

Gopal Vs. the State of Uttar Pradesh

Gopal Vs. the State of Uttar Pradesh

SooperKanoon Citation : sooperkanoon.com/852403

Court : Kolkata

Decided On : Jun-15-1971

Reported in : AIR1972Cal67

Judge : Salil K. Roy Chowdhury, J.

Acts : [Arbitration Act, 1940](#) - Sections 8 and 9

Appeal No. : Award Matter No. 79 of 1971

Appellant : Gopal

Respondent : The State of Uttar Pradesh

Advocate for Def. : Salil Hazra, Adv.

Advocate for Pet/Ap. : Sankar Ghosh and ;Bhaskar Gupta, Advs.

Judgement :

ORDER

Salil K. Roy Chowdhury, J.

1. This is an application for removal of the named Arbitrator and appointment of an Arbitrator in terms of an arbitration agreement between the parties dated the 27 of Jan., 1967. The application is made under Section 8(b) read with Explanation to Section 9 and Section 11 of the Arbitration Act.

2. The relevant facts are that by a contract in writing dated the 27th of January, 1967 between the parties the petitioner was appointed as clearing/handling and transport agents of the respondents in respect of a complete 1200 tons a day capacity cement making plant including its spares, tools and tackles as also for such other consignments as may be desired by the Director. Government Cement Factory on behalf of the Government of Uttar Pradesh being supplied by Messrs. Fives Lille Cail of Paris, France or by any suppliers at Calcutta Port or Dum Dum Airport on the terms and conditions contained in the said agreement.

3. The said agreement dated the 27th of January, 1967 in Clause 28 contained an arbitration clause as follows:

'In case of any disputes, differences or questions arising between the parties herein touching or arising out of this agreement or the subject-matter thereof, the same will be referred to the Secretary, Government of Uttar Pradesh, Industries Department for arbitration and his decision shall be final and binding on the parties. The Arbitrator may from time to time with the consent of the parties enlarge the time for making and publishing the award.'

4. It is alleged by the petitioner that various works were done under the said contracts and bills were submitted by the petitioner to the respondent out of which a sum of Rupees 502786.75 still remains due and payable by the respondent to the petitioner. The respondent is alleged to have been raising various disputes in regard to the payment of the said bills of the petitioner and have not paid the same. It is alleged by the petitioner that demands were made both orally and in writing from the respondent to pay the said sums but the respondent has failed and neglected to do so and in consequence the petitioner by a cable dated the 11th of November, 1968 regretted that no payment has been received by them in respect of their outstanding bills and asked for remittance of Rs. 75,000/- on account and requested them to intimate when the matter between them can be finalised. The respondent by their telegram dated the 11th of December, 1968 intimated that as per their account no amount was payable to the petitioner and also asked for sending the Accountant of the petitioner for scrutiny of the bills. The petitioner by their telegram and letter dated the 19th February, 1969 to the

