

The State of Rajasthan and ors. Vs. Ferro Concrete Construction (India) Pvt. Ltd.

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Court : Rajasthan

Decided On : Aug-09-1991

Reported in : 1992(1)WLC363; 1991WLN(UC)358

Judge : S.N. Bhargava, J.

Appeal No. : S.B. Civil Misc. Appeal No. 342 of 1991

Appellant : The State of Rajasthan and ors.

Respondent : Ferro Concrete Construction (India) Pvt. Ltd.

Disposition : Appeal allowed

Judgement :

S.N. Bhargava, J.

1. This appeal has been filed against the order dated 27.4.1991 passed by the District Judge Ajmer, allowing application under Section 20 r/w Section 8 of the Arbitration Act, moved by the respondent, M/s Ferro Concrete Construction (India) Private Ltd.

2. The tender submitted by the respondent for supply of P.S.C.C. Pipes was accepted by the appellant and a work order to the tune of nearly Rs. 10 Crores

was given on 23.8.1988 which was received by the respondent on 30.8.1988. A formal agreement was executed on 11.1.1989 by which the work was to be executed within two years i.e. from 23.8.88 to 22.8.1990. Clause 23 of the agreement relating to arbitration runs as under:

Clause 23. - If any question, difference or objection whatsoever shall arise in any way in connection with or arising out of this instrument, or the meaning of operation of any part thereof or the rights, duties or liabilities of either party, then save in so far as the decision of any such matter constituting a total claim of Rs. 5,0001- or above whether it has been finally decided accordingly, or whether the contract should be terminated or has been rightly terminated and as regards the rights or obligations of the parties as a result of such termination shall be referred for adjudication to a sole arbitrator to be appointed as hereinafter provided.

For the purpose of appointing the sole arbitrator referred to above, the Chief Engineer will on receipt of notice and prescribed fee from the contractors send a panel of 3 names not below the rank of Superintending Engineer of the Rajasthan Government & who shall all be presently unconnected with the contract. The contractor shall on receipt of the names as aforesaid select any one of the persons names to be appointed as a sole arbitrator and communicate his name to the Chief Engineer. The Chief Engineer shall thereupon appoint the said persons as the sole arbitrator without delay. The arbitrator shall give reasons for award.

Subject as aforesaid the provisions of the Arbitration Act, 1940, or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceedings under this clause.

3. Some dispute arose between the parties and as per Clause 23 of the terms of agreement, quoted above, the respondent wrote letters to the Chief Engineer but no Abribrator came to be appointed and therefore on 4.9.1990 the respondent filed an application in the court of District Judge, Ajmer, Under Section 20 read with Section 8 of the Arbitration Act, praying inter-alia as under:

(a) That non petitioner No. 3 may be directed to file the agreement in this Hon'ble Court.

(b) That the claims mentioned in Para 16 and 17 of the present petition be referred for the adjudication through the Arbitration by an Independent person be appointed as Sole Arbitrator by this Court, as the non petitioner No. 1 has failed to act in accordance with the provision of Clause 23 of General Conditions of Contract Vol. 1 Unit-11.

(c) That the non petitioners be restrained not to take any action against the petitioner in relation to the present agreement dated 11.1.1989 in any way i.e. not to impose any penalty by way of damages and on the risk and responsibility of the petitioner, no work be got carried out from any other person or agency. No coercive method or action be taken against the persons or against the property and no amount be deducted or withheld from the other contract of the petitioner as against the contract in dispute.

(d)

(e)....

4. Notices of the said application were issued and the State Government filed a detailed reply. The Distt. Judge, after hearing learned Counsel for the parties vide its order dated 27.4.1991 held that the respondent is entitled to get Arbitrator appointed Under Section 8 and fixed the case for 9.5.1991 for hearing the parties on the point of nominating an Arbitrator. It is against this order that the present appeal has been filed by the State of Rajasthan. The respondent had entered into a Caveat. It was furnished with a copy of the memo of appeal and the stay petition. Record of the case was also called from the court below. Arguments were heard.

