Alkarma Vs. Delhi Development Authority

Alkarma Vs. Delhi Development Authority

SooperKanoon Citation : sooperkanoon.com/685848

Court : Delhi

Decided On : Apr-08-1981

Reported in : AIR1982Delhi230; 20(1982)DLT53; ILR1982Delhi343; 1981RLR387

Judge : A.B. Rohatgi, J.

Acts : Arbitration Act, 1940 - Sections 20

Appeal No. : Suit No. 396A of 1980

Appellant : Alkarma

Respondent : Delhi Development Authority

Advocate for Pet/Ap. : R.K. Lakhanpal,; Raman Lakhanpal,; R.K. Khanna and;

Judgement :

Avadh Behari Rohatgi, J.

(1) The facts.This case raises a rather interesting point. It arises upon a petition under s. 20 of the Arbitration Act (the Act). It arises in this way Shri Jai Kishan Das of M|s Alkarma, petitioner, is a contractor. He entered into a contract with the respondent Delhi Development Authority (DDA) for the execution of work of construction. He was awarded the work of fixing aluminium windows in Vikas Minar, a building where Dda sits. This work was awarded to him in 1973.

(2) The contractor did the work. While the work was in progress certain disputes arose between the parties. The contract contains an arbitration clause. This is clause 25. It reads :

'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 or workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, design, drawings, specifications, estimates, instruction, orders or these conditions or otherwise concerning the works, or the execution or failure to execute the same shall be referred to the sole arbitration of the person appointed by the Engineer Member, Delhi Development Authority at the time of disputes. It will be no objection to any such appointment that the arbitrator so appointed is a Delhi Development Authority employee, that had to deal with the matters to which the contract relates and that in the course of his duties as Delhi Development Authority employee he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being 'unable to act for any reason, such Engineer Member Delhi Development Authority as aforesaid at the time of such transfer, vacation of office or inability to act shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor. It is also a term of this contract that no person other than a person appointed by such Engineer Member Delhi Development Authority as aforesaid should act as arbitrator and, if for any reason, that is not possible, the matter is not to be referred to arbitration at all. In all cases where the amount of the claim in dispute is Rs. 50,000.00 (Rupees fifty thousand) and above, the arbitrator will give reason for the award. Subject as aforesaid the provisions of the Arbitration Act, 1940 or any statutory modification or reenactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause. It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of each such dispute.'

(3) The contractor invoked the arbitration clause. The public official designated in the agreement to appoint the arbitrator is the engineer member of the D.D.A. He appointed Sh. Balbir Singh, his own Superintending Engineer, as the sole arbitrator. He decided the disputes. He made the award. This was the first arbitration.

(4) The contractor completed the work. Dda prepared the final bill on 15th April, 1978 and finalised it. The contractor was not satisfied with the way in which his final bill was settled. He raised a number of disputes. He requested for the appointment of an arbitrator on 14th July, 1978. This was his second request for appointment of the arbitrator under clause 25. The engineer member acceded to his request This time Mr. G. Subramanyam, another Super in tending Engineer, was appointed as the arbitrator on 20th March, 1979. He heard the parties. On 20th May, 1980 he made and published the award. This was the second arbitration.

(5) Now comes the demand for third arbitration. On 25th August, 1980, the contractor made this application under s. 20 of the Act for the appointment of an arbitrator in respect of the outstanding disputes which had not been referred to Sh. G. Subramanyam. The application is opposed by the DDA. They say, 'No, this is rest judicata; you cannot come a third time'. It is said that at the request of the contractor the arbitrator was appointed twice and that he cannot ask for the appointment of an arbitrator 'again and again' because 'there has to be an end to such applications in the interest of justice'. It is said that the principle underlying Order Ii Rule 2 Civil Procedure Code applies to arbitration and that the engineer member who is the appointing authority has considered the request of the contractor and has come to the conclusion that the request is 'not genuine and bona fide'. He has thereforee declined to exercise his power under clause 25 of the agreement.