Director, Uttar Pradesh Government Cement Factory, Dalla Project, Mirzapur pointed out that the allegations of the respondent were incorrect and inter alia requested to send the due amounts and if the said sum is not paid petitioner gave notice that they Will take necessary steps for safeguarding their interests. Thereafter various correspondences and telegrams ensued between the parties and ultimately on the 17th/20th of July, 1970, the petitioner regretted that no payments were received by them in respect of their outstanding bills amounting to Rs. 5,02,786.75 and pointed out that under Clause 17 of the contract between the parties payments of the bills should have been made within 30 days upon presentation and although more than one year has elapsed after the presentation of the bills no payment has been received by the petitioner and they finally invoked the arbitration clause of the contract and called upon the respondent to nominate and appoint the arbitrator in terms of the arbitration clause within 15 days thereof otherwise the petitioner gave notice that they will appoint a person as the sole arbitrator to proceed with the matter. Copy of the said letter was also sent to the Secretary Government of Uttar Pradesh, Industries Department, the nominated arbitrator under the agreement with a request to enter upon the reference. As no reply was received by the petitioner to their said notice dated the 17th/20th of July, 1970 the petitioner again wrote a letter to the Director, Uttar Pradesh Government Cement Factory, Dalla Project dated the 22nd of August, 1970 with a copy to the Secretary, Government of Uttar Pradesh Industries Department, Lucknow stating that as one month has elapsed after the appointed arbitrator was requested to enter upon the reference in terms of the arbitration agreement for adjudicating the disputes and differences between the parties, the petitioner gave notice that they have no alternative but to move the Court for appointment of an arbitrator without any further reference to the respondent. Thereafter the petitioner by a letter dated the 12th of September, 1970 addressed to the Secretary Government of Uttar Pradesh, Industries Department, Lucknow with a copy to the Director, Uttar Pradesh Government Cement Factory, Dalla Project, again gave a notice as the dispute between the parties has not been referred to the arbitrator in terms of the arbitration clause in the agreement and requested the appointed arbitrator, that is, the Secretary to enter upon reference forthwith on receipt of the said letter and fixing the date of the meeting of the arbitrators for preliminary directions etc. As

there was no response either from the appointed arbitrator or the Director of Uttar Pradesh Government Cement Factory, Dalla Project, the petitioner finally by a letter dated the 7th of January, 1971 to the Director Uttar Pradesh Government Cement Factory, Dalla Project gave a notice under Section 8 of the Arbitration Act that they have appointed Dr. Tapas Banerjee. Barrister-at-Law as a sole Arbitrator to adjudicate the disputes that have arisen between the parties and the respondent to call upon to concur in such appointment within 15 days after the service of the said notice and if they failed to concur, the petitioner would apply to appropriate Court for appointment of Dr. Banerjee as the sole Arbitrator with directions to enter upon reference and make an award. It is only after the said notice under the Arbitration Act being served on the respondent, the Director, Uttar Pradesh Government Cement Factory, Dalla Project replied by a letter dated the 29th of January. 1971 and contended that it is only the Secretary to the Government of Uttar Pradesh, Industries Department who can be appointed as sole Arbitrator for adjudication of disputes between the parties and the points of dispute have already been referred to by the petitioner to the Secy., Govt. of Uttar Pradesh, the Arbitrator whose decision is awaited. It was also contended that the agreement does not provide for appointment of any other person as the Arbitrator. By a letter dated the 6th of Feb., 1971 the respondent intimated the petitioner that as the petitioner by their letter dated the 7th of Jan., 1971 has referred to the Government for orders the Government is examining the same with reference to the arbitration proceeding desired by the respondent and in the meantime the Deputy Director, Uttar Pradesh Government Cement Factory, Dalla Project by the said letter alleged that six bills of the petitioner have not been received by them and asked for copies of the same to enable them to examine the said bills. There were certain internal correspondences of the respondent which have been annexed to the affidavit-in-opposition of Sukhamay Ghosh affirmed on the 26th of May, 1961 referring to the views taken by the respondent's Departments including Law Department, according to which there was no dispute to be referred to the arbitration and as such there cannot be any question of appointment of an arbitrator and neglect or refusal on the part of the arbitrator to act and appointment of sole Arbitrator under Section 8 of the Arbitration Act. Finally, the respondent by a lengthy letter dated the 15th of April, 1971 addressed to the petitioner inter alia

contended that as there is no dispute between the parties and the matter is pending investigation by the respondent and after their investigation if any dispute arises then the disputed matter can be referred to adjudication of the Secretary, Government of Uttar Pradesh, Industries Department in terms of the arbitration clause and as there was no dispute Section 8 of the Arbitration Act has no application. Thereafter on the 20th of April, 1971 the petitioner made this application for removal of the appointed arbitrator under the agreement and appointment of Dr. Tapas Banerjee, Barrister-at-Law or such other person as the Court deemed fit and proper as Arbitrator to adjudicate the dispute between the parties.

