

(1978) 03 CAL CK 0063
In the Calcutta High Court
Case No : Matter No. 58 of 1978

V.G. Ghawda Pvt. Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 08-03-1978

Acts Referred:

Arbitration Act, 1940 — Section 20, 8

Citation : AIR 1978 Cal 271

Hon'ble Judges : S.K. Roy Choudhury, J

Bench : Single Bench

Advocate : Gautam Guha, for the Appellant; P.K. Sen and Dipak Som, for the Respondent

Judgement

S.K. Roy Choudhury, J.—This is an application u/s 8 of the Arbitration Act, 1940 for appointment of an Arbitrator by the Court in place and stead of an Arbitrator who has resigned.

2. The facts shortly are that the petitioner entered into a construction contract with the respondent dated the 26th of June, 1958, for the construction of a new railway line on the terms and conditions mentioned in the said agreement. The said agreement contained an arbitration clause in the general conditions of contract which was incorporated in the said contract between the parties. The said clauses are Clause. 62 and 63. As disputes and differences arose in terms of the said contract and the petitioner demanded reference to arbitration of the disputes in terms of the arbitration clause on or about 31st of March 1973, and as the respondent failed to refer the disputes to arbitration an application u/s 20 of the Arbitration Act, 1940, was made before this Court by the petitioner on the 6th of Sept., 1974, being special Suit No 25 of 1974, and by an order dated the 18th of March, 1975, the arbitration agreement was directed to be filed in this Court and an order of reference was made to the Joint Arbitrators to be appointed in terms of the arbitration clause. Pursuant to the said order of reference, the General Manager of the South Eastern Railway in terms of the

arbitration agreement appointed one Mr. Section K. N. Nayar and Mr. Section Sengupta as the joint Arbitrators by his letter dated the 16th of Sept. 1976. It appears that the Arbitrators entered on the reference and thereafter, one of the said Arbitrators Md. Section K. N. Nayar resigned from the office of the Co-Arbitrator by his letter dated the 23rd, of June, 1977, addressed to the General Manager, South Eastern Railway. The petitioner addressed a letter to the General Manager, South Eastern Railway dated the 20th of July, 1977, requiring the said General Manager, to concur in the appointment of an Arbitrator out of the names mentioned in the said letter.

3. It is alleged by the petitioner that the General Manager, by a letter dated the 19th of July, 1977, wrongfully in purported exercise of his authority appointed one Mr. V. P. Dang as an Arbitrator in place of Mr. Section K. N. Nayar who has since resigned. Thereafter, the Joint Arbitrators by their letter dated the 30th of July, 1977, required the petitioner to submit its statement of Claim before the said Joint Arbitrators Mr. Section Sengupta and Mr. V. P. Dang. The petitioner by his letter dated the 11th of Aug. 1977, challenged the validity of the appointment of Mr. Dang by the General Manager alleging the same as not in accordance with the arbitration agreement and thereby refused to file the statement of claim until the Tribunal of Arbitration is properly constituted. It is alleged by the petitioner that no appointment by filling up the vacancy caused by the resignation of the said Arbitrator, Mr. Section K. N. Nayar has been made by mutual consent of the parties. Therefore, the present application was filed on the 25th of Jan. 1978 for appointment of an Arbitrator by the Court in place and stead of the said Arbitrator Mr. Section K. N. Nayar who has resigned.

4. Mr. Goutam Guha, appearing for the petitioner, submitted that all the requirements u/s 8(1)(b) of the Arbitration Act, 1940, have been satisfied in this case as the petitioner after the resignation of one of the said two Arbitrators caused a notice to be served on the respondent to concur in the appointment of an Arbitrator in place and stead of the said Arbitrator, Mr. Section K. N. Nayar, and as the respondent failed to do so the present application has been made for the appointment of an Arbitrator to fill up the vacancy. Mr. Guha submitted that there is no intention of the parties expressed in the said arbitration agreement not to fill up the vacancy and therefore, the Court has the jurisdiction to appoint the said Arbitrator by filling up the vacancy. Mr. Guha submitted that the purported appointment by the General Manager after his original appointment is bad as he had no jurisdiction to do so as the power has been exhausted after it has been exercised. Mr. Guha also submitted relying on the decision of Masud J. in East India Construction Co. (P) Ltd. Vs. Union of India (UOI), that the power of appointment by the General Manager exhausted after the same has been exercised. The arbitration clause in the said case before Mr. Justice Masud was the identical clause which is for consideration in this case. Therefore, Mr. Guha submitted that it is only the Court which has the power to appoint and the substitutional appointment by the General Manager should be held to be bad and invalid. He submitted that the arbitration clause does not provide for such

