

Pam Development Pvt. Ltd. Vs. Calcutta Port Trust and anr.

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SooperKanoon Citation : sooperkanoon.com/869218

Court : Kolkata

Decided On : May-08-1995

Reported in : (1995)2CALLT84(HC)

Judge : Altamas Kabir, J.

Acts : [Arbitration Act, 1940](#) - Section 20, 20(1), 20(3) and 20(4)

Appeal No. : Special Suit No. 14 of 1994

Appellant : Pam Development Pvt. Ltd.

Respondent : Calcutta Port Trust and anr.

Advocate for Def. : Surajit Roychowdhury and ;Bithika Mondal, Advs.

Advocate for Pet/Ap. : P.K. Roy and ;Tapan Kumar Sengupta, Advs.

Disposition : Application allowed

Judgement :

Altamas Kabir, J.

1. This application under Section 20 of the [Arbitration Act, 1940](#), involves certain interesting points of law regarding appointment of Arbitrators and Umpires in arbitration proceedings and the maintainability of a second application under Section 20 of the said Act. In order to appreciate the same, it is necessary to

briefly state the facts out of which this application arises.

2. On or about 13th February, 1991, the Chief Engineer, Calcutta Port Trust, issued a Work Order in favour of the petitioner Company for construction and commissioning of a High Level Road Bridge over the existing railway tracks to cater for loading at Hide Road in replacement of the existing steel Trust Bridge and to dismantle and remove the same. Disputes and differences arose between the parties during the execution of the work and the contract was terminated by the respondents on 19th October, 1993.

3. The petitioner thereupon by its letter dated 20th November, 1993, forwarded a consolidated list of its dues and claims to the Chief Engineer, Calcutta Port Trust, the respondent No. 2 herein, for settlement and payment within fifteen days of receipt thereof. According to the petitioner, the respondent No. 2 failed to reply to the said letter or make payment in terms thereof.

4. The petitioner company, thereafter, addressed a letter to the Chairman, Calcutta Port Trust, on 6th December, 1993, requesting him to appoint an Arbitrator within sixty days from the date of receipt of the letter, in keeping with the provisions for reference to arbitration contained in Clause 11B of the Agreement executed between the parties on 23rd February, 1991. The relevant portion of the said clause reads as follows:

'(a) In all disputes..... the decision of the Engineer shall be final and binding on all parties to the contract and shall forthwith be given effect to by the Contractor.

(b) If, however, the Contractor is dissatisfied with any such decision of the Engineer he shall within 15 days after receiving notice to such decision require that the matter shall be referred to the Chairman, Calcutta Port Trust, who shall thereupon refer the matter within 60 days from the date of receipt of such notice to an Arbitrator to be appointed from a panel of Arbitrators to be maintained by Calcutta Port Trust for the purpose and any such reference shall be deemed to be submission to arbitration within the meaning of Indian [Arbitration Act, 1940](#), or any statutory modification thereof.'

5. As no steps were taken by the Chairman, Calcutta Port Trust, to refer the matter to arbitration within the stipulated period of sixty days, the petitioner made an application under Section 20 of the [Arbitration Act, 1940](#), for filing of the agreement in this Court, for appointment of an Arbitrator in terms of Clause 68 of the General Conditions of Contract applicable to the Contract entered into between the parties, and for reference of all disputes between the parties for decision to the said Arbitrator.

6. The said application was disposed of by a learned Judge of this Court on 20th April, 1994, by the following order :

'In terms of the Arbitration clause, the Chairman, Calcutta Port Trust, is directed to nominate an Arbitrator from the panel of Arbitrators maintained by the Calcutta Port Trust for that purpose and any such reference shall be deemed to be a submission to arbitration within the meaning of Indian [Arbitration Act, 1940](#). Such nomination shall be made within four weeks from the date of communication of this order and the Arbitrator will enter upon reference within two weeks from the communication of the order nominating such an Arbitrator.'

7. According to the petitioner Company, although, the aforesaid order disposing of the Section 20 application was duly communicated to the Chairman, Calcutta Port Trust, by its learned advocate on 25th April, 1994 no nomination was made in terms of the said order within the stipulated period of four weeks or upto the date of the filing of the present application also under Section 20 of the [Arbitration Act, 1940](#).

8. Appearing in support of the application, Mr. P. K. Roy, learned Senior Advocate, urged that on the failure of the Chairman, Calcutta Port Trust, to nominate an Arbitrator as per the directions contained in the order passed on 20th April, 1994, on the earlier application under Section 20 of the said Act, the petitioner Company had been compelled to make the present application, also under Section 20 of the said Act, inter alia, for modification of the earlier order and for the appointment of an Arbitrator to resolve the claims submitted by the petitioner.