5. Mr. Sankar Ghosh with Bhaskar Gupta appearing for the petitioner submitted that the disputes between the parties arising out of the contract are covered under the arbitration clause and in spite of the notice under Section 8 of the Arbitration Act, the respondent has failed to appoint any Arbitrator and order should be made as prayed for. Mr. Ghosh submitted that from the facts it is quite clear that the Arbitrator named in the arbitration agreement, that is, the Secretary Government of Uttar Pradesh. Industries Department, has neglected or refused to act in spite of repeated requests by the petitioner by their letters dated 17th/20th of July, 1970 and final letter dated the 7th of January, 1971 as the said appointed Arbitrator did not comply with within one month from the requests made by the petitioner to enter on and proceed with the reference within the meaning of the explanation to Section 9 of the Arbitration Act. In these circumstances, there has been positive failure, neglect and refusal on the part of the appointed Arbitrator. As such he is liable to be removed under Section 11(1) of the Arbitration Act and the sole Arbitrator Dr. Tapas Banerjee should be appointed to adjudicate the disputes as notice under Section 8(1)(c) of the Arbitration Act has been duly served on the respondent and the respondent having failed to comply with the notice the petitioner is entitled to the order asked for.

6. Mr. Salil Hazra appearing for the respondent was fair enough to concede that he cannot sustain the stand taken by his Client that there is no dispute between the parties. As such there cannot be any reference to arbitration in terms of the arbitration agreement. He contested the application mainly on the ground that

there is no wilful or deliberate failure or neglect on the part of the named arbitrator that is the Secretary, Government of Uttar Pradesh, Industries Department to enter upon or proceed with the reference as he was labouring under a misapprehension or misconception as to the legal position of existence of a dispute at this stage. He submitted that in order to invoke Section 8 there must be neglect or failure or refusal to act on the part of the arbitrator which must be deliberate and wilful. Mr. Hazra referred to passage of Russell on Arbitration, 18th Edition page 99 wherein two English cases have been referred. -- Re Hawley and North Staffordshire Rly., (1848) 2 De G. & Sm. 33, and Burkett Sharp and Co. v. Eastcheap Dried Fruit Co. and Perera, (1962) 1 Lloyd's Rep. 267 in which Court held that in the facts and circumstances of those cases there were no refusals to act on the part of the arbitrators. He also referred to the decision Nandaram Hanutram v. Raghunath & Sons Ltd., : AIR1954 Cal245 where Bachawat, J., held that the existence of dispute or difference is a condition precedent to the exercise of the jurisdiction by the arbitrator under the arbitration clause and a dispute implies an assertion of a right by one party and a repudiation thereof by another. But the repudiation by the other party may be either express or implied and may be by words or by conduct. But as Mr. Hazra has already conceded and rightly, that he cannot now contend that no dispute has arisen between the parties as such the decision of Bachawat, J., is no longer relevant for the purpose of deciding the present application. Mr. Hazra further contended that the parties should be bound by their agreement and the disputes must be referred to the named arbitrator under the agreement where in the facts and circumstances as are disclosed by the correspondence between the parties including the internal correspondence of the respondent that there was a misconception in the mind of the arbitrator as to the correct legal position and as such he cannot be said to have refused to act or there is any failure or neglect on the part of an arbitrator under the agreement- As such the parties should refer the disputes to the named arbitrator and Mr. Hazra submitted that the Secretary, Government of Uttar Pradesh, Industries Department should be appointed as Arbitrator to adjudicate the disputes between the parties and the matter to be referred to him.