(6) The single question in this case is : Can the contractor ask for the appointment of an arbitrator for the third time? His case is that he omitted to refer certain disputes to the appointing authority when he made the second request for appointment of arbitraor on 14th July, 1978. He realised the mistake on 3rd

October, 1979 when he sent a letter to the engineer member of the Dda under certificate of posting. In this letter he set out seven disputes claiming substantial amounts in respect of these disputes and requested that as Sh. G. Subramanyam is already engaged in the task of adjudication of the disputes these matters may also be referred to him for his adjudication 'so that the whole matter could be adjudicated upon and finalised by him in one award'. He received no reply to this letter.

(7) On 2nd April, 1980 he sent a second letter again under certificate of posting. In this he referred to his first letter of 3rd October, 1979 and repeated the request for the reference of the disputes to Sh. G. Subramanyam because he had not by then made the award. No reply was received by him even to the second letter.

(8) The contractor then wrote a third letter on 19th July, 1980 in which he referred to the previous letters of 3rd October, 1979 and 2nd April, 1980 and requested for the appointment of an arbitrator under clause 25. This letter he took care to deliver personally at the office of the Dda and its receipt is not in dispute. Even to the third letter he got no reply.

(9) On 8th August, 1980 the contractor wrote a fourth letter recounting all that he had said earlier in his three letters and requesting once more for the appointment of an arbitrator. This letter was sent by registered A.D. post. To this last letter the engineer member replied. On 8th September, 1980 he wrote to the contractor this :

'I am directed to refer to your Advocate's letter No. AlkannalRRLl80[l dated 8th August, 1980 and to say that your letter dated 3-10-79 has not been received in this office and as such no action for referring these disputes to the Arbitrator could be taken.'

(10) To this letter the contractor made a reply on 10-9-80. He wrote to the engineer member that he sent the letter of 3rd October, 1979 under postal certificate and actually sent a photostat copy of the Upc to him. A copy of the letter of 3rd October, 1979 together with a list of claims was again sent. In the end he requested the engineer member to appoint an arbitrator for the settlement of the

outstanding disputes as per clause 25 of the agreement. The contractor received no reply to this letter. But before this letter he had already filed the petition on August 25, 1980, as I have said.

(11) What is significant is this that the engineer member did not make any reply to any of the letters which the contractor wrote to him till 8-9-80. The engineer member says that he did not receive the first letter dated 3-10-79 nor the second letter dated 2-4-80. He admits that he received the letter dated 19-7-1980 but made no reply.

(12) As regards the non-receipt of the letter of 2nd April, 1980 the letter of the engineer member dated 8-9-80 is completely silent. All that was said is that the letter dated 3-10-79 was never received. It nowhere says that even the letter of 2-4-80 was not received. The contractor in the letter of 2-4-80 had referred to his earlier letter dated 3-10-79. In the third letter of 19-7-80 he had referred to this earlier two letters. In the fourth letter of 8-8-80 he had referred to the first three letters. I cannot thereforee in these circumstances hold that the contractor has fabricated letters of 3-10-79 and 2-4-80 and they are an 'after thought'. If they had been an 'after thought', as has been pleaded in the written statement, the engineer member ought to have said at least that he did no receive the letter of 2-4-80 when he replied on 8-9-80. His silence and his failure to reply to the letter of 19-7-80 persuades me to hold that the contractor's claim is genuine and bonafide. It cannot accept the engineer member's plea that the claim is not genuine. Nor was he right in declining to exercise his power under clause 25 of the agreement. Right from 3-10-79 till 25-8-80 the contractor was repeatedly writing to the engineer member. He was saving to him 'I have some outstanding disputes. Will you please refer them to the arbitrator?' The engineer member paid no heed. He wrote to the contractor on 8-9-80 when he had already gone to court and had filed this petition. rest Judicata And O. Ii R.2, Civil Procedure Code .

(13) Counsel for the Dda says that on the principle of Order Ii Rule 2 Civil Procedure Code these disputes cannot be referred to arbitration. He has referred me to Jiwani Engineering Works v. Union of India, : AIR1978 Cal228 . A learned judge of the Calcutta High Court (Sabyasachi Mukharji J), held that though order Ii

Rule 2 does not in terms apply to proceedings under the Act there is no reason why the principle thereof should not be applied to arbitration proceedings in appropriate cases. With respect to the learned judge I feel bound to differ on the applicability of Order Ii rule 2 to arbitration proceedings. The reason is that the arbitrator is not a court. Order Ii Rule 2 applies to precedings before a court. It cannot apply to proceedings before the arbitrator. It is a penal provision. It is draconian in nature. To apply Order Ii rule 2 to arbitrations will not only be illegal but also unjust. I do not deny that the principle or rest judicata applies to arbitration. That doctrine is founded in public policy and applies equally to suits and awards. The role as to merger which applies to judgments applies equally to awards. [See Spencer Bower On rest Judicata (Turner ed.)] p. 362.

