

Associated Builders Vs. Delhi Development Authority and anr.

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Court : Delhi

Decided On : Aug-23-1995

Reported in : 60(1995)DLT317

Judge : K. Ramamoorthy, J.

Acts : [Arbitration Act, 1940](#) - Sections 8

Appeal No. : Suit No. 1910A of 1994

Appellant : Associated Builders

Respondent : Delhi Development Authority and anr.

Advocate for Def. : Mr. S.K. Mittal

Advocate for Pet/Ap. : B.K. Divan and; S.K. Mittal, Advs

Judgement :

K. Ramamoorthy, J.

(1) The petitioners have filed the suit under Sections 8 and 20 of the Arbitration Act. The petitioners entered into a contract with the defendants for the construction of 613, Janta Houses in Pocket 'Q' at Dilshad Garden, Delhi and necessary agreements were executed between the parties. T

(2) The Contractor approached the respondents on several occasions for the payment of the work done, refund of balance security deposit besides other dues and damages payable by the respondents to the contractor on account of the breach committed by the respondents. The final bill was submitted by the petitioners on 1.7.1994. The respondents refused to pay the amount and, therefore, by virtue of Clause 25 of the agreement the petitioners have invoked the arbitration for the adjudication of the disputes.

(3) By letter dated 4.8.1994 the petitioner requested the Engineer Member, respondent No. 2 to appoint the Arbitrator for the adjudication of the disputes. The petitioner have in paragraph No. 8 given the details of the disputes to be referred for arbitration. The letter was delivered to the respondents on 8.8.1994 which could be seen from the acknowledgement card sent Along with the registered letter. The respondents had not sent any reply. therefore, according to the petitioner this Court is competent to appoint an Arbitrator for adjudicating the disputes.

(4) Reply was filed by the Delhi Development Authority, the first respondent contesting the claim of the petitioner on the ground that the question of damages cannot be gone into by the Arbitrator and as such those disputes mentioned in the agreement alone could be referred to arbitration and the Arbitrator can be appointed only by the Delhi Development Authority as per the clause instead of any reply by the Delhi Development Authority to the letter dated 4.8.1994 of the petitioner for the appointment of Arbitrator as per clause in the agreement.

(5) The petitioner have filed rejoinder to the reply of the respondents.

(6) Mr. S.K. Mittal, learned Counsel for the respondents contended that the matter is covered by judgment of the Full Bench reported in Ved Prakash Mithal v. The Union of India and Others, : AIR1984 Delhi325 , and therefore, a direction could be issued by this Court to the Second Respondent to nominate an Arbitrator and the Delhi Development Authority has now lost its right to nominate its Arbitrator and except the question of damages and other points referable to the agreement could be directed to be considered by the Arbitrator to be appointed by the Delhi Development Authority. In : AIR1984 Delhi325 (supra) in Paragraph 2 the Full

Bench noticed:

'2Disputes between the parties The plaintiff issued notice under Section 4 read with Section 8(1) of the [Arbitration Act, 1940](#) (the Act) invoking the arbitration clause and requiring the Chief Engineer appoint an Arbitrator in accordance with the clause. The Chief Engineer did not appoint the Arbitrator. The contractor thereupon made an application under Sections 8 and 20 of the Act on 3rd May, 1982 against the Union of India and the Chief Engineer. He prayed that the agreement may be filed and the disputes may be referred to the arbitration of a person to be appointed in terms of Clause 25 of the agreement failing which an Arbitrator may be appointed by the Court.'

(7) The contention of the Union of India was in the following terms :

3.The application was contested by the Union of India and the Chief Engineer on a variety of grounds. Before the learned Single Judge (B.N. Kirpal, J.), a ruling of the Division Bench in *Kishan Chand V. Union of India* (1974) 2 Delhi 637 (S.N. Andley, C.J. and T.P.S. Chawla, J.) was cited in support of the submission that where the Chief Engineer refused to appoint an Arbitrator, as in this case, the Court has no jurisdiction to deal with the matter and an application should be thrown out. Four other decisions of the learned Single Judge of this Court were cited before Kirpal, J. They are *Basakha Singh and Sons v. Indian Drugs and Pharmaceutical Ltd.*, : AIR1979 Delhi220 (Sultan Singh J.): *Rajindra Electric Works v, Delhi State Industrial Development Corporation Ltd.* Air 1981 Delhi 225 (J.D.Jain,J.):*M/s.Alkarama v. Delhi Development Authority* Air 1981 Delhi 230 (Avadh Behari Rohtagi, J.), and *G.D. Tiwari v. Union of India*, unreported decisions in Suit No. 1287-A of 1982, dated 9th January, 1982 decided by G.R. Luthra, J. On the decisions cited before him the learned Single Judge found a conflict of opinion. He, therefore, referred this case to a larger Bench. This is how this suit has come to us for decision. And the learned Judge also have stated as to how the matter had come before the Full Bench.