7. I may note here that the notice of the application with the leave of the Court has been duly served on the arbitrator, that is, the Secretary, Government of Uttar

Pradesh, Industries Department but he has not chosen to appear to make any representation to this Court or explain the circumstances which are now alleged by the respondent, as to why he did not enter upon and proceed with the reference after the dispute was specifically referred to him by the petitioner and he was asked to enter on the reference. It is significant that, the named arbitrator never replied to the petitioner in spite of the fact he had been served with the letters dated 17th/ 20th July, 1970, 12th September, 1970 and 7th January, 1971 by the petitioner. It is sought to be contended by Mr. Hazra that the arbitrator communicated with the respondent and as such the respondent came to know that the arbitrator was taking the same view as the respondent and their Law Department took on the subject-matter that is, as there no dispute has arisen between the parties, the appointment of the arbitrator is premature. I may quote here a relevant statement contained in a letter from S.N. Acharya, Sanyukt Sachiv to the Director, Government Cement Factory. Datta dated the 31st of March, 1971 which is as follows :--

'Here the dispute is yet to be referred to the Secretary (Industries) and recourse to Section 8 will be had only when he neglects or refuses to act. The Factory can send its reply to the notice of the above lines.'

8. The notice referred to in the said statement in the letter dated the 31st of March 1971 is the notice of motion of this application served by the petitioner on the respondent.

9. Mr. Hazra has also referred me to all the correspondence between the parties and the internal correspondence of the respondent and submitted that in the circumstances when the arbitrator is labouring under a misconception of legal position he cannot be said to have refused to act or failed or neglected to act and the application for appointment of an Arbitrator by Court under Section 8 or removal of the arbitrator under Section 11 of the Arbitration Act do not arise. He further contended that the arbitrator has not accepted the appointment as there is no evidence before the Court that the arbitrator signified his assent either to the petitioner or to the respondent accepting the office of the arbitrator in terms of the arbitration agreement. Mr. Hazra further contended that in the arbitration

agreement the sentence 'his decision shall be final and binding on the parties' signifies that the arbitrator was a persona designata and the parties intended not to supply the vacancy in case he refuses or neglects to act in terms of the arbitration agreement. It may be noted that this point has not been taken in the affidavits but it is now being argued from the Bar. Moreover, in my view, the contentions of Mr. Hazra are untenable as the arbitration clause itself is quite clear and the arbitrator is the incumbent in the office of the Secretary, Government of Uttar Pradesh at the time of reference of dispute to arbitration and can never be construed as an arbitration by a persona designata. Further the point not being specifically taken in the opposition it cannot be allowed to be taken from the Bar as that is a question of fact which the petitioner had no opportunity to deal with and assuming respondent can take that point as I have already held that by interpretation of the arbitration clause it cannot be said that there was any intention as appearing in the said agreement that the vacancy of the arbitrator created by his neglect or refusal to act was not intended to be supplied. I cannot accept the contentions of Mr. Hazra for obvious reasons. Position as disclosed in the correspondence between the parties and the internal correspondence is that the arbitrator is completely under the control and spell of the respondent and lacks in the fundamental conception as to the powers and duties of an arbitrator and as such is incapable of acting as an arbitrator in the disputes between the parties and discharge his judicial function impartially without being influenced by the views and orders of the respondent. In my view, if he is allowed to be the arbitrator to adjudicate the dispute between the parties whole purpose and object of the arbitration would be frustrated. The conduct of the respondent and the appointed arbitrator being the present Secretary to the Government of Uttar Pradesh, Industries Department raises no doubt in my mind that it would be injustice and against all principles of equity and good conscience to refer the matter to the appointed arbitrator in the facts and circumstances of this case.

10. Mr. Bhaskar Gupta cited a Division Bench decision of the Madras High Court in K.G.S. Venkatanaranayya v. K.G.S.V.R. Lakshmidewaamma, (1947) 2 Mad LJ 520 wherein a dispute between the members of a Hindu Joint family was referred by an agreement in writing to an appointed arbitrator after a criminal proceeding was instituted in the Bombay Magistrate's Court by a party. In fact, there were