(14) P. C. Mallick J. in Seth Kerorimall v. Union Of India : AIR1964 Cal545 has held that the same dispute once referred and embodied in an award cannot be the subject matter of a fresh reference and to that extent the rule of rest judicata applies to arbitration proceedings. But he was not prepared to hold that the disputes which could have been raised but were not raised previously cannot be raised on the principle of constructive rest judicata. If the principle of constructive rest judicata does not apply to arbitration I do not see how a draconian provision such as Order Ii Rule 2 can apply. Until we hold that arbitrator is a court we cannot accept that the principle of Order Ii Rule 2 applies to proceedings before him. Mallick J. has said :

'FURTHER it is not the law that all disputes in relation to one contract must be disposed of in one reference. Failure to raise any such dispute in one reference does not debar a party from raising other disputes to be adjusted in a subsequent reference. Principles of O. Ii r.2 do not apply to arbitration proceedings.'

NATURE Of Building Contracts

(15) There can be successive arbitrations and successive awards under one arbitration agreement. In the case of building contracts, which I suppose are one of the most fruitful sources of the arbitration procedure, it not infrequently happens that there are series of arbitrations arising out of the same contract. The building contracts are in a sense themselves Seriall contracts; they provide for evaluation

of the work by stages, for payment so often, and so on and so forth; they envisage a state of affairs which, win continue over some time and that state of affairs all has to be dealt with under the umbrella of one contract. The arbitration clause is designed to deal with a question of Seriall disputes [Purser & Co. v. Jackson (1976) 3 All E.R. 641. Order Ii rule 2 cannot be invoked to prevent successive references in respect to the same contract. As long ago as 1920 Rankin J. refused to apply Order Ii rule 2 to arbitrations (see Bal Mukund Ruia v. Gopiram Bhotica, Air 1920 Cal 8081. Neither the principle of Order Ii rule 2 nor the doctrine of constructive rest judicata, I apprehend, can be invoked to bar the present reference. And more so when the request to refer these disputes was made whilst the second arbitration was in progress. The contractor did not ask for a third arbitration. He was content if left over disputes were referred to Mr. Subramanyam. His letters dated 3-10-79 and 2-4-80 were written when Shri Subramanyam had not made the award. On the material before me I hold that these letters were sent to the engineer member and he took no notice of them. That the letter of 2-4-80 was sent is certain as there was no denial by the engineer member in correspondence. His failure to reply to letter dated 3 9-7-80 admittedly received in his office convinces me that the contractor's grievance is genuine and ought to be redressed.

(16) The second arbitration was in progress on 3rd October, 1979 when the contractor wrote the first letter. That was so when he wrote the second letter on 2nd April, 1980. If the engineer had accepted the prayer these disputes which are now to be referred to a third arbitrator would have gone to Mr. Subramanayam and he would have given his award on these disputes also. The request of the contractor was reasonable. The position now is that Sh. G. Subramanvarn has already made the award and a third arbitrator will have to be appointed for the settlement of outstanding disputes. And if this is the inevitable conclusion I cannot blame the contractor for it. Refusal And IMPOSSIBILITY

(17) Lastly counsel for the Dda said that this court has no power to appoint an arbitrator once the public official designated in the agreement, namely the engineer member, has refused to appoint an arbitrator and 'has declined to exercise his powers under clause 25 of the agreement'. I do not agree. In my

opinion if the appointer fails or declines to appoint an arbitrator and does not give any good reason for doing so the court has power under s. 20 of the Act to file the agreement and to order him to appoint an arbitrator.

(18) Clause 25 is not exhausted by the appointment of the arbitrator once or even twice. There can be Seriall disputes. There can be Seriall arbitrations. The clause remains in full force. The arbitrator can be appointed from time to because the contract evisages disputes arising from time to time. It is for the court to see when the matter comes before it whether there are any disputes 'arising out of or relating to the contract' which ought to be settled by arbitration. If the court comes to an affirmative conclusion it can order the person designated to appoint an arbitrator and refer the disputes to him.