5. Learned Counsel for the respondent Shri P.C. Markandey has taken a preliminary objection to the maintainability of the present appeal and has submitted that an appeal Under Section 39 of the Arbitration Act does not lie against the order dated 27.4.1991 because the order under challenge does not fall in any of the six categories given in Section 39 of the Arbitration Act and since Under Section 39 of the Arbitration Act an appeal is permitted from the orders mentioned in Clauses (i) to (vi) of the Act and from no others, hence this appeal is not maintainable and should be dismissed on that ground alone. He has submitted

that the impugned order is not an order Under Section 20 of the Arbitration Act calling for filling or refusing to file an arbitration agreement but it is an order under Section 8, which does not fall in any of the six categories mentioned in Section 39. He has placed reliance on an order of the Jammu & Kashmir High Court, passed in CIMA No. 75/90 Union of India v. Vishno Kumar Gupta and Anr. (decided on 7.11.90) wherein the division bench has held that no appeal Under Section 39 of the Arbitration Act is competent against an order appointing Arbitrator. Learned Counsel for the respondent has further submitted that this order in Vishno Kumar Gupta's case (supra) has been affirmed by Hon'ble the Supreme Court in as much as Special Leave Petition No. 5840/91 has been dismissed vide order dt. 15.4.1991.

6. Learned Counsel for the respondent has further submitted that the impugned order is an order Under Section 8 of the Arbitration Act and the Court has ample power to appoint an Arbitrator. He has placed reliance on the following authorities:

(i) Union of India v. D.P. Singh : AIR1961 Pat228 wherein it has been held that an application Under Section 8 is maintainable where the party having the sole power under the arbitration agreement to appoint the only arbitrator fails to make the appointment when called upon to do so, even if the agreement has not expressly provided that the appointment should be made by the consent of both parties. This authority has been relied by this Court in The State of Rajasthan v. Mehta Chetandass Kishandass I.L.R. 28 Rajasthan 660.

(ii) Fertiliser Corporation of India Ltd. v. Ravi Kumar Ohri : AIR1979 Ori19 which has also referred to D.P. Singh's case (supra).

(iii) Executive Engineer, Prachi Division Bhubaneswar v. Gangaram Chhapolia and Anr. : AIR1980 Ori51 .

(iv) Niranjana Swain v. State of Orissa and Ors. : AIR1980 Ori142 and The Fertilizer Corporation of India Ltd. and Ors. v. Ranjit Kumar Mishra : AIR1980 Ori152 in which Ravi Kumar Othri and D.R. Singh's cases have been referred.

(v) Banarsi Dass Mittal v. Housing Board, Haryana and two Ors. 1988 (1) Arbitration Law Reporter 170 (Punjab & Haryana High Court).

(vi) Union of India and Anr. v. Amamath Aggarwal Construction Pvt. Ltd. 1988 (2) Arbitration Law Reporter 337) where Niranjana Swain's case (supra) has been referred (Punjab & Haryana High Court).

(vii) Cement Corporation of India v. Surendra Kumar Subhash Chand 1990 (2) Arbitration Law Reporter 142 (Punjab & Haryana High Court), wherein it has been held that if a fair offer of the contractor by giving notice for appointment of Arbitrator has not been accepted by the Corporation composite application by the contractor for filing of the agreement and appointment of Arbitrator is competent although it mentions only Section 20 and not Section 8 and the court is competent to appoint an Arbitrator.

7. Learned Counsel for the respondent has also drawn my attention to Ex. p.16 letter dated 18th June, 1990 by the respondent to the Chief Engineer, PHED Submitting a list of claims, matters for determination and requesting him to nominate a panel to three persons as provided in Clause 23 of the agreement, within a period of thirty days and also giving warning that failure to do so shall constrain them to proceed as advised. He has also drawn my attention to another letter dated 31.7.1990 (Ex. p.17) reminder to Ex. p. 16 but in spite of these letters, the Chief Engineer persons designate did not give a panel of three letters, provided in Clause 23 of the agreement and therefore, the respondent had no other alternative except to file a petition in the District court on 3.9.1990.

8. Learned Counsel for the respondent has further submitted that the State Government did not file the written statement for nine months and it was only on 19.3.1991 that the objections were filed to the application submitted by the respondent. This has delayed the whole process. He has also brought to my notice the following observations of their lordships of the Supreme Court in Gum Nanak Foundation v. Rattan Singh and Sons : [1982]1SCR842 :

Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum less formal, more effective and speedy for

resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940 ('Act' for short). However, the way in which the proceedings under the Act are conducted and without an exception challenged in Courts, has made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of the Court been clothed with 'legalese' of unforeseeable complexity.