alternative arbitrators that is, in case of failure of one other will act as an arbitrator. After the said agreement to arbitration the criminal proceeding was withdrawn from Bombay Court but each of the two named arbitrators refused to act. Thereafter an Advocate's notice was sent to each of the named arbitrators requesting them to reconsider the matter and consent to act as arbitrator. One of the arbitrators replied immediately and declined to act as an arbitrator. The other arbitrator neither acknowledged the receipt of the Advocate's notice nor replied to it. Thereafter a fresh criminal proceeding was started in Bombay Presidency Magistrate's Court, about two and half months after the notice of the Advocate was received by one of the arbitrators who did not reply to the said notice, suddenly gave notice to the parties that he will hold the reference of the arbitration at his residence. It was contended that the said arbitrator not having acknowledged the receipt of the Advocate's letter clearly indicated that he had no intention to act as an arbitrator in the matter and as such the criminal proceeding in Bombay Presidency Magistrate's Court was started. It was also contended that the opposite party had approached the arbitrator and caused the arbitrator to enter into the reference under pressure. As such there will be no impartial justice before the arbitrator. In spite of such notice the arbitrator proceeded ex parte and made an award. The award was challenged and was set aside on the ground that there was no valid appointment of arbitrator as the arbitrator having refused to act cannot subsequently without a fresh submission by the parties enter into reference and the award was invalid. In that decision Gentle. C. J at pages 521-22 has held :

'When asked by the respondent, in the letter of July 15, to reconsider his refusal and to act as as arbitrator, Mr. Venkata Seshayya did not even acknowledge the letter. The Explanation to Section 9 of the Arbitration Act provides that the fact that an arbitrator, 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. Assuming the respondent's letter of July 15, addressed to Mr. Venkata Seshayya, was a request within the contemplation of the section, in the light of his earlier refusal and since he did not comply with the request contained in the letter within one month, his conduct must constitute further refusal to act.

In the thirteenth edition of Russell on 'Arbitration', it is stated at page 335 as follows :

'Acceptance of the office by the arbitrator appears to be necessary to perfect his appointment. It has been so decided in the case of an umpire, and it would seem to be only reasonable that an appointment should not be considered to be effective until the person appointed has agreed either expressly or tacitly to exercise the functions of the office.'

In *Sadik Husain v. Kaniz Zohra Begam*, (1911) 38 Ind App 181 (PC) it was observed by the Board at page 751 :

'It appears to their Lordships that, when an arbitrator is nominated by parties, his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue. His refusal to act necessarily follows, for he has not performed the first action of all, namely, to take up the office by signifying his assent to his appointment.'

The notice dated October 1, sent by Mr. Venkata Seshayya, by which he purported to make directions in the arbitration by fixing the date for the inquiry, was given after he had expressly refused to act; and, assuming the respondent's advocate's letter of July 15 (which Mr. Venkata Seshayya ignored) was notice contemplated by the Explanation to Section 9, after his omission to comply with the notice within one month, which omission was further refusal to act, as contemplated by the Explanation. Even if the respondent's letter of the 15th July was not such a notice, his refusal to act had been expressed five months before he purported to give directions as arbitrator and had not been withdrawn. In either event, Mr. Venkata Seshayya had done nothing regarding his appointment as arbitrator by the agreement of April 28, before he sent his communication of October 1, save to express and to indicate refusal to act.

In my view, when he wrote the communication of October 1, the time had passed within which he could have accepted the appointment and that that communication itself was not such acceptance. Before he wrote it, he did not take up the appointment by signifying his assent to it and he had divested himself of the

character if an arbitrator. Further, there was no fresh submission by the parties to the arbitration'

11. In my view, although the facts in the Madras Case are somewhat different from the present one, but the principle, when an arbitrator should be held to have refused to act within the meaning of Explanation to Section 9 has been stated and I have no hesitation in applying the principle to the facts of this case where as I have already held that the arbitrator has refused to act after being called upon by the petitioner to enter on and proceed with the reference within the meaning of Explanation to Section 9 of the Arbitration Act.