(19) Counsel referred me to Kishan Chand v. Union of India 2nd 1974 (II) Delhi 637 (S. M. Andley C.J and T.P.S. Chawla J.) and recent decisions in Basakha Singh v. Indian Drugs and Pharmaceutical Air 1979 Del 220 (6) and Rajendra Electric Works v. Delhi State Industrial Development Corporation (Suit No. 120-A|79 decided on 19-12-80) (7). Relying upon the division bench counsel says that if the appointor declines to make the appointment the arbitration agreement itself is destroyed. He relies on the following words of the clause :

'IT is also a term of the contract that no person other than a person appointed by such Engineer Member Delhi Development Authority as aforesaid should act as arbitrator and, for any reason, that is not possible, the matter is not to be referred to arbitration at all.'

(20) Obviously the purpose of this stipulation is to negate the power of the court to appoint the arbitrator under s. 8 of the Act. This is what the division bench has said I respectfully agree. But this does not mean that if the engineer member does not appoint an arbitrator and gives no good reason for his doing so the court is powerless and the contractor remedyless. All that it means is that the court cannot appoint an arbitrator under s. 8(i) of the Act because the arbitrator has to be appointed by the engineer member and none else. But if the engineer member does not appoint or revises or declines for no good reason the court can order him to appoint an arbitrator. This the court can do under s. 20 of the Act. The power of

the court is superior to the power of the engineer member. Such a clause thereforee, though absolute in terms, is qualified in the sense that it is subject to the overriding powers of the court embodied in sub sec. (4) of s. 20. The clause says that if it is not 'possible' to appoint an arbitrator the matter is not to be referred to arbitration at all. It contemplates a case where, for example, the engineer member's post is abolished in the set up of the Dda or the constitution of that body is changed by an Act of the legislature. But it does not say that the engineer member's refusal is final and the court shall have no power over him. The court has no power to appoint the arbitrator itself, it is true, but it has the power to order, if necessary compel, the engineer member to appoint an arbitrator in terms of the clause. If he refuses the court can overrule him.

(21) I cannot accept the argument that if the public official designated in the agreement refuses to appoint the arbitratorthe court can do nothing about it. Itself the court cannot appoint, the division bench has held. But they do not hold that the court shall have no power to direct him under s. 20(4) either. This question did not arise before the division bench because the Chief Engineer. the appointing authority there, had himself appointed the arbitrator before the matter was heard. The question which now arises was posed to them but they did not answer it. Speaking for the court T.P.S. Chawla J. said :

'Aconundrum was sought to be posed in the course of the argument. It was said that, whereas section 4 of the Arbitration Act recognised the validity of an arbitration agreement vesting power in a person designated to appoint an arbitrator or arbitrators, on the construction we were placing on section 20(4) the court would be unable to deal with a situation in which the person designated failed or refused to appoint. So. it was argued, we ought to construe that sub-section as giving to the court an overriding power to appoint an arbitrator in every case. It may well be that the court is powerless in the 'situation contemplated. Indeed, the observations in Union of India v. Messrs New India Constructors Delhi and others , seem to suggest that that is probably the legal position. But the Arbitration Act is not all-comprehending and does not provide for every imaginable case. We do not think such riddles ought to deflect us from the plain words of section 20(4), more especially when the cases to which we have referred

subscribe to the opinion we entertain.'

(22) What was a 'conundrum' and a 'riddle' then is now a live issue for this court to answer. Can the judge fold his hands and say 'I have no power'? In that case the arbitration agreement is itself destroyed. But it is dangerous so to hold. In my opinion s. 20(4) comprehends a case covered by s. 4 of the Act. Section 4 says :

'THE parties to an arbitration agreement may agree that any reference there under 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.'

Section 20(4) says :

'WHERE no sufficient cause is shown, the Court shall order the agreement to be filed, and shall 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.'

(23) A sound interpretation of these provisions would be to hold that the court itself has no power to appoint the arbitrator but under s. 20(4) it can order the designated person or holder of the designated office to appoint the arbitrator. The court is expressly empowered to (1) order the agreement to be filed, and (2.) make an order of reference to the arbitrator appointed by the parties. The parties have not appointed the arbitrator in this case, it is true, but they have agreed to the procedure for appointing the arbitrator. Why should the other party not follow the agreed procedure? The court will follow that procedure and call upon the designated person to appoint the arbitrator. You do not need a mandatory injunction to issue for this as was held in Union of India v. M|s. New India Constructors, . The order has that force. The responsible public official will obey it.

