PATNA HIGH COURT

Manohar Singh Sahay

Vs

Jogendra Singh

Civil Revn. No. 279 of 1976

(Hari Lal Agrawal and Madan Mohan Prasad, JJ.)

15.07.1983

JUDGEMENT

H. L. Agrawal, J.

1. This application under Section 115 of the Civil Procedure Code arising out of an order passed under Section 8 of the Arbitration Act (briefly 'the Act') by the court below on an application filed by opposite party No. 1. has been referred to the Division Bench by a learned single Judge as some important points of law are involved in this case. The main question of 'law is as to whether the court exercising powers under Section 8 of the Act could appoint a new arbitrator in place of the named arbitrator in the arbitration clause of the agreement between the parties.

2. The relevant facts are these: According to the case of opposite party No. 1 (being the managing partner of the firm of the petitioner), the petitioner had entered into a contract with M/s. Heavy Engineering Corporation for erection of a steel structure work of about 950 metric tonnes and machinery repairing, and other equipments, for boiler house and Gas producer plant of bio-proximately 1800 metric tonnes. This job was entrusted to opposite party No. 1 under a work order dated 4-2-1971 containing an arbitration clause to the effect that in case of any, dispute between the parties i.e. the petitioner, and opposite party No. 1, it will be decided through arbitration Which will be binding on both the parties and Sri. Manohar Singh Sahay will be the sole arbitrator. The Work Order was executed by opposite party No. 1 in accordance with the terms of the agreement which was relating to 6000/- tonnes Hydrolic press in E. O. T. cranes and also some extra work Opposite Party No. 1 is thus said to have carried the work for over Rs. 4,00,000/- (Four Lacs). The petitioner, however, did not settle the claim and accordingly the opposite party No. 1 requested the petitioner on 21-9-1974 to refer the matter to opposite party No. 2 for arbitration.

3. Having received no reply, opposite party No. 1 requested the arbitrator (opposite party No. 2) to enter upon the reference. Opposite party No. 2, however, did not enter upon the reference for a pretty long time so much so that by a letter dated 24-7-1976 (sic) (annexure-4) addressed to opposite party No. 1, it was stated that :

> "We do not agree that the matters sought to be referred by you are now arbitrable."

In the circumstance mentioned above, opposite party No. 1 sent a notice on. 16-7-1975 to the petitioner informing him that as the named arbitrator had neglected to arbitrate in the matter, he would appoint Sri D.N. Chatterjee Advocate as the arbitrator in his place requesting him to concur with the said appointment. On receipt of this notice, opposite party No. 2, by his setter dated 28-7-1975, however informed opposite party No. 1 that he would enter into the reference. Notwithstanding the said attitude of the other side, opposite party No. 1 made an application in the court below as mentioned above on the ground the named arbitrator having neglected to enter upon the reference for such a long time rendered himself unfit to act as the arbitrator and that opposite party No. 1 had also lost his confidence in him on account of his being the managing partner of the debtor firm.

4. In the show cause filed by the petitioner, inter alia, he took the stand that the sole arbitrator having already entered upon the reference on 28-7-1975 asking both the parties to submit their written statements or counter-claims, the application was not maintain able inasmuch as opposite party No. 1 in spite of submitting to the arbitrator, has filed this application with false and fictitious grounds.

5. The court below, on taking into consideration all the facts and circumstances, mentioned above, and the series of letters addressed by opposite party No. 1 to the arbitrator and his replies, came to the conclusion that "the arbitrator should have entered upon the reference within one month of the receipt of the letter dated 10-1-1975 (Ext.A). But, admittedly he did not enter into the reference and, for the first time, sent a letter dated 28-7-1975 (Ext.A/7). The sole arbitrator, therefore, entered, into the reference after the expiry of more than six months .... The sole arbitrator has, thus, neglected to act as the sole arbitrator". The court below has also referred to Para 3 of the First Schedule where a period of four months, only has been fixed for submission of the award and then came to the conclusion that the sole arbitrator has lost his jurisdiction to act as the arbitrator. The court below, accordingly took the view that the sole arbitrator had neglected to act as the arbitrator and was liable to be removed and accordingly it removed apposite party No. 2 and appointed Sri D.N. Chatterjee, advocate as the arbitrator in his place to act as the sole arbitrator in the matter. The court below, has also observed that the petitioner did not state any word against the appointment of. Sri D.N. Chatterjee, advocate as the sole arbitrator.

6. Mr. Kameshwar Prasad, learned counsel appearing in support of this application, raised several points challenging the order of the court below. He firstly contended that the court acting under Section 8 of the Act has no authority to replace the named arbitrator in the arbitration clause. In support of this contention he placed reliance upon the case of M/s. Amarchand Laljit Kumar v. Shree Ambica Jute Mills Ltd., AIR 1966 Supreme Court 1086. Before coming to the consideration of the above case I would like to refer to the relevant propositions of Section 8 itself which empower the court to appoint an arbitrator or umpire in any of the following cases:-

> "(a) x x x x
> (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) x x x x "

In this connection explanation to clause (b) of Section 9 of the Act is also relevant and is quoted hereunder.

> "Explanation :- The fact that an arbitrator or umpire after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of Section 8 and this section."

7. Coming to the proposition of law relied upon by Mr. Kameshwar Prasad that the court had no authority to remove the named arbitrator as such, on the face of it, was erroneous because if there could be any such restriction then many a claim for arbitration would be frustrated by such arbitrators very easily. The Supreme Court decision (supra) is not an authority for the proposition. All that it lays down is that the court before exercising its discretion to give leave to revoke an arbitrator's authority, it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. This very decision speaks of the discretion which is vested in the court. A similar decision was given by this Court in the case of *Satya Narayan v. Baidyanath Mandal*[1], where it was observed that the discretion to revoke the authority of the sole arbitrator should be exercised after appreciation and consideration of all the facts which are material for the purpose of enabling a judge to exercise a judicial discretion.