9. Mr. Roy submitted that, although, an attempt had been made by the respondents to show that the order of 20th April, 1994, had been duly complied with by the Chairman, Calcutta Port Trust, in effect, the same had been complied with within the time frame indicated therein.

10. Referring to the copy of an Order-sheet annexed to the Supplementary Affidavit affirmed on behalf of the Calcutta Port Trust on 19th November, 1994, Mr. Roy urged that same seemed to indicate that one Shri D. N. Ghosh had been appointed as Arbitrator on 6th May, 1994.

11. Mr. Roy urged that the Arbitrator was not informed of such appointment by the respondents and, as would appear from the annexures to the Affidavit-in-Opposition affirmed on behalf of the Calcutta Port Trust, such information was given to the learned Arbitrator allegedly appointed on 6th May, 1994, by the Advocates-on-Record of the Calcutta Port Trust by their letters dated 30th May, 1994, and 8th June, 1994.

12. Mr. Roy submitted that, thereafter, on 9th June, 1994, the Arbitrator wrote to the parties informing them of his intention to hold the first sitting of the arbitration proceedings on 21st June, 1994.

13. Mr. Roy urged that even if it be assumed that the appointment of the Arbitrator had been made on 6th May, 1994, the Arbitrator was informed of such appointment by the learned Advocates-on-Record of the Calcutta Port Trust first on 30th May, 1994, and, thereafter, on 8th June, 1994 without notice of such appointment, however, to the petitioner Company.

14. Mr. Roy urged that if 30th May, 1994, be taken to be the first date of communication of the order passed on the Section 20 application of the petitioner Company on 20th April, 1994, then, in such event, the Arbitrator acted beyond his authority in entering upon the reference beyond the period of two weeks stipulated in the said order. In the alternative, even if 8th June, 1994, be taken to be the date on which the Arbitrator was first informed of his appointment and the order passed on 20th April, 1994, Mr. Roy urged that without communication of the appointment of the Arbitrator to the petitioner Company, such appointment could not be said to

be complete and effective, in which case the nomination of the Arbitrator could not have been made within the period of four weeks stipulated in the said order of 20th April, 1994.

15. In support of his aforesaid contentions, Mr. Roy relied upon certain observations made by Russel in his treatise on Arbitration to the effect that an appointment of an Arbitrator by a party is not complete without communication thereof to the other party.

16. Mr. Roy urged that it was the consistent view of various jurists that nomination implies notice and in the absence of such notice it could not be said that the nomination was complete.

17. In this connection, Mr. Roy also urged that mere nomination of the Arbitrator would not also make the appointment complete and acceptance of the office by the Arbitrator was necessary to perfect his appointment.

18. This is the view of Russel and also R. S. Bachawat in their respective works.

19. In support of his aforesaid contention, Mr. Roy relied upon a Single Bench decision of this Court in *Dominion of India v. Kalyan Kumar Purkayastha*, reported in 53 Calcutta Weekly Notes at page 180, wherein following the view expressed by Russel, the learned Single Judge also held that appointment of an Arbitrator by a party is not complete till it is notified to the other side.

20. Mr. Roy submitted that since the Chairman, Calcutta Port Trust, had failed to nominate an Arbitrator within the period specified in the order of 20th April, 1994, it must be held that no effective appointment had been made, and the Court should, therefore, appoint an Arbitrator under sub-section (4) of Section 20 of the [Arbitration Act, 1940](#).

21. Mr. Roy contended that notwithstanding the final disposal of the earlier application under Section 20 of the said Act, since no appointment had, in fact, been made in terms of the said order, the Court had ample jurisdiction to make an appointment under Sub-section (4) of Section 20 of the said Act.

22. In this connection, Mr. Roy referred to the decision of the Supreme Court in G. Ramachandra Reddy & Co. v. Chief Engineer, Madras Zone, M.E.S., reported in : [1994]3SCR808 and the decision of a learned Single Judge of this Court in Ranjeet Singh v. Union of India, reported in 1993(2) Calcutta Law Journal at Page 432, wherein it was, inter alia, observed that when notice is given to the opposite contracting party to appoint an Arbitrator, failure to take action upon such notice gives right to either party to invoke the jurisdiction of the Court under Section 20 of the Arbitration Act, and if such application is made, the Court is bound to make a reference in accordance with sub-section (4) thereof either to the Arbitrator already appointed by the parties, or where the parties cannot agree, to an Arbitrator appointed by Court.

23. Mr. Roy urged that in view of the above, the order of 20th April, 1994, on the earlier Section 20 application was required to be modified and an Arbitrator was required to be appointed by the Court to enter upon the reference and to resolve the claims submitted by the petitioner.

24. Opposing the application, Mr. Surajit Roychowdhury urged that the same was wholly misconceived and was based on an erroneous appreciation of the law and facts relating to the appointment of the Arbitrator.