substitutional appointment and, therefore, it is only the Court which can appoint the Arbitrator u/s 8(1)(b) of the Arbitration Act, 1940. Mr. Guha also submitted that the question of the application u/s 20 of the Arbitration Act, 1940, being barred under Article 137 can no longer be raised by the respondent as the order u/s 20 of the Arbitration Act, 1940, was duly made by this court and the same has been given effect to by appointment of the Arbitrators pursuant to the said order of reference and during the pendency of the reference one of the Arbitrators has resigned causing vacancy in the said Tribunal of arbitration which is required to be filled up to proceed further with the pending reference. Mr. Guha also submitted that the petitioner has changed his position after the respondent has accepted the said order of the Court and reference was made to the Arbitrators pursuant to the order of the Court. Therefore, the respondent is estopped from questioning the validity of the order of reference u/s 20 of the Arbitration Act, 1940. Mr. Guha further submitted that the said application u/s 20 of the Arbitration Act, 1940 is not barred by limitation under Article 137 as the demand for arbitration in terms of the arbitration clause was made by the petitioner only in 1973 by its lawyer's letter dated the 31st of March, 1973, and the application u/s 20 of the Arbitration Act, was made on the 6th of Sept., 1974, being well within three years from the right to apply accrued being the date on which the demand was made for referring the disputes to be referred to arbitration in terms of the arbitration clause in the agreement. Mr. Guha submitted that order should be made as prayed for in this application by appointment of an Arbitrator in place and stead of the Arbitrator who has resigned and the vacancy may be filled up.

5. Mr. P. K. Sen, appearing with Mr. Dipak Som, for the Respondent, submitted firstly that the order u/s 20 of the Arbitration Act, 1940, referring the disputes to the Arbitrators to be appointed in terms of the Arbitration agreement must be held to be made in an application which was barred under Article 137 of the Limitation Act, 1963. Mr. Sen submitted that after the order u/s 20 was made on the 18th of March, 1975, the Supreme Court in the decision of The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, has held that Article 137 applies to any petition or application filed under any Act and, therefore, it includes any application under the Arbitration Act, that is an application u/s 20 of the Arbitration Act, 1940. Mr. Sen therefore, submitted that the previous decisions of the Supreme Court in which it has been held that the Limitation Act does not apply to an application u/s 20 of the Arbitration Act, 1940, can no longer now be held to be good law. Mr. Sen also submitted that subsequently Sabyasachi Mukharji, J. following the Supreme Court decision has held that an application u/s 20 is governed by Article 137 of the Limitation Act. 1963,

6. I am not in a position to accept the contention of Mr. Sen as the facts of this case are quite different and distinguishable. As in this case an application u/s 20 of the Arbitration Act, 1940, was made within the prescribed period under Article 137 that is, within three years from the date on which the right to apply accrued and a right to apply u/s 20 of the Arbitration Act, 1940, can be said to accrue

only after a demand is made to refer the disputes to arbitration under the arbitration agreement. There is a distinction between the claim being barred under the Limitation Act, and right to apply u/s 20, which is only a machinery section for referring the disputes to arbitration by an order of Court. The Supreme Court has held that whether the claim to be made in the reference to arbitration is barred or not is a question to be decided by the Arbitrators and not by the Court in an application u/s 20 of the Arbitration Act 1940. See Mohd. Usman Military Contractor, Jhansi Vs. Union of India (UOI), Ministry of Defence, which has followed a previous Supreme Court decision in Wazirchand Mahajan and Another Vs. Union of India (UOI), . Therefore, the said application u/s 20 in which an order has already been made cannot be said to be barred by limitation. Secondly the order being given effect to and acted upon by both the parties by appointment of the Arbitrators and referring the disputes to them, it is no longer (open) to the respondent to challenge the said order. The order was not appealed from nor it has been set aside nor it can be said to be a nullity. Therefore, there is no substance or merit in the contention of Mr. Sen. that the order u/s 20 of the Arbitration Act, 1940, pursuant to which reference was made to the Arbitrators in terms of the Arbitration agreement can be said to be bad.