8. It is no doubt, true that in view of the agreement between the parties, opposite party No. 1 having reposed his confidence in the named arbitrator, takes him for the better or worse. In that view of the matter, the court acting under Section 8 of the Act should exercise its power cautiously and sparingly and the parties complaining to it should not be relieved from the decision of the arbitrator because he fears that his decision may go against him. Section 8 (1) itself also indicates the grounds on which the authority of an arbitrator may be revoked and one of them being where he neglects or refuses to act. The conduct of the arbitrator in not acting for a long time is in itself a sufficient ground for appointment of another arbitrator in his place. The explanation to S, 9 referred to above, has put a time limit of one month after request by either party to enter upon the reference failing which he will be deemed to have neglected to act. The first point advanced by Mr. Prasad has, therefore, got no substance.

9. The next argument of Mr. Kameshwar Prasad was that the reference to the arbitrator cannot be unilateral and it must be bilateral. Developing this argument, he contended that inasmuch as after receipt of the letter by the arbitrator from opposite party No. 1, the petitioner had not joined him and was still disputing the competency of the called dispute, the letter of opposite party No. 1 dated 10-1-1975 could not constitute a valid basis for entering upon the reference. This contention of Mr. Prasad as the previous one, is also entirely misconceived and if I may say so, the contention is contrary to the elementary principles of law of Arbitration. If this could be the law then the defaulting party would always make the arbitration clause infructuous by refusing to join in the reference. I understand a bilateral reference through the intervention of the court or out of court also in some cases where the parties may agree and formulate the dispute and make a joint reference; but, to lay down as a principle of law that there cannot be any unilateral

reference, is absolutely unthinkable. The explanation to Section 9 of the Act also provides that the arbitrator has to enter upon the reference within a period of one month after the request by either party.

10. Mr. Prasad, however, also referred to a single judge decision of this Court in the case of *Ramkhelawan Mistry v. Rabindra Kumar Ghose*[2], This decision is entirely on a different point where the arbitration clause provided for reference to three arbitrators in a partnership agreement: each partner having a right to appoint his own and appointment of arbitrators was made by two of them but the third refused. Thereupon the two partners applied to the court to appoint an arbitrator for the third partner and when an application was made by the two partners, it was held that neither Section 8 nor Section 9 nor Section 10 was applicable to such cases and the remedy was under the ordinary law of instituting a suit and they could not get any relief under the arbitration clause.

11. It was next contended by Mr. Prasad that appointment of Shri D.N. Chatterjee as the sole arbitrator was made before the expiry of 15 clear days after the service of notice. No such plea was taken in the court below nor do I find any substance in the same as the provisions of sub-section(2) referred to above have no application inasmuch as 15 days would be referable to their first letter of January, 1975 and not to the letter by which the opposite party No. 1 nominated Mr. D.N. Chatterjee as his arbitrator.

12. The last point that was raised by Mr. Kameshwar Prasad was that the nature of dispute between the parties being technical, an advocate would not be a proper and desirable arbitrator.

13. The reply of Mr. S.K. Roy Choudhary, learned counsel appearing on behalf of opposite party No. 1, firstly was that no such objection was taken in the court below and that there was no material on the record to suggest any technical nature of the dispute. According to opposite party No. 1 the petitioner was not setting his bills. He also contended that the advocate arbitrator can take assistance of technical persons if so needed. It is no doubt, true that in the case of *Union of India v. New India Constructors, Delhi*[4] which Mr. Roy Choudhary himself cited in support of the proposition that the court had discretion to revoke the authority of an arbitrator and appoint an advocate-arbitrator in place of the Govt. arbitrator where the dispute related to a Govt. construction was held to be improper and he was replaced by the High Court.

14. Mr. Kameshwar Prasad again contended that this argument of Mr. Roy Choudhary is entirely erroneous and would render the award incompetent. It is no doubt true that an arbitrator cannot take assistance of an outsider for arriving at a finding in the proceeding and if an arbitrator arrives at a finding by consulting such any outsider or if he allows his decision to be affected by such persons, he would be guilty of misconduct and to this extent I would accept the contention of Mr. Prasad. But, in my opinion, taking assistance of a stranger to help the arbitrator in taking measurements or making arithmetical calculations or the like would not amount the award being effected by the decision of an outsider. It would simply amount to seeking help of a ministerial machinery. I find support for this view from the case of *National Electric Supply and Trading Corporation Pvt. Ltd. v. Punjab State*[5],

15. Some argument was also advanced by Mr. Prasad regarding the finding of the trial court regarding the neglect of the arbitrator. He contended that in any view of the matter at the time

when the application was made by opposite party No. 1 in the court below, the arbitrator had already entered upon the reference.

16. I have already referred to the circumstances which induced the court below to come to the conclusion of 'neglect' on the part of the arbitrator. Apart from the fact that on the circumstance considered by the court below it is not possible to take a different view as the same is apparently a finding of fact. I do not find any material irregularity in coming to that conclusion by the court below justifying interference in the revisional jurisdiction.

17. The application, therefore, having no substance, must fail and it is hereby dismissed. Hearing fee is assessed at Rs. 200/-.

Madan Mohan Prasad, J.

18. I agree.

Application dismissed.

Cases Referred.

[1]AIR 1972 Pat 21
[3] AIR 1961 Pat 120
[4] AIR 1955 Pun 172
[5] AIR 1963 Pun 56