

Union of India

Vs

Prafulla Kumar Sanyal

Civil Appeal No. 1205 of 1969

(Syed M. Fazal Ali, D. A. Desai JJ)

06.11.1978

JUDGMENT

KAILASAM, J. –

1. This appeal is preferred by special leave by the Union of India against the judgment and order of the Calcutta High Court dated July 31, 1968. The Union of India called for tenders for the construction of a bridge on Imphal River in the State of Manipur. The respondent submitted his tender and the tender was accepted by the appellant at Manipur on February 20, 1965. On March 11, 1965, a formal agreement was entered into in writing between the parties. On behalf of the President of India, the Executive Engineer, Hydro Electric & Bridges Project Division, executed the agreement. The deed of agreement contained an arbitration clause which provided that "except where otherwise provided in the contract, all questions and disputes arising out of or relating to the contract shall be referred to the sole arbitration of the person appointed by the President of India which such designation only as he may specify for Manipur Territory and if he is unwilling to act, to the sole arbitration of some other person appointed by the arbitration".

2. A dispute arose between the parties and the respondent filed a suit against the Union of India in the High Court of Calcutta under the Arbitration Act and prayed that the arbitration agreement dated March 1, 1965 be filed and that an order of reference be made to the arbitrator under the terms of the said agreement. Before the single Judge who took the matter at the first instance, the application was resisted on the ground that no part of the cause of action had arisen within the jurisdiction of the Calcutta High Court. Learned single Judge rejected this contention on behalf of the appellant herein holding that the averments made in paragraphs 13 to 15 and paragraphs 18 to 21 showed that parts of cause of action had arisen within the jurisdiction of the Court and the Court had jurisdiction to try any suit in respect of the said subject-matter if such suit had been filed in the Calcutta High Court. In this view, the court rejected the objection filed by the Union of India and appointed Mr. Tapash Banerjee, a member of the Bar, as the arbitrator. Against the judgment, the Union of India preferred a Letters Patent Appeal. In the Letters Patent Appeal, the Union of India did not impeach the conclusion and finding of the learned Judge that the Court had jurisdiction to deal with the matter. But, it was submitted on behalf on the Union of India that clause 29 of the agreement provided that any matter of dispute shall be referred to the sole arbitration of the person appointed by the President of India (with such designation only as he may specify for Manipur Territory) or if he is unwilling to act to the sole arbitrator some other person appointed by the arbitrator. An arbitrator can be appointed only under the terms of the agreement. The High Court rejected this contention on the ground that the arbitration agreement does not mention any appointed arbitrator. The arbitration agreement states that an abritrator has to be appointed by the President of India or if he is unwilling to act to the sole arbitration, some other person has to be appointed by the

Administration. The High Court in appeal held that it was manifest that there was no arbitrator appointed in the agreement.

3. Under Section 20(4) of the Arbitration Act when an agreement is filed, the court is required to make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court. The sub-section requires that the court shall make an order of reference to the arbitrator appointed by the parties whether in the agreement or otherwise. If no such arbitrator had been appointed and when the parties cannot agree upon an arbitrator, the court may proceed to appoint an arbitrator by itself. Thus if an arbitrator had been appointed whether in the agreement or otherwise, the court shall make an order of reference to him. In this case, clause 29 of the agreement provides that every dispute shall be referred to the sole arbitration of the person appointed by the President of India or if he is unwilling to act to the person appointed by the arbitrator. An arbitrator, in fact, has not been appointed by the President though the provision has been made for such appointment. Construing strictly the words of sub-section (4), the court is not bound to make an order of reference to the person that is to be appointed by the President of India or in the event of his not willing to a person to be appointed by the Administration, for the arbitrator has not been appointed as contemplated in the sub-section. Therefore, it will not be obligatory on the part of the court to make an order of reference to the arbitrator that may be appointed by the President. If an arbitrator had not been appointed as required in the sub-section, the court is to find whether the parties could agree upon an arbitrator. If the parties agree, the court has to appoint the person agreed to as an arbitrator. If there is no such agreement, the court will have to appoint an arbitrator of its choice.

4. It was contended on behalf of the appellant that when the arbitration agreement contains adequate and exhaustive machinery for appointment of arbitrators including substitutional appointments in case the appointed arbitrator refuses to act, it must be construed as the arbitrator having been appointed under sub-section (4) to Section 20. In support of this contention a decision of Calcutta High Court in *Union of India v. HIMCO (India) Pvt. Ltd.* (AIR 1965 Cal 404) was relied on, wherein Bachawat, J. observed that the arbitration agreement contained adequate and exhaustive machinery for appointment of arbitrators including substitutional appointments in case the appointed arbitrator refuses to act. The learned Judge observed the fact that the appointed arbitrator has not yet signified his willingness to act as arbitrator does not debar the court from making an order of reference of the dispute to him. If subsequently refuses to act as the arbitrator the procedure laid down in the arbitration agreement will prevail and will have to be followed. In support of this view the learned Judge relied on the decision of this Court in *M/s. Dhanrajamal Govindram v. M/s. Shamji Kalidas and Co.* (AIR 1961 SC 1285). This Court referring to the powers of the Court under Section 20(4) to appoint an arbitrator observed that it was perfectly possible (in the case) if the parties appointed the arbitrator or arbitrators. If the parties do not agree, the court may be required to make a decision as to who should be selected as an arbitrator. The Court further observed that in the case before it the parties by their agreement have placed the power of selecting an arbitrator or arbitrators in the hands of Chairman of the Board of Directors, and the court can certainly perform the ministerial act of sending the agreement to him to be dealt with by him. The decisions do not consider the question whether under Section 20(4) the court is bound to appoint an arbitrator who has actually not been appointed but for whose appointment adequate and exhaustive machinery had been provided. Taking into account the wording of the sub-section that the court shall make an order of reference to the arbitrator appointed by the parties we do not feel that the sub-section requires the court to appoint an arbitrator who had not actually been appointed, but for whose appointment adequate provisions have been made.

5. In the instant case, as an arbitrator has not been appointed by the parties and as the parties are not agreed upon an arbitrator the court may proceed to appoint an arbitrator, but in so doing it is desirable that the court should consider the feasibility of appointing an arbitrator according to the terms of the contract. In this case the respondent in his petition has prayed for an appointment of an arbitrator under the terms of the agreement. Before us both the parties expressed a desire that the President should be asked to appoint an arbitrator according to clause 29 of the agreement. We feel that there could be no objection to this suggestion and we accordingly ask the President to appoint an arbitrator as contemplated under clause 29 within two months from today. The arbitrator so appointed will immediately enter on his duties and dispose of the reference as expeditiously as possible. The appeal is accordingly allowed. The President will appoint the arbitrator within two months from today, failing which Mr. Tapash Banerjee who was appointed as an arbitrator by the single Judge of the Calcutta High Court will enter upon his duties. In the circumstances of the case, there will be no order as to costs.

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