7. Mr. Sen thereafter submitted that the General Manager having appointed an Arbitrator in place and stead of an Arbitrator who has resigned, in exercise of the authority and power given to him under the arbitration agreement, the vacancy has already been filled up and this application is not maintainable. He submitted referring to the recent Division Bench decision of this Court in Sunil Mukherjee Vs. Union of India (UOI), that Section 8 has no application in case of the arbitration agreement as in the instance case. The same arbitration clause came up for consideration before the Appeal Court and according to Mr. Sen it has been held construing the said arbitration clause and Section 8 of the Arbitration Act, that the arbitrators were not appointed by consent of the parties and, therefore, the present application u/s 8 is not maintainable. Mr. Sen referred to para. 13 of the said Division Bench decision in Sunil Mukherjee Vs. Union of India (UOI), and submitted that the application should be dismissed. He also cited the Allahabad High Court decision in Union of India (UOI) Vs. Gorakh Mohan Das and Another, which was approved by the said Division Bench of this Court in Sunil Mukherjee v. Union of India.

8. Mr. Sen submitted that in the said Division Bench decision in Sunil Mukherjee Vs. Union of India (UOI), the identical arbitration clause has been judicially construed and it has been held that Section 8 of the Arbitration Act, 1940, has no application in such arbitration clause. Therefore, the present application is not maintainable. I am unable to accept the said contention as the decision before the Division Bench arose at the initial stage of the appointment of the Arbitrator under the said Arbitration clause and on the refusal of one of the arbitrators to act after the reference has been entered on by the joint arbitrators subsequent to their initial appointment under the said arbitration clause. Therefore, the Division Bench was not dealing with the circumstances as it has arisen in this

case,

9. Considering the respective contentions very carefully, I am of the view that there is no substance or merit in the contention of the Respondent as raised by Mr. P. K. Sen. I have already held that the question of the original application u/s 20 of the Arbitration Act, 1940, being barred under Article 137 of the Limitation Act, 1963, cannot be raised by the respondent in this application. Firstly, on the facts of this case there could not be any question of limitation as the application was made well within three years from the date when the right to apply u/s 20 accrued to the petitioner. Secondly, the order has been given effect to and acted upon by the parties and the Arbitrators entered upon the reference which was directed by the said order. The order could not be said to be a nullity or without jurisdiction. Therefore, the Respondent is not entitled to turn round now and raise the said objection as it is estopped by procedure, which was adopted and accepted by both the parties in the said reference. In fact, the Respondent alleged in this application that the General Manager has already appointed an Arbitrator in place and stead of the Arbitrator who has resigned in exercise of his power of appointment under the arbitration agreement.

10. Regarding the question of the applicability of Section 8 to the present application I am of the view that the case is covered by the decision of Masud, J. in East India Construction Co. (P) Ltd. Vs. Union of India (UOI), where the facts were identical as in this case and I respectfully agree with the said decision of Masud, J. and as such it must be held that the Court has power to appoint an Arbitrator in place and stead of the Arbitrator who has resigned in exercise of the Court's power u/s 3(1)(b) read with Section 8(2) as all the conditions have been satisfied. It is fundamental that the Court has the power to appoint Arbitrator where an appointed Arbitrator has refused to act and the arbitration agreement does not show that it was intended that the vacancy should not be supplied and the parties do not supply the vacancy. Here the arbitration agreement does not contain any procedure for the appointer to substitute an Arbitrator in place of an Arbitrator who has resigned or refused to act. Therefore, it is only the Court (which) is empowered to appoint the Arbitrator in the present case. The power of appointment of the Arbitrators by the General Manager, South Eastern Railway, under the arbitration agreement must be held to have exhausted after it has been exercised as in this case pursuant to the said order of reference made by the Court, Therefore, the parties having not filled up the vacancies after the notice was served by the petitioner it must be held that the court has the power to appoint the Arbitrator u/s 8(1)(b) read with Sub-s. (2) thereof.

11. It appears that the General Manager by his letter dated the 30th of July, 1977 purported to appoint one Mr. V. P. Dang, Deputy Chief Accounts Officer (General) South Eastern Railway (Garden Reach). The petitioner has not raised any question about his suitability as an Arbitrator but challenged the said appointment only on the ground that the General Manager has no power any more to appoint a substituted Arbitrator in place of the Arbitrator who has

resigned and it is the Court which can only appoint an Arbitrator unless the parties by consent filled up the vacancy. Therefore in my view, having regard to the nature of the disputes, it is proper to appoint a suitable person and I do not find anything against the said Mr. V. P. Dang to be appointed as Arbitrator in this application.

12. Therefore, I am making the following Order:

Mr. V. P. Dang, Deputy Chief Accounts Officer (General) South Eastern Railway (Garden Reach), is hereby appointed Arbitrator in place and stead of Mr. Section K. N. Nayar who has resigned. The Arbitrator and all parties to act on a signed copy of the minute on the petitioner's advocate on Record undertaking to complete and file this order.

13. Costs of this application would be cost in the Arbitration proceeding.