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(1952) 12 P&H CK 0019

In the Punjab And Haryana At Chandigarh

Case No : F.A.F.O. No. 40 of 1952

Union of India (UOI) — APPELLANT

Vs

New India Constructors, Delhi and Others — RESPONDENT

Date of Decision : 30-12-1952

Acts Referred:
Arbitration Act, 1940 — Section 4, 8, 8(1), 8(3)

Citation : AIR 1955 P&H 172

Hon'ble Judges : Savinder Singh Sodhi, J;Khosla, J

Bench : Division Bench

Advocate : C.K. Daphtary and S.M. Sikri, for the Appellant; K.L. Gosain and H.L. Sibal, for the Respondent

Final Decision : Allowed

Judgement

Soni, J.—Messrs. New India Constructors obtained two contracts for the construction of certain tenements to be made in Delhi. Clause 25 of each of the contracts provided means for the settlement of disputes. Clause 25 ran as follows:

"Settlement of disputes.

(25). Except where otherwise provided in the contract ''all questions and disputes relating'' to the meaning of the Specifications, designs, drawings, and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or so to any other question, claim, right, matter or thing whatsoever in any way arising out of, or relating to the contract, designs, drawings, specifications, estimates, instructions, orders, or these conditions, or otherwise concerning the work, or the execution or failure to execute the same, whether arising during the progress of the work. or after the completion or abandonment thereof "shall be referred to the sole arbitration of the Chief Engineer/Additional Chief Engineer, Central Public Works Department, and if Chief Engineer/Additional Chief Engineer is unable or unwilling to act to the sole

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arbitration of some other person appointed by the Chief Engineer/Additional Chief Engineer willing to act such arbitrator.''

''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 this agreement relates and that in the course of his duties as such Government servant he had expressed views on all or any of the matters in dispute of difference. The award of the arbitrator so appointed shall be final, conclusive and binding on all parties to this contract."

Differences having arisen between the parties, Messrs, New India Constructors sent a notice to the Chief Engineer on 3-12-1951 to enter upon and proceed with the arbitration and in case he was not inclined to arbitrate to appoint some other suitable person as an arbitrator.

This notice was served on the Chief Engineer on 7-12-1951. No reply was given to this notice. On 9-2-1952, the New India Constructors approached the Court with an application u/s s 5, 8, 11, 12 "and other relevant provisions" of the Arbitration Act, 1940, stating that the Chief Engineer had neglected and failed to enter on the arbitration and to use reasonable despatch in entering on and proceeding with the reference and praying that as he had not made any appointment the authority of the Chief Engineer as an arbitrator be revoked and the Court may be pleased to appoint any person to act as sole arbitrator in place of the said Chief Engineer.

This application was put in Court on 9-2-1952. Service of this application was made on the respondent Government of India on 22-2-1952. On 25-2-1952, the respondent approached the Court for an adjournment, which was granted. On 27/28-2-1952, the Chief Engineer ''appointed Mr. C. P. Malik, Superintending Engineer, as the arbitrator to settle the dispute.''

On 8-3-1952, written statement was put in Court on behalf of Government stating that owing to unavoidable circumstances it was not possible to appoint an arbitrator immediately on receipt of applicant''s demand, but that the Chief Engineer had on 27/28-2-1952, already appointed Mr. C. P. Malik, Superintending Engineer, Central Circle, New Delhi, as an arbitrator to decide the dispute under Clause 25 of the agreement and that the arbitrator having been appointed the present petition was infructuous and should be dismissed.

On 5th March, the Court passed an order holding that as the Chief Engineer had failed to act, his failure to act for a month amounted to neglect on his part and that the unavoidable circumstances under which the arbitrator could not act had not been explained and" that this neglect was sufficient to appoint a new Arbitrator. The Court therefore appointed Mr. Pritam Singh Safeer, Advocate, to act as an arbitrator in this case. The Government has appealed to this Court. We have heard Mr. Daphtary on behalf of Government and Mr. Kundan Lal Gosain on behalf of the New India Constructors.

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2. The question involved in this case is twofold. Though Section s 5, 8, 11, 12 "and other relevant Section s" of the Arbitration Act were mentioned in the application, the argument proceeded on the interpretation of Section 8 of the Arbitration Act only. That Section s states--

"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."

The point involved in the interpretation of Section 8 is whether in this case Section 8 at all applies. That is to say whether the Chief Engineer when he refused to act himself acted as an arbitrator and" also whether on his refusing to act himself when he neglected to appoint an arbitrator in his place he was acting as an arbitrator even then, The second point is whether in the circumstances, the appointment of Mr. C. P. Malik, Superintending Engineer, which had been made by the Chief Engineer should have been superseded.

