

(1995) 07 DEL CK 0040

In the Delhi High Court

Case No : Original Miscellaneous Petition No. 115 of 1992 and 185 of 1993

Universal Consortium Engineers Pvt. Ltd.

APPELLANT

Vs

State Trading Corporation of India Ltd.

RESPONDENT

Date of Decision : 04-07-1995

Acts Referred:

Citation : (1995) 3 AD 334 : (1995) 2 ARBLR 242 : (1995) 59 DLT 273

Hon'ble Judges : R.C. Lahoti, J

Bench : Single Bench

Advocate : Ramesh Keshwani, S.K. Watel and R.K. Watel, for the Appellant;

Judgement

R.C. Lahoti, J.

(1) Universal Consortium Engineers Pvt Ltd, the petitioner had submitted a tender to the State Trading Corporation of India Ltd. for construction of a multi storey building known as Stc Building Complex (Jawahar Vyapar Bhawan) at Tolstoy Marg. The tender was accepted by the respondent. A contract dated 23.7.1980 was finalised and entered into between the parties. The contract contained an arbitration clause. The relevant part thereof provided as under: -

"ARBITRATION of Managing Director, STC. If any dispute, question or controversy, the settlement of which is not herein specifically approved for, shall at any time arise between the Stc and the contractor relating to this contract or any clause or thing contained or the construction thereof or any matter connected with this contract or the portion of the same or the rights or duties or liabilities of either party then in every such case, the matter in dispute shall be referred to the arbitration of the Managing Director, Stc or his nominee and his decision shall be binding on both the parties. The provision of Indian Arbitration Act, 1940 as amended from time to time shall apply to such arbitration proceedings. Arbitration proceedings shall be held at Delhi and only Delhi Courts will have jurisdiction in the matter. It will not be open to the contractor to object to the appointment of Chief Engineer, Stc and their Architects or their nominee

as Arbitrator on the ground that he is an officer of the Stc or has dealt with the matter in question in the course of his duties or has expressed views on all or any matters in dispute. Service under this contract shall notwithstanding the existence of any such dispute/ question or controversy continue during the arbitration proceedings and no payments due or vice-versa shall be withheld on account of such proceedings unless such payments are the direct subject of such arbitration proceedings."

(2) There was an addendum dated 10.10.1983 added to the main agreement which is not relevant for the controversy at hand.

(3) Disputes arose between the parties and the petitioner sought for appointment of an Arbitrator. The Chairman-cum-Managing Director expressed his unwillingness to act as an Arbitrator. Ultimately the parties agreed upon the appointment of a retired Judge of the Supreme Court as an Arbitrator. Late Mr Justice S.M. Sikri, a retired Chief Justice of India, was appointed an Arbitrator.

(4) As regards issue No.1 the learned Arbitrator made and published his award which has been made a rule of the Court. As regards issue No. 2, the learned Arbitrator held 86 hearings, the last of which was in May, 1992. Thereafter, on account of sickness the learned Arbitrator could not hold any sitting. He expressed his inability to proceed further with the hearing of the arbitration proceedings. He" expired on 24.9.1992.

(5) According to the petitioner, further construction work was carried on by it during the pendency of the arbitration proceedings and thereafter it has resulted into accrual of further disputes between the parties which disputes are set out in Annexure-1 to the petition u/s 8(2)/20(4) of the Arbitration Act.

(6) The petitioner also served a registered letter dated 21.7.1992 calling upon the respondent to concur in supplying the vacancy in the office of the Arbitrator by agreeing to appointment of a retired Judge of the Supreme Court in place of late Mr Justice S.M. Sikri. It was suggested in the alternative that the respondent may suggest three names of retired Judges of the Supreme Court of India or of an equivalent status so that the petitioner may choose one of them to be appointed as an Arbitrator.

(7) On 26.8.1992, the Chairman-cum-Managing Director of the respondent appointed Shri W.D. Dandage, Director-General, Cpwd (retired) as the Sole Arbitrator. Operative part of the letter of appointment reads as under:-

"I here by supply the vacancy caused on the resignation of Mr Justice Sikri and nominate and appoint you as the Sole Arbitrator to arbitrate upon the aforementioned differences and disputes between the parties and request you to enter upon the reference and take necessary steps to arbitrate upon the said differences and disputes and make your reasoned award in regard thereto. You may kindly advise about the fee you will charge for the said case as the Sole Arbitrator, as also the fee, if any, for secretarial assistance."