9. He has also placed reliance on *Ramji Dayawala & Sons (P) Ltd. v. Invest Import* : [1981]1SCR899 wherein their lordships observed as under:

Protracted time consuming, exasperating and atrociously expensive court trials impelled an alternative mode of resolution of disputes between the parties; arbitrate-don't litigate. Arbitration being a mode of resolution of disputes by a Judge of the choice of the parties was considered preferable to adjudication of disputes by court. If expeditious, less expensive resolution of disputes by a Judge of the choice of the parties was the consumation devoutly to be wished through arbitration, experience shows and this case illustrates that the hope is wholly belied because in the words of Edmond Davis J. in *Price v. Milner* (1966) 1 W.L.R. 1235 these may be disastrous proceedings.

10. On the other hand, learned Counsel for the appellants has submitted that the impugned order has been passed on an application Under Section 20 and therefore it clearly falls within Clause (iv) of Section 39 of the Arbitration Act and therefore, it is appealable and even if it not appealable, a revision does lie and hence, this Court is quite competent to examine the merits of the decision by the trial Court. He has submitted that in case this Court finds that the appeal is not maintainable, this appeal may be treated as a revision petition.

11. Shri M.I. Khan, learned Addl. Advocate General further submitted that if the application filed by the respondent is to be treated as one Under Section 8 of the Arbitration Act, then it is not maintainable. The court can appoint Arbitrator Under Section 8 only if all the conditions Under Section 8 are fully satisfied. The court

has no inherent powers to appoint an Arbitrator. In this connection, he has placed reliance on *Bharal Construction Co. Ltd. v. Union of India* : AIR1954 Cal606 wherein it has been held as under:

'A' Court has no inherent or absolute power to appoint arbitrators; its powers are only those which are expressly specified in the Act, such as for example, those contained in Section 8(1)(b) And unless it is shown that a particular arbitration agreement falls in any of the contingencies contained in that clause, the section is not applicable, although the arbitration agreement may not exclude an intention to fill up vacancy, if one should arise.

12. Learned Counsel for the respondents has further placed reliance on *Union of India v. Gopal Dass & Co.* 1966 Allahabad Law Journal 518 wherein the court has given out three important ingredients as under. He has further stated that if any of the three ingredients are not fulfilled, application Under Section 8 is not maintainable:

(i) the arbitration agreement provides that the reference shall be one or more arbitrators to be appointed by consent of the parties;

(ii) that after the differences have arisen all the parties do not concur in the appointment or appointments; and

(iii) that a written notice has been duly served calling upon the other party to concur in the appointment or appointments or in supplying the vacancy.

13. He has further placed reliance on *Union of India v. Dev and Co.* Shillong A.I.R. 1978 Gauhati 91 wherein it has been held that powers of the court under Sub-section (2) of Section 8 cannot be invoked if Sub-section (1) of Section 8 itself is not applicable. It has further been submitted by him that Section 4 provides for appointment of Arbitrator or arbitrators by a third party designated either by name or exofficio as the holder of a certain office. Hence, where a clause in the arbitration agreement gave jurisdiction to the Additional Chief Engineer or the Administrative Head of the Department to appoint the arbitrator, the Court can have absolutely no jurisdiction Under Section 8 to entertain the application of the

contractor and to appoint the arbitrator. In such a case, appointment made under Section 8 cannot be saved by Section 20.

14. He has further placed reliance on Ved Prakash v. Union of India (FB) 1984 Delhi 325 wherein it has been held that where a clause in an arbitration agreement provides that in case of dispute the Arbitrator will be appointed by the Chief Engineer and the Chief Engineer refuses to appoint an Arbitrator, the request by the contractor, neither Section 8(1)(a) nor Section 8(1)(b) apply to the case. But the court can appoint Arbitrator in such case not under Section 8 but Under Section 20 Sub-clause (4) read with Section 4 of the Act.