3. It is simpler to take the second point. The notice to the Chief Engineer to act under Clause 25 was served on him on 7-12-1951, Though he did not act on this application immediately, he did make an appointment though no doubt the appointment was made after the application had been put into Court. The appointment was made at the end of February 1952 -- less than three months after the notice had been made to the Chief Engineer.

There have been laches. But Government Departments do not always act very promptly. The question is whether this delay of 2 3/4 months has been such that the appointment made by the Chief Engineer should be cancelled. Neither in the pleadings nor in the arguments before us was anything mentioned against Mr. C.

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P. Malik, Superintending Engineer,

There is no reason why the appointment of Mr. C. P. Malik, which does not contravene the provisions of Clause 25 of the agreement and has made by the Chief Engineer, though made late, should have been upset. The words of Clause (2) of Section 8 are "The Court may appoint". The use of the word "may" implies that a discretion is given to the Court. That discretion has to be exercised properly, and not arbitrarily.

It was contemplated in Clause 25 of the agreement that it would be no disqualification for the person appointed by the Chief Engineer to act as an arbitrator if he was a Government servant or had to deal with the matters to which the agreement related, or if he had dining the course of his duties expressed his view on or any of the matters in dispute or difference.

A qualified Engineer is surely better than a mere Advocate in settling disputes involving technical matters. I therefore hold that the Court even if it had jurisdiction to decide this application under the Arbitration Act made an improper use of its discretion in not appointing Mr. C. P. Malik as the arbitrator.

I would set aside the order of the Court below and direct that Mr. C. P. Malik enter on the reference as an arbitrator and perform his duties as such and make his award as expeditiously as possible.

4. The point which took a considerable time of the Court in arguments was on the interpretation of Section 8 of the Arbitration Act.

There is no doubt that under Clause 25, the Chief Engineer has to perform two duties. Firstly, it is his duty to act as an arbitrator himself, and if he does not do so, he clearly refuses or neglects to perform the duties of the arbitrator. But the agreement does not stop there. The agreement continues to say that if the Chief Engineer is unable or unwilling to act as the sole arbitrator, then he must appoint another person in his place as an arbitrator.

The question is whether the second function of the Chief Engineer is a function which is performed by him as an arbitrator or whether he is performing this function as a ''persona designata'' having certain duties to perform not as an arbitrator -but as a person appointing somebody else to act as an arbitrator.

In the alternative of the Chief Engineer failing to act as arbitrator the contract could easily have provided that it would be the Secretary to the Department or the Minister or some other agreed individual who was to make the appointment of the arbitrator. Mr. Daphtary contended that the Chief Engineer had two distinct capacities.

His first capacity was that of an arbitrator. His second capacity wss not that of an arbitrator but was that of a ministerial or executive officer who under the contract had nothing to do but to make an appointment and the appointee was to perform the functions of an arbitrator. Mr. Daphtary''s argument amounted to

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this though he himself did not so put it that in the event of the Chief Engineer not himself functioning as an arbitrator, the case becomes one contemplated by Section 4 of the Arbitration Act. Section 4 runs as follows;

"4. The parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment."

Mr. Daphtary''s argument next proceeded that if that be the case, that is to say if the functions of the Chief Engineer be split into his two capacities, his one capacity being that of an arbitrator and his other and later capacity in the agreement being that of a ''persona designata'' to make an appointment, then the Arbitration Act provides not machinery on the failure of the ''persona designata'', u/s 4 failing to act.

Mr. Daphtary''s argument is that this is what has happened in this case. The ''persona designata'', the Chief Engineer has failed to act and the Arbitration Act has not provided for the contingency. The parties must, in these circumstances, approach the Court in the ordinary manner and either bring a suit for a mandatory injunction or take such other steps in a civil suit as they may be advised, but that no appointment can be made by the Court under the Arbitration Act.

That a person can have two capacities is well known. A person may be acting in his personal capacity and he may be acting as a guardian for somebody else or trustee for somebody else or in any other capacity. I confess that the argument of Mr. Daphtary appeals to me. In my opinion this was a clear splitting up of the personality of the Chief Engineer.

Mr. Daphtary had urged that his argument was strengthened by the relief clause following Clause (c) of Sub-Section (1) of Section 8 which says 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.

Mr. Daphtary''s argument was that the parties in this case were the New India Constructors and the Government, and the New India Constructors should have served a notice on Government to concur in the appointment of an arbitrator. When the relief clause says that the parties may serve the arbitrators with a notice, this happens -- so Mr. Daphtary argued -- when the arbitrators neglect to perform their function of appointing an umpire.

The word "act" in Clause (b) of Section 5(1) according to Mr. Daphtary means acting as an arbitrator. The weakness of this argument is that when the arbitrators appoint an umpire they themselves do not act as arbitrators, but they act merely as ministerial officers to appoint someone who in case of difference between the arbitrators decides the case.