25. Referring to the order passed by this Court on 20th April, 1994, in the earlier Section 20 application, Mr. Roychowdhury firstly contended that since the earlier application under Section 20 had been finally disposed of by the 6aid order, there was no scope for yet another application under Section 20 of the [Arbitration Act, 1940](#).

26. Mr. Roychowdhury then urged that in the said order of 20th April, 1994, it had been stipulated that the nomination of the Arbitrator by the Chairman, Calcutta Port Trust, was to be made within four weeks of communication of the said order, and the Arbitrator was required to enter upon the reference within two weeks from the communication of the order of nomination of the Arbitrator.

27. Mr. Roychowdhury urged that the said order had been implemented in its two stages in strict compliance of the time frame mentioned therein.

28. Referring to the order-sheet annexed to the Supplementary Affidavit affirmed on behalf of the Calcutta Port Trust, Mr. Roychowdhury urged that while the order on the Section 20 application had been made on 20th April, 1994, the Arbitrator was appointed by the Chairman of the Calcutta Port Trust on 6th May, 1994, well within the stipulated period of four weeks.

29. Mr. Roychowdhury then urged that no period had been fixed in the said order of 20th April, 1994, within which time the order of nomination was required to be communicated to the Arbitrator. The order provided that the Arbitrator would have to enter upon reference within two weeks of being communicated with the order of his nomination.

30. Mr. Roychowdhury urged that as the letter written by the Advocates-on-Record of the Calcutta Port Trust on 30th May, 1994, had not been received by the Arbitrator, he had in his letter of 9th June, 1994, referred only to the letter of 8th June, 1994, addressed to him by the Advocates-on-Record of the Calcutta Port Trust, informing him of his appointment as Arbitrator in the matter.

31. Mr. Roychowdhury urged that if 8th June, 1994, be taken to be the date on which the order of his appointment was communicated to the Arbitrator, then the first sitting fixed for 21st June, 1994, was also within the period of two weeks stipulated in the order of 20th April, 1994.

32. Mr. Roychowdhury urged that from the above it would be evident that the order of 20th April, 1994, had been duly complied with within the stipulated time frame and the petitioner could have no grievance on such score.

33. Mr. Roychowdhury then urged that, although, English jurists were of the view that the appointment of the Arbitrator or Umpire was not complete till he was informed of his appointment and he accepted such appointment, the Courts in India had taken a different view in the matter.

34. In support of his aforesaid contention, Mr. Roychowdhury firstly referred to a passage from S. D. Singh's 'Law of Arbitration' where relying upon the decision of the Bombay High Court in the case of Keshavsingh Dwarkadas Kapadia v. Indian

Engineering Co., reported in : AIR1969 Bom227 , the learned author observed that the appointment of an Arbitrator or Umpire is complete as soon as it made. To make the appointment complete, it is not necessary to secure his consent. If he subsequently refused to accept the appointment it would merely amount to refusal to act, there being no difference in refusal to act and refusal to accept.

35. Mr. Roychowdhury then contended that the views expressed by the Bombay High Court were subsequently confirmed by the Supreme Court in the appeals preferred from the decision of the Bombay High Court and reported in : [1972]1SCR695 . While disposing of the Appeals, the Hon'ble Supreme Court observed that the question of acceptance of appointment of Umpire arises with reference to the stage when he is called upon to act, since the [Arbitration Act, 1940](#), does not say that appointment of Umpire by Arbitrators is to be made only after obtaining the consent of the appointee.

36. Mr. Roychowdhury contended that the same principle would have to be extended to the appointment of Arbitrators as well.

37. Mr. Roychowdhury lastly submitted that when appointments of Arbitrators and Umpires are made by third parties, the same is not required to be intimated to the parties, and the appointment would be valid for all purposes, even if no notice of such appointment was given.

38. Mr. Roychowdhury urged that, on the aforesaid grounds the present application, which was wholly misconceived, was liable to be dismissed with costs.

39. Two questions fall for decision in this case, namely, (i) had an Arbitrator been effectively appointed in terms of the order passed on 20th April, 1994, in the earlier application under Section 20 of the [Arbitration Act, 1940](#), and (ii) whether this second application under Section 20 of the said Act is maintainable.

40. The answer to the first question has more or less been given by the Supreme Court in Keshavsingh Kapadia's case (supra). Contrary to what has been expressed by English authors as to when the appointment of an Arbitrator or Umpire becomes complete, first the Bombay High Court and then the Supreme

Court, in the light of the provisions of the Indian [Arbitration Act, 1940](#), have held that the validity and/or completeness of the appointment of an Umpire, in the facts of that case, did not depend on acceptance of the person concerned, but became complete as soon it has made. If subsequently he refused to act, that would be a different matter altogether, but the appointment would be valid for all purposes.