(24) Section 20(4) certainly comprehends a case of s. 4, whatever else it may or may not. Enactment of s. 4 itself shows that the framers of the Act were not oblivious of a case where the designated person may fail or refuse to appoint the arbitrator. They could easily imagine such a case. They thereforee gave power to

the court in s. 20(4).

(25) The words 'the arbitrator appointed by the parties in the agreement' occurring in s. 20(4) will also cover the arbitrator who, though not specifically named in the agreement, is appointed in accordance with the procedure laid down therein. thereforee, when the court decides that the agreement should be filed it can call upon the person designated in the arbitration agreement to appoint an arbitrator and reference can be made to the arbitrator so appointed. This would be a reference to the arbitrator appointed by the parties in the agreement' within the meaning of sub-section (4). In case the person designated in the agreement fails or refuses to appoint an arbitrator, the reference can still be made if the parties at that stage agree upon the appointment of a person as arbitrator. This would be a reference to the arbitrator appointed by the Parties 'otherwise' then in the agreement within the meaning of sub-section (4). This is the view a division bench of M.P. has taken in Parganiha and Agnihotri v. Union of India, 1977 M.P.L.J. 252 (Singh and Tanklia JJ) and I respectfully agree.

(26) In Kishan Chand's case the division bench did not decide this point. It did not arise before them. They gave no definite answer to the 'conundrum' as would appear from their manner of speaking and use of expressions like 'may will be' and 'probably' in the paragraph I have quoted. On this point they made no pronouncement of law such as can be said to be binding. They left the 'riddle' unsolved. The truth is that the facts before the division bench were different from the facts which have troubled this court in this case. In my opinion the court has an overriding power on the designated authority in the arbitration agreement and can compel it to appoint an arbitrator in terms of the clause. We ought not to give judicial encouragement to the hands-off theory which militates against the power of the court conferred by s. 20 in plenary terms.

(27) To say that if the person designated refuses or fails to appoint the arbitrator the arbitration agreement is itself destroyed is to misread the clause. 'If for any reason that is not possible the matter is not to be referred to arbitration at all.' This means that the arbitrator has to be appointed by the engineer member and none else. So long as the engineer member exists why should it not be possible for him

to appoint an arbitrator. But if the engineer member is non-existant the matter will not be referred at all. thereforee so long as the office and the holder of the office designated exist it cannot be said that it is not 'possible' to appoint the arbitrator and the arbitration clause is destroyed. That will make the engineer member the sole arbiter, a law into himself, who may or may not at his pleasure appoint an arbitrator and by his own pleasure destroy the arbitration clause leaving the court and the contractor high and dry. I cannot reach such a conclusion on the meaning of the clause.

(28) Impossibility is one thing and refusal another. Impossibility contemplated by clause 25 is in the nature of impossibility of performance of what may be called the frustration of the arbiration clause. But frustration operates, as Lord Summar has said, automatically. It strikes, once and strikes no more. (Hirji Mulji v. Cheong Yue Steamship (1926) Ac 497. Refusal, on the other hand, is volitional and can be corrected by courts. The Engineer Member : His role as a third party :

(29) The argument of counsel for the Dda involves a confusion of thought. The parties to the contract are (1) the Dda and (2) the contractor. They are the parties who have entered into the arbitration agreement which provides for the settlement of disputes by a tribunal of their choice. Section 20 says that they are to be called plaintiff and defendant. They play an active role when a dispute arises and an application under s. 20 is made. The defendant, non-applicant, has to show that there is good reason why the matter should not be referred in accordance with arbitration agreement. The plaintiff-applicant then satisfied the court 'that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement,' to use the words of s. 34. If satisfied the court orders the agreement to be filed and makes an order of reference to the arbitrator appointed by the parties in the agreement.

