refuses to concur in the appointment of an arbitrator under the arbitration clause, the other party has the right to move the court u/s 8 of the Act. In a decision of this Court in the case of

Union of India(UOI) Vs. D.P. Singh, it was held by Raj Kishore Prasad, J. that an application under .Section 8(1)(a) of the Act is maintainable where the party having the sole power under the arbitration agreement to appoint the arbitrator fails to make the appointment when called upon to do so.

It was further held that there is no duty cast on the court to consult the defaulting party and give him the opportunity to make an appointment before itself making the appointment, even where the defaulting party has the sole power under the arbitration clause to appoint the sole arbitrator and that the court has absolute discretion in the matter of appointment of an arbitrator after hearing the other party; counsel for the petitioner, however, drew my attention, to another decision of Untwalia, J. (as he then was) in the case of Ramkhelawan Mistry Vs. Rabindra Kumar Ghose and Another, in support of the proposition that the court could not in the present case appoint an arbitrator. In that case the arbitration clause provided that the differences between the three parties to the agreement shall be referred to arbitration of three arbitrators, each of the partners nominating one arbitrator and on a difference arising between the parties two of them appoint-ed two arbitrators, but the third one refused to nominate his own and carry out the terms of the arbitration clause. Thereupon the two partners had applied to the court to appoint an arbitrator in exercise of its powers under Sections 8, 9 and 10 of the Act. It was held that the sections aforesaid were not applicable to the case as the contingency provided by each of the sections was not covered by the arbitration clause. It appears that in that case the court below had taken the view that Section 8 of the Act was not applicable but the court could appoint an arbitrator u/s 9. The learned Judge held that Section 9 applied to a case of reference where the arbitration clause provides a reference to two arbitrators and did not apply to the facts of that case. With regard to Section 8 the learned Judge said that the agreement must provide for reference "by consent of the parties" and the agreement clause in that case did not provide for that. As will appear, the decision in that case was given on the facts of that case itself. In the instant case before me the facts are entirely different. Apart from that, in the case of Union of India v. D. P. Singh (supra) also an agreement similar to the present one was construed and it was held that it was inherent in the agreement itself that the nomination of the arbitrator shall be deemed to have been made by the consent of both the parties. The learned Judge said that there may be express provision to such an effect but even in the absence of any express provision such a provision must be taken to be necessarily implied. I respectfully concur in this view. According to the agreement in the present case the sole arbitrator was to be the General Manager or his nominee. It must be taken to be implied that the General Manager or his nominee was to be the sole arbitrator in the present case with the consent of the parties. Therefore, the requirement of Section 8 of the Act with regard to arbitrators "to be appointed by consent of the parties" is obviously fulfilled.

I may further refer to a decision of the Supreme Court in the case of Chander

Bhan Harbhajan Lal Vs. State of Punjab, . In that case the agreement provided that in the mattex in dispute the case shall be referred to a Settlement Committee for arbitration; on a dispute arising a committee was appointed but before the conclusion of its work it was abolished and a second committee was subsequently appointed and made an award. It was challenged and set aside and the second committee thus ceased to function. Thereafter the Government gave a notice u/s 8(1) of the Act to concur in the appointment of a fresh committee to arbitrate. Ultimately it moved the court u/s 8(2) of the Act. It was held that the committee having become incapable of acting it was within the competency of the court to appoint a new committee. The learned Judges further held that "equally untenable is the contention that Section 8 is not applicable to cases where the condition stipulates the appointment of a Settlement Committee by one of the parties. This submission was made relying on the wording of the section that any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy. This part of the section no doubt contemplates two parties but the section cannot be read as not being applicable where the agreement provides for the nomination of the committee by one of the parties for the section itself says that the party may serve the other parties. "May serve the other parties" will include not serving other parties in cases in which the service on the other party is not contemplated." This decision thus lends support to the principle that where one party is to be arbitrator and has become incapable of acting, which will also cover cases of refusal to act, the court has the authority to appoint an arbitrator u/s 8 of the Act. The subsidiary argument of Mr. P. K. Bose in this connection to effect that before appointing the arbitrators the court should have asked the General Manager to act as the arbitrator or to appoint his nominee, is untenable.

13. No other point was raised during the arguments of Mr. P. K. Bose. The opposite party was heard in reply.

Thereafter Mr. Bose finished his argument in reply. Arguments were thus concluded. The counsel for the parties then wanted to find out any relevant decision and for that the case was adjourned. When it was placed again, Mr. Bose suddenly wanted to raise a new point, namely, that on the facts of the present case and in view of the agreement, the application should have been filed u/s 20 of the Act for filing the agreement and appointment of arbitrator and for reference to such arbitrator. It ap-pears that the point was not raised in the trial court nor was it raised in the petition and the opposite party naturally urged that the point ought not to be allowed at this stage to be raised. In such circumstances, it would be unfair to the opposite party to allow the petitioner to raise a new point, not raised earlier, which depends upon the interpretation of the agreement and other facts. I, therefore, refused Mr. Bose permission to raise any new point long after arguments were concluded.

14. In the result, the order appointing two arbitrators, in the circumstances of

the case, has to be set aside and the case is remitted to the court below to appoint only one arbitrator who will act in the reference.