41. Furthermore, the nomination of the Arbitrator by the Chairman, Calcutta Port Trust cannot strictly be said to be sent to, all the parties to the reference.

42. In any event, in this case, the Arbitrator was informed of his nomination by the learned Advocates-on-Record of the respondents on 8th June, 1994, and he, thereafter, proceeded to fix the first sitting on 21st June, 1994, within the time frame indicated in the order of 20th April, 1994, on the earlier application under Section 20 of the [Arbitration Act, 1940](#).

43. As to the maintainability of the instant application, I am of the view that the same is maintainable, notwithstanding the earlier application filed under Section 20 and the order passed thereupon. The arbitration agreement should not be allowed to fail merely because the designated authority for appointing the Arbitrator chooses not to exercise his powers in making such nomination.

44. Appointment of an Arbitrator by the Court or by a third party has been referred to by the Supreme Court, to be a ministerial act and a ministerial functionary cannot destroy the arbitration agreement. He cannot act in such manner as to defeat the agreement itself.

45. It appears to me that the powers and duties of the Court under Section 20 of the Arbitration Act, can be divided into different stages and categories. Sub-section (1) entitles a party to an arbitration agreement to apply to the Court having jurisdiction that the agreement be filed in Court. Subsection (3) requires notices to be issued by the Court to all the parties to the agreement, other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be followed.

46. Sub-section (4) provides that 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.

47. In order to appreciate the matter properly, the provisions of subsection (4) of Section 20, which are of special relevance in this case, are set out herein below :

'20(4). 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.'

48. As will be seen from the above, the powers and duties of the Court under sub-section (4) are of two distinct kinds. In the initial stage, when no sufficient cause is shown, the Court may order that the agreement be filed and thereupon make an order of reference to the Arbitrator appointed by the parties, in the second stage, when the parties cannot agree upon an Arbitrator, the Court is free to appoint an Arbitrator.

49. There are, therefore, two distant stages intended in sub-section (4) and the passing of an order in the first stage would not, in my view, preclude the Court from exercising its powers in the second stage in the event the first stage fails.

50. It may be worth mentioning that in the event the parties do not agree upon an Arbitrator or the person designated fails to make such appointment, there is no reference at all, and the question of passing any Award would not, therefore, arise.

51. In my view, till such time as an Award is made, *Here printed in italics.* it would be open to the Court to exercise its powers at the second stage for the purpose of appointing an Arbitrator to go into the disputes and differences between the parties arising out of the contract and which are referred to him, when no nomination is made by the parties.

52. In my view, it would be wrong to assume that by directing that the agreement be filed in Court, the Court is left with no further powers and is precluded from passing other orders in the event the designated authority fails to appoint an Arbitrator in terms; of the directions given by the Court.

53. Sub-section (5) of Section 20 provides that after the different stages contemplated in Sub-section (4), the arbitration is to proceed in accordance with and is to be governed by the other provisions of the Arbitration Act as far as they can be made applicable. By virtue of the said provision, the power of the Court to pass further orders, in my view, is saved and it would be an erroneous proposition of law to suggest that the Court ordering the agreement to be filed becomes junctus officio thereafter.

54. As was held by the Hon'ble Supreme Court in the case of D. Gobindaram v. Shamji K. and Co., reported in : [1961]3SCR1029 , the powers and duties of the Court under Sub-section (4) of Section 20 are of two distinct kinds. The first is the judicial function to consider whether the arbitration agreement should be filed in Court or not, which may involve dealing with objections as to the existence and validity of the agreement itself. Once that is done and the Court directs the agreement to be filed, the first part of its powers and duties come to an end. Then follows a ministerial act of reference to an Arbitrator or Arbitrators appointed by the parties, and, in the event, they do not agree, the Court may be required to take a further decision as to who should be selected as an Arbitrator.

55. Accordingly, even after directing the agreement to be filed, the Court is entitled to give effect to and/or to act in terms of the other provisions of Section 20 of the Arbitration Act, which would include the appointment of an Arbitrator, where the designated authority fails to make an appointment.

However, although, in my view, the present application for the appointment of an Arbitrator is maintainable, the same cannot succeed in view of my findings on the first question that the nomination of the learned Arbitrator by the Chairman, Calcutta Port Trust, had been validly done and the learned Arbitrator had also fixed the first meeting in the arbitration proceedings within the time frame indicated in the order passed by this Court in the earlier application under Section 20 on

20th April, 1994.

The application, therefore, fails and is dismissed, but without any order as to costs.

Prayer for stay of this judgment is considered and allowed. The judgment will remain stayed for a period of two weeks from date.

All parties to act on a signed copy of the operative part of this judgment on the usual undertaking.

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