The arbitrators then are not acting as such to decide the matters in dispute

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between the parties but are merely appointing someone who would in the event of the arbitrators not agreeing decide the dispute.

In reply it can be urged that when under Clause (b) or Clause (c) arbitrators neglect to perform their function of appointing an umpire they have entered upon the reference, the Arbitration machinery had been set in motion, and one of the stops in the arbitration proceedings remains to be performed which is not being performed through the default of the arbitrators acting as arbitrators in not appointing their own umpire. This argument appears to be good.

In answer it may be urged that Clause (c) contemplates not only the appointment of an umpire by the arbitrators but also by the parties; and parties themselves would never be acting as arbitrators. But the force of this answer is lessened by the fact that in Clause (c) the word "act" is not used.

Moreover Clause (c) applies when the arbitration proceedings are on their way, half completed by the appointment of arbitrators, the other half remaining incomplete because of the forum not being fully formed. When in a case of the present kind the arbitration has not started at all, it appears to me that the case falls under the provisions of Section 4 of the Arbitration Act.

5. In any case even if the Court had the right to make an appointment it did not exercise its discretion wisely in appointing Mr. Pritam Singh Safeer, the appeal is accepted and the order appointing Mr. Pritam Singh Safeer is set aside and Mr. C. P. Malik who has been appointed as the arbitrator is directed to enter upon the reference of parties as expeditiously as possible. There will be no order as to costs of these proceedings whether here or in the Court below. The point involved is of considerable difficulty and there is no direct authority on the point.

Khosla, J.

6. I agree with the order proposed by my learned brother Soni J., and have only a word two to add to his discussion of the points argued before us. Under the terms of the arbitration clause the Chief Engineer or the Additional Chief Engineer could either act as a sole arbitrator himself or appoint some other person willing to act as such arbitrator. As I see this clause, it means not that the Chief Engineer or the Additional Chief Engineer was ''appointed'' sole arbitrator but that he was given the authority either to enter upon the arbitration himself or to appoint another arbitrator.

This means in substance that ho could appoint either himself or some one else and unless such appointment was made he could not be said to have acted as arbitrator or to have entered upon arbitration. His silence therefore does not mean that he neglected or refused to act as arbitrator. When the notice calling upon him to enter upon the arbitration was served upon him on 7-12-1951 he could have chosen one of two courses. He could have replied and said that he was going to enter, upon the arbitration, or he could have said that he was going to appoint someone else as the sole arbitrator.

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Upon this decision being taken the provisions of Section 8(1)(b) would have come into play, but until then it could not be said that he had neglect ed or refused to act as arbitrator.

7. There is one other point which appears to me to be relevant, namely, the meaning of Clause (2) of Section 8. It seems to be that the expression "the Court may, ... appoint an arbitrator" does not mean that the Court must appoint an arbitrator. The Court is given a discretion in the matter.

In ''Bjornstad v. Ouse Shipbuilding Co., Ltd.'' (1924) 2 KB 673 (A), it was held that the Court had discretion to make an appointment and that the Court could in a proper case refuse to make the appointment. In that case the Judge in Chambers had made the appointment, but in appeal this appointment was set aside upon good grounds.

Therefore, even if the view is taken that in this case there was refusal by the arbitrator and the Court below had discretion to appoint a substitute, the discretion can be reviewed in appeal, and we feel what in the present case it is more in the fitness of things that an officer of the Public Works Department who knows contracts of this type and understands the points in dispute should act as the arbitrator and not an outsider.

I am of the view that Mr. C. P. Malik is a much better person to act as an arbitrator in this case than Mr. Pritam Singh Safeer who can know nothing of the technical working , of the Public Works Department.

8. I therefore hold that in this case there was no refusal to act and therefore the Court was not justified in appointing another arbitrator. In any case the delay was explained and the Court below did not act properly in appointing a substitute merely because there had been three months'' delay in the appointment of Mr. C. P, Malik. The discretion which is vested in the Courts by virtue of Section 8(2) can be reviewed in appeal, because this discretion is to be exercised in a judicial manner.

I may also here mention an English case, ''In re Wilson & Son, and Eastern Counties Navigation and Transport Co.'' (1892) 1 QB 81 (B), in which it was held that where a person named as an arbitrator objected to act because he felt that he needed an order of a Court before he could enter upon the arbitration, his act could not be said to amount to refusal.

In the present case there has been no refusal by the Chief Engineer. Departmental action, it appears, was being taken. On 25-2-1952 time was asked for and on 27-2-1952, Mr. C. P. Malik, was appointed arbitrator.

9. For the reasons given above, I would allow this appeal and dismiss the application of the respondents. The appointment of Mr. C. P. Malik, was in my view properly made.

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