12. I will once again briefly analyse the fact which appears from the admitted correspondence. The contract was entered into on the 27th of January, 1967 and it appears that the work under the contract was completed before November, 1968. The petitioners by their telegram dated the 11th of November, 1968 sent to the respondent recorded with regret that after discussions no payments of their outstanding bills have been received. There was no response to the said telegram and the petitioner again by another telegram dated 23rd of November, 1968 requested the respondent to remit payment of the outstanding bills and also referred to the telephonic talk in the meantime. Thereafter, for the first time, the respondent responded by a telegram completely denying any liability to the petitioner as in the respondent's account nothing was found payable to the petitioner. Thereafter it appears that various letters were exchanged between the parties and also a telegram dated the 6th of July, 1970 sent by the petitioner to the respondent on the subject but nothing happened. Ultimately, by the notice dated 17th/20th of July, 1970 sent to the respondent and copy to the named arbitrator the petitioner invoked the arbitration clause in the contract and called upon the respondent to nominate and/or appoint the said arbitrator within 15 days and also requested the named arbitrator to enter into the reference. There was no response from the respondent or the arbitrator. The named arbitrator had not the ordinary courtesy to acknowledge the receipt of the letter to the petitioner although the said letter was a formal notice under the Arbitration Act on the face of it. Thereafter the petitioner by a series of letters addressed to the respondent and the said arbitrator being letters dated 22nd August, 1970, 12th September, 1970 and 7th January,

1971 requested formally the arbitrator to enter on and proceed with the reference and asked the respondent to take steps in the matter of the reference but no reply or response was received by the petitioner either from the respondent or the arbitrator. It was only for the first time by the letter dated the 29th of January, 1971, the respondent through the Director, Uttar Pradesh Government Cement Factory, Dalla, replied to the statutory notice under Section 8 of the Arbitration Act dated the 7th of January, 1971 served by the petitioner on the respondent which is set out hereunder :--

'BY REGISTERED POST WITH A/D

No. D-7 (XXIVL) 67-68-1424

From :--

The Director, Government Cement Factory,
Dalla Mirzapur.

Recd. on 29-1-71.

To

M/s. Gopal & Kumar, 14, Netaji Subhas Road, Calcutta-1.

Dated Dalla Jan. 20, 1971.

Sub. :-- Notice for arbitration Proceedings.

Dear Sirs,

Please refer to your letter No. RK/ U-3/71/36, dated 7-1-71 purporting to be a notice under Section 8 of the [Arbitration Act, 1940](#), for appointment of Sri Tapeshe Banerjee as Sole arbitrator for adjudicating in the dispute between you and the Factory administration.

Section 28 of the agreement entered with you only provides for appointment of Secretary to Government of Uttar Pradesh Industries Department, as sole

arbitrator for adjudicating in the dispute between you and the factory administration arising out of the contract for clearance of consignments from Calcutta Port and their handling at the Port as well as at the destination point entered with you. The points in dispute have already been referred by you to the Secretary to Government of Uttar Pradesh, Industries Department and his decision in the matter is awaited. The agreement does not provide for appointment of any other person as arbitrator and, as such, we totally disagree with contents of your letter under reference.

Yours faithfully,

Sd/-

(S.P. Bhatnagar)

Director.

13. After the said letter the respondent sent another letter dated the 6th of February 1971 to the petitioner in continuation of the said letter dated the 29th of January, 1971 which is as follows :--

No. D-7-1485/

Dated, Dalla, February 6, 1971.

From

The Director, Government Cement Factory, Dalla (Mirzapur)

To

M/s. Gopal & Kumar, 14, Netaji Subhas Road, Calcutta-1.

Dear Sirs,

In continuation of this office letter No. D-7 (XXIVL)/67-68-1424 dated January 29, 1971, I am to say that your letter of January 7, 1971 has been referred to Government for orders and they are examining it with reference to the arbitration

proceedings desired by you. We shall revert on the subject as soon as Government's orders in the matter are received. In the meanwhile I am to Bay that your undermentioned six bills included in the list of outstanding bills sent with your letter of RK/V-3/70, dt-17-7-1970 do not appear to have been received by us.