(8) Copy of the letter was sent to the petitioner.

(9) According to the petitioner, the respondent could not have without the consent of the petitioner appointed an Arbitrator. In the facts and circumstances of the case, the appointment could be made only by the Court. According to the respondent the appointment was made by the Chairman-cum- Managing Director consistently with the arbitration clause. As the appointment of the Arbitrator made once does not exhaust the authority to make an appointment the same can be exercised as many times as may there be the occasions for exercising the same. The Chairman-cum-Managing Director having made the appointment the petition filed by the petitioner does not lie.

(10) It maybe noted that the petition under Sections 8 and 20 of the Arbitration Act filed by the petitioner on 7.5.93 has been registered as Omp 115/92. The respondent has filed a petition u/s 28 of the Arbitration Act, 1940 on 15.12.1993 seeking enlargement of time for making and publishing of the award by the Arbitrator appointed on 26.8.1992.

(11) The learned Counsel for the petitioner has in support of the petition placed reliance on the law laid down by the Supreme Court in Parbhat General Agencies, etc. Vs. Union of India (UOI) and Another, etc., , Chander Bhan Harbhajan Lal Vs. State of Punjab, , and Union of India Vs. R.B. Ch. Raghunath Singh and Co., . All these decisions and a few others have been considered, analysed and followed and the principles of law succinctly laid down in a very recent decision of the Supreme Court in the State of West Bengal Vs. M/s. Naional Builders,

(12) The question which arose before their Lordships in the State of West Bengal's case (supra) was whether in the case of refusal to act by the Arbitrator the power to appoint next Arbitrator vests in the Court or (he appointment has to be in accordance with the procedure provided in the agreement. In other words, does the power to appoint the sole Arbitrator under the agreement comes to an end with such appointment having been made once or every time the Arbitrator refused to act, the parties were to take recourse to appointment of another Arbitrator as provided in the agreement itself. Their Lordships have held :-

"WHEN the agreement provides that dispute between the parties shall be referred to the person named in an agreement it is an appointment by consent but where the Arbitrator so appointed refused to act, the next appointment can 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 agreement can be forced to the 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. In a case where the arbitration clause provides for appointment of a Sole Arbitrator who had refused to act then the agreement clause stands exhausted and it is for the Court to intervene and appoint another Arbitrator u/s 8(I)(b) if the arbitration agreement does not show that it was intended that the vacancy shall not be

supplied.

(13) The arbitration clause in the case at hand does not show the parties having intended that the vacancy shall not be supplied. The Chairman-cum-Managing Director has refused to act as an Arbitrator. Late Chief Justice Mr. Sikri also refused to act for health reasons. In such circumstances it will be deemed that the arbitration clause does not operate and it is only the Court which has to intervene and appoint another Arbitrator.

(14) For the foregoing reasons the appointment dated 26.8.92 made by the Chairman-cum-Managing Director of the respondent cannot stand. It is invalid. The petitioner has rightly approached the Court and it is the Court which has to exercise its jurisdiction u/s 8(l)(b) of the Act.

(15) For the foregoing reasons Omp 115/92 is allowed. Shri Shivdayal, (r/o H-175, Ashok Vihar, Phase-I, New Delhi-110052. Tele. 7242062) a retired Chief Justice of High Court is appointed an Arbitrator. He would resume the arbitration proceedings from the point at which they were left by his predecessor. Additional disputes raised by the petitioner and annexed as Annexure 1 with the petition in Omp 115/92 are also directed to be referred to the Arbitrator. The Arbitrator would decide whether the disputes raised by the petitioner arise out of the contract between the parties and fall within the purview of the arbitration clause. Looking to the nature of the disputes raised the Arbitrator would be at liberty to avail the services of a technical person to assist him in resolving the disputes. The Arbitrator may also have secretarial assistance. The fee and costs of arbitration proceedings shall be borne equally by the parties.

(16) As a consequence the petition u/s 28 filed by the respondent as Omp 185/93 is dismissed as infructuous.