(30) It is no answer to the application under s. 20 that the reference to the arbitrator cannot be made because the designated public official, the engineer member, has refused to make the appointment. The engineer member has no such role to play in the arbitration clause. His function is purely ministerial. He has to appoint an arbitrator when the court makes the reference. The Dda can contest

the application of the contractor on all grounds open to it. But not the engineer member. He is not a party. His role is passive. He is the employee of the DDA. That he is a member of the Dda does not mean that he is the DDA. Dda is a corporate body having a common seal and a perpetual succession (see the Delhi Development Act s. 3(2).

(31) Now, strictly speaking, what is the role of the engineer member in the litigation arising out of s. 20 proceedings. The court will hear the Dda and if so sufficient cause is shown why the agreement should not be filed 'the court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed by the parties'.

(32) The position is this. There is a straight contest between the plaintiff-applicant on the one hand and the defendant, non-applicant, on the other. The engineer member is a third party who is not a party to the contract. The arbitrator has to be his nominee, it is true. But he does not exercise any function other than ministerial. The Privy Council says: 'It is very common in England to invest responsible public officials with the duty of appointing arbitrators under given circumstances. Such appointment should be made with integrity and impartiality, but it is new to their lordships to hear them called judicial acts'. (Per Lord Hobhouse, Palgrave Gold .Mining Co. v. Mc Millan (1892) Ac 460. The Supreme Court has said : 'The powers and duties of the court under s. 20(4) are of two distinct kinds. The first is the judicial function to consider whether the arbitration agreement should be filed or not. This may involve dealing with objections to the existence and validity of the agreement itself. Once that is done the court has decided that the agreements must be filed, the first part of its powers and duties is over. Then follows a ministerial act of reference to arbitrator or arbitrators appointed by the parties.' (Per Hidaytullah, J. in M|s D. Gobindram v. M|s Shamji and Co. : [1961]3SCR1029

(33) The mode of appointment under clause 25 is that the arbitrator shall be appointed by the engineer member. The engineer member has to do it. The court can order him. How can he refuse or decline to make the appointment? The Dda has failed to show sufficient cause why the agreement be not filed. That is the end of the matter and infact the end of the legal battle. Now the arbitrator must be

appointed. The engineer member must do it. He cannot destroy the arbitration agreement. He cannot defeat the agreement by refusing to appoint an arbitrator. The law gives him no such power nor does the arbitration agreement. The arbitration clause embodies the agreement of both parties that, if any dispute arises with regard to the obligations which one party has undertaken to the other, such dispute shall be settled by the arbitrator to be appointed by the engineer member of DDA. The role of the engineer member is a subsidiary role. He has no choice. When the court orders the arbitration agreement to be filed in exercise of its judicial function the appointment of arbitrator by the engineer member must necessary follow. This is why the Supreme Court calls it 'ministerial'. The power to appoint an arbitrator is placed by the parties in the hands of the engineer member. But the power to destroy the clause is not placed in his hands.

(34) When an application is made under s. 20, the court has to decide first whether an order should be made that the agreement be filed. In taking this decision, the court will consider whether there is a valid subsisting arbitration agreement and whether the dispute raised is within the ambit of the clause. This part of the function is referred to as the judicial function in D. Gobindram's case. After the court reaches the conclusion that the agreement should be filed, there comes the second stage of making the reference. The court tells the engineer member : 'How you appoint the arbitrator'. This is subordinate to the judicial function. In the nature of things the engineer member cannot be given the pride of place and the power to destroy.

(35) The fallacy in counsel's argument is that the engineer member is equated with the Dda and his refusal to appoint is put forward as meaning the death of the clause. The engineer member is not DDA. He cannot refuse to appoint the arbitrator once the court orders the agreement to be filed and calls upon him to nominate the man to whom the disputes will go for arbitrament and award. Counsel's reasoning is an inversion of the correct procedure contemplated by the clause. The engineer member who is a third party becomes the contestant and the real defendant i.e. Dda takes shelter behind the refusal of its alter ego. That the engineer member is a third party is borne out by the fact that he nowhere appears as a central figure in the arena. He is not heard by the court in the contest

between the contractor and the DDA. Viewed in this light the puzzling question posed as a problem to be solved becomes easy to answer.

(36) For these reasons the application is allowed with costs. The arbitration agreement is ordered to be filed. The engineer member is directed to appoint an arbitrator within one month and refer the disputes set out in the annexure to the letter of 3-10-79 to the arbitrator.