Sl. No. Bill No. Date Amount.

1. 2224-4-67Rs. 6,682.502. 20318-10-67Rs. 55.003. 2554-11-67Rs. 65.004. 2564-11-67Rs. 245.005. 2575-11-67Rs. 50.006. 1042-3-67Rs. 15,000.00

Rs. 22,097.50

Please send copies of the same with certificate of non-payment to enable us to examine it and take necessary action.

Yours faithfully,

Sd/- Ashok Chandra

Deputy Director.

For Director.

14. In the circumstances the petitioner naturally had no other alternative but to make this application under the Arbitration Act for removal of the named arbitrator and appointment of arbitrator by the Court and took out a notice of motion on the 1st of April, 1971 of this application and served the same on the respondent. The respondent after receiving the notice of the application through the Director, Government Cement Factory, Dalla, by long letter dated 15th of April, 1971, inter alia, contended that there was no dispute between the parties as the Government was examining the alleged claim of the petitioner and after examination, the Government will know the position and after that if any dispute remained that may be referred to arbitration. In substance they alleged that there is no ground for petitioner's present application and the same being premature. It is clear from the conduct of the respondent that their whole idea is to delay the settlement or adjudication of the dispute between the parties which has arisen in 1968 under the contract as long as possible under various pleas. It also appears that the arbitrator

is completely under the control and influence of the respondent and in fact Mr. Hazra has clearly admitted before me that the arbitrator did not think it necessary to make any communication to the petitioner but he intimated the respondent that he was holding the same view with the respondent that there is no dispute existing between the parties, as such the question of invoking the arbitration clause has not arisen, being premature. The matter being under consideration of the respondent and until an order is made by the Government on the subject no dispute can arise. The whole attitude of the respondent and the arbitrator seems to me against all principle of natural justice, common sense and complete denial of ordinary rights of a citizen. The respondent and the arbitrator seem to have taken the law in their own hand and acted in a high-handed manner denying the legal rights of the petitioner under the said contract and it is only after services of the statutory notices under Section 8 of the Arbitration Act and the notice of motion of this application they are setting up all sorts of frivolous and untenable pleas which cannot be entertained or accepted in a Court of law. The submission of Mr. Hazra on behalf of the respondent that as the arbitrator was labouring under a misapprehension as to the basis of his jurisdiction, being the existence of dispute under the contract, and there was no dispute yet as the respondent is still considering the alleged claim of the petitioner, that is why, the arbitrator thought it fit not to show the ordinary courtesy of replying to the series of the requests made by the formal notices to him to enter upon and to proceed with the reference. In the circumstances it is clear from the conducts of the respondent and the arbitrator that the named arbitrator i.e., the present Secretary, Government of Uttar Pradesh, Industries Department is an unfit and incapable person to act as an arbitrator in terms of the arbitration agreement between the parties.

15. As I have already held that the arbitrator has neglected and refused to act within the meaning of the Explanation to Section 9 of the Arbitration Act he is liable to be removed under Section 11(1) of the Arbitration Act and the petitioners are entitled to an order in this application.

16. In the result, I make an order appointing Dr. Tapas Banerjee Barrister-at-Law, of No. 1/1B, Deodar Street, Calcutta-19 as an arbitrator to adjudicate the dispute which has arisen between the parties in respect of the agreement dated the 27th

of January, 1967 and he is to enter upon the reference on a signed copy of the minute of this order and he is to make his award within four months from the date of his entering reference. I am appointing Dr. Tapas Banerjee not as the appointed arbitrator of the petitioner but as an arbitrator whom I think a fit and proper person to adjudicate the disputes between the parties. The respondent to pay the costs of this application. The arbitrator and all parties to act on a signed copy of the minutes and the petitioner to complete the order.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com