15. Learned Counsel for the appellants has further submitted that since the matter involved in dispute is rather technical in nature, only a technical man should be appointed as an Arbitrator. In this connection, he has placed reliance on Union of India v. New India Constructors, Delhi .

16. Learned Counsel for the appellants has further submitted that the two notices Ex. P.16 and Ex. P.17 were only sent to the Chief Engineer and not to the State Government who is a party to the agreement and, therefore, compliance of Clause 23 of the agreement has not been made. In reply to this learned Counsel for the respondent has submitted an affidavit of Sh. S.C. Dhige, Commercial Manager and Attorney Holder of the respondent enclosing a copy of the letter dated 31.7.1990 which Was sent to the Secretary to the Government, Ministry of Public Health, Government of Rajasthan, Jaipur, enclosing therewith a copy of the respondent's letter addressed to the Chief Engineer, dated 31.7.90 and requesting to intervene in the matter as the Chief Engineer has failed to appoint an Arbitration so far. In the affidavit, it has further been affirmed that this letter was delivered to the Personal Assistant to the Secretary, PHED in closed envelop. In reply to this application, nothing has been submitted on behalf of the appellants rebutting this position. But it has been submitted that the respondent has filed the affidavit and copy of letter after arguments were concluded only as an after thought. Moreover, this position was not taken in the application filed by him or anything earlier so this should be ignored.

17. Learned Counsel for the appellants has further submitted that since the respondent did not send the prescribed fee along with the application as envisaged by Clause 23 of the agreement, it was not incumbent upon the Chief Engineer to send a panel of three names and since the respondent has fulfilled its part of the obligation in enclosing the prescribed fee, it cannot complain that the Chief Engineer has failed to send the panel of Arbitrators. In this connection, he has also brought to my notice the letter marked 'A', dated 1.2.91 wherein the Chief Engineer has written to the respondent to deposit the prescribed fee of 10% of the total amount of claim for which arbitration is desired. The letter further says that this amount of fee is tentative only and subject to modification as per the final approval of the Government. In spite of this letter, the respondent did not deposit the prescribed fee and therefore, the Chief Engineer did not send the panel of three persons and as such, it cannot be said that the Chief Engineer has failed to perform its part of the contract in sending a panel of Arbitrators.

I have carefully gone through the judgment of the trial court as also the record of the case and have given my thoughtful consideration to the whole matter. I have also gone through the various authorities cited at the bar.

18. It cannot be disputed that the respondent filed an application Under Section 20 read with Section 8 of the Arbitration Act. In the prayer also, the respondent prayed that a direction be issued to file the agreement in the court which is a prayer only Under Section 20 and then, it has further been prayed that an independent person be appointed as the Sole Arbitrator be the court as the State of Rajasthan has failed to act in accordance with the provisions of Clause 23 of the agreement. This prayer also falls Under Section 20 of the Arbitration Act. Section 4 of the Arbitration Act provides that the parties to an arbitration agreement may agree that any reference thereunder shall be to an Arbitrator or Arbitrators to be appointed by a person a designata in the agreement either by name or as the holder, for the time being, of any office or appointment and in the present case, Clause 23 provides that the Chief Engineer on receipt of notice and prescribed fee from the contractor sent a panel of three names not below the rank of Supdtg. Engineer of the Rajasthan Government was are not connected with the contract and then the contractor shall, on receipt of names as aforesaid, select any one of

the persons named to be appointed as the Sole Arbitrator and communicate his name to the Chief Engineer. There is no dispute that the differences have arisen and some disputes are pending between the parties and they have to be resolved through arbitration as per Clause 23. The main point for consideration is as to whether the respondent has fulfilled its obligation envisaged in Clause 23, by giving the notice to the Chief Engineer along with the prescribed fee and Chief Engineer has failed to perform its part, in spite of the notice from the respondent, Learned Counsel for the respondent has very vehemently submitted that no fee has prescribed and the word 'prescribed' means a fee decided before the agreement was concluded. In the present case, the appellants have failed to show as to what is the prescribed fee which was to be sent along with the notice to the Chief Engineer. Even the letter dated 1.2.1991 does not specify the exact amount. It only says 10% of the total amount of claim tentatively, which is subject to modification and as such the respondent was not obliged to deposit any fee along with the notice to the Chief Engineer and the fee could be paid later on also. We have to consider as to whether without sending the prescribed fee the respondent could insist that the Chief Engineer should nominate the panel of Arbitrators. It is true that the appellants have not been able to show that any fee had been prescribed before this agreement had come into existence or there is any schedule which mentions about the prescribed fee and the mention in their letter dated 1.2.1991 that prescribed fee of 10% may be deposited tentatively which will be subject to modification as per the final approval of the Government, also shows that there is no fixed prescribed fee and therefore, it cannot be said that it was incumbent upon the respondent to submit prescribed fee along with the notice because nothing was prescribed and therefore nothing was deposited but at the same time it cannot also be said that the person designate i.e. the Chief Engineer has failed in nominating a panel of three persons and therefore the court should appoint an independent Arbitrator.

19. In the light of what I have said above, it is not necessary for me to go into the question at length as to whether the application filed by the respondent should be treated an application Under Section 20 or only Under Section 8 of the Arbitration Act because in my view, the conditions required by Section 8(1) of the Act have not been fulfilled. Section 8 of the Arbitration Act envisages that before the court

gets jurisdiction to appoint an Arbitrator, the following three ingredients should be satisfied; as has also been observed by the Allahabad High Court in Gopal Das's case (supra).

(i) the arbitration agreement provides that the reference shall be to one or more arbiters to be appointed by consent of the parties;

(ii) that after the differences have arisen all the parties do not concur in the appointment or appointments; and

(iii) that a written notice has been duly served calling upon the other party to concur in the appointment or appointments or in supplying the vacancy.

20. Looking to the scheme of the Arbitration Act, the court has no inherent or absolute power to appoint Arbitrator and unless all the ingredients mentioned in Section 8 have been fulfilled, the court cannot appoint an Arbitrator. Section 4 of the Arbitration Act also provides that if a person a designata has been named and agreed to between the parties, it is he alone who can nominate an Arbitrator and not the court and it is only Under Section 20 of the Act that the court can appoint an Arbitrator if the conditions mentioned in Section 20(4) exist but in no case the court can appoint an Arbitrator Under Section 8(1) find full support in taking this view from the full bench decision of the Delhi High Court in Ved Prakash (supra).

21. During the course of arguments, I had asked the learned Counsel for the respondent to submit a panel of names which it will like to be appointed by this court. The respondent gave names of nine persons including two retired High Court Judges. I asked the learned Counsel for the appellants if he will agree to any of these names but he declined and gave three other names which the learned Counsel for the respondent did not agree. Thus, I find that parties have not been able to agree on a named Arbitrator & therefore, it is not possible for me to appoint an Arbitrator agreeable to both the parties. I am conscious of the observations made by their lordships of the Supreme Court in Guru Nanak Foundation and Ramji Dayawala (supra) and the present case is also an example of the same It cannot be disputed that difference between the parties have to be settled by arbitration only and this process of selecting an Arbitrator has taken nearly one

year. In view of the observations made above, I am of the opinion that the District Judge, Ajmer had no jurisdiction to appoint an Arbitrator Under Section 8 of the Arbitration Act and he has gone beyond his jurisdiction, and his order is liable to be quashed. In this view of the matter it is not necessary for me to go into the question whether an appeal lies against the order appointing Arbitrator or not because it is an admitted position and admitted by the parties that a revision does lie even against an order appointing Arbitrator. Since I have come to the conclusion that the learned court below has exceeded its jurisdiction in invoking Section 8 of the Arbitration Act, the order passed by it is set a said.

22. In the result, this appeal is allowed, the order dated 27.4.1991 passed by the Distt. Judge, Amjer, is set aside and I hereby direct the persona designata i.e. the Chief Engineer, Public Health Engineering Deptt. Government of Rajasthan, Jaipur, to nominate a panel of three persons as envisaged by Clause 23 of the agreement, within fifteen days from today and thereupon the contractor respondent can select any one of them and may communicate his acceptance to the Chief Engineer, PHED. Thereupon, the Chief Engineer shall appoint the said person as the Sole Arbitrator without delay.

23. No order as to costs.

24. Before parting with the case, I would like to observed that the State Government should prescribed the fee for arbitration so that such disputes do not arise in future and the persona designata when the requested should nominate the Arbitrator within time.