(8) It was contended before the Full Bench on behalf of the Union of India that once the Chief Engineer did not appoint the Arbitrator for one reason or the other then Court is powerless and the party is remediless and the only course open to

the party was to file civil suit and the learned Counsel for the Union of India sought the assistance of the view taken by this Court in *Kishan Chand v. The Union of India and Another* 1974 (2) Delhi 637, which was over-ruled by the Full Bench.

(9) In *Nandyal Coop. Spinning Mills Ltd. v. K.V. Mohan Rao*, : [1993]2SCR280 . The Supreme Court observed in the facts of the case as follows :

'3.The respondent concluded a contract with the appellant on February 11, 1986 to construct a building at a cost of Rs. 1.00 crore. During its execution since differences had arisen the respondent by his letter dated July 27,1987 requested the Administrative Head of the appellant to appoint an Arbitrator within 15 days from the date of its receipt. On August 8 and 18, 1987 the respondent was informed that the matter was under consideration. He renewed request in letter on August 17, 1987 evoked no action. Finding it futile to wait, on July 7, 1988, the respondent filed O.P. No. 167 of 1988 in the Court of Subordinate Judge, at Nandyal to appoint an Arbitrator. The notice was issued to the appellant therein. By letter dated July 27,1988 the respondent was informed of the appointment of Shri Yethiraj, Superintending Engineer of B.H.E.L., Hyderabad as Sole Arbitrator. After giving opportunity to both sides by Order dated March 12, 1991, the Civil Court appointed Mr. Justice C-Sriramulu, a retired Judge of the High Court s Arbitrator. The High Court dismissed C.R.P. No.1381 of 1991 on October 25,1992.'

(10) The Order of the High Court of Andhra Pradesh appointing the Retired Judge of the High Court was challenged. The Supreme Court dismissed the same. In Para 11 of the Judgment the Supreme Court observed :

'11.It would thus be clear that if no Arbitrator had been appointed in terms of the contract within 15 days from the date of receipt of the notice the Administrative Head of the appellant had abdicated himself of the power to appoint arbitrator under the contract. The Court gets jurisdiction to appoint an Arbitrator in place of the contract by operation of Section 8(l)(a). The contention of Mr. Rao, therefore, that since the agreement postulated preference to Arbitrator appointed by the Administrative Head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. It is seen

that under the contract the respondent contracted out from adjudication of his named Arbitrator and the named person was not appointed, certainly (he only remedy left to the contracting party was the right to suit. This is not the case on hand. The contract did not expressly provide for the appointment of a named Arbitrator. Instead power has been given to the Administrative Head of the appellant to appoint Sole Arbitrator. When he failed to do so within the stipulated period of 15 days enjoined under Section 8(l)(a), then the respondent has been given right under Clause 65.2 to avail the remedy' under Section 8(l)(a) and request the Court to appoint an Arbitrator. If the contention of Mr. Rao is given acceptance, it would amount to putting a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself.'

'INMis. G. Ramachandra Reddy & Co. v. Chief Engineer, Madras Zone, Military Engineering Service, : [1994]3SCR808 the Supreme Court had an occasion to consider the question. The Supreme Court following the judgment in : [1993]2SCR280 held that: 'Thus when the notice was given to the opposite party to appoint an Arbitrator in terms of the contract and if no action had been taken, it must be deemed that he neglected to act upon the contract. When no agreement was reached, even in the Court between the parties, the Court gets jurisdiction and power to appoint an Arbitrator.

(11) In Prem Chand Sharma Company v. Delhi Development Authority in Suit No. 3253/92 Usha Mehra, J.-had the occasion to consider the same point and the learned Judge decided the matter following the judgment of the Supreme Court in : [1994]3SCR808 (supra).

(12) In the instant case there was no agreement between the parties for appointment of the Arbitrator before me. And the learned Counsel for the Delhi Development Authority contended that the question of damages cannot at all be referred to the Arbitrator and cannot be pertained. That can not be accepted at all. For the purposes of adjudication of the disputes I appoint Mr. Justice Rajinder Sachar, a retired Chief Justice of this Court. The learned Arbitrator after entering on reference shall pass the Award within four months there from. The learned Arbitrator shall be at liberty to fix his remuneration and other charges. The parties

shall approach the learned Arbitrator within two weeks from today. This order shall be communicated to the learned Arbitrator immediately. There shall be no